XI INTERNATIONAL CONGRESS OF COMPARATIVE LAW

CARACAS VENEZUELA, 29 AUGUST 1982

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SECTION IVC CIVIL RIGHTS

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THE AGE OF 'COMPUTICATIONS'

Opening a high level French Government Conference on Information Technology and Society in September 1979, the French Minister for Telecommunications, Mr. N. Segar, addressed the realities and future prospects of the 'informatisation' of society. He pointed to the problems and opportunities of the new information technology. Surprisingly enough, he coined a Franglais expression, 'computications', to describe the linkage of computers and telecommunications. It is the marriage of these two technologies which represents the most dynamic aspect in the 'revolution in the techniques of communication' today.

Australia is experiencing quite rapid penetration of all sectors of the economy by computications technology. The ability of linked terminals to transmit information in ever growing abundance, at ever increasing speed, at ever diminishing cost and with the propensity to manipulate and aggregate material from differing sources have obvious implications for society and its laws. The new techniques of communications have an impact on employment levels, on individual liberties, and on national culture and language, and on national security and defence. The greater vulnerability of the wired society, has been the subject of many studies.[1] They are not the subject of this essay; nor is it confined to computications. In Australia, other technologies are in being or on the horizon which affect the quantity and quality of communication. The Australian Federal Government has announced its intention to support a domestic satellite, with obvious implications to the movement of information in a country of continental size. Telefacsimile and teletext are being introduced. Radio and television cover the country. A recent committee of inquiry has suggested important changes in the organisation and delivery of services of the national broadcasting system, the Australian Broadcasting Commission.[2] The ownership and control of commercial television and radio

channels has been much in the news, following the rejection by the Australian Broadcasting Tribunal of an endeavour by Mr. Rupert Murdoch, the Australian publisher with world-wide interests, to secure the control, by companies in his group, of one of the four Melbourne television stations. At the time of writing, an appeal against this rejection is being heard by the Administrative Appeals Tribunal. Legislation to amend the Broadcasting and Television Act, with effect in this application, was hurried through the Australian Parliament during the litigation before the Administrative Appeals Tribunal.

The print media have not been immune from consideration. Important decisions have come before the courts in Australia affecting the publication of information by the newspapers. In Victoria, the State Government established a Committee of Inquiry under a former Supreme Court Judge to examine the ownership of the media and any changes in State laws necessary to combat growing concentration of ownership of the media in Australia, at least in that State. Reflecting trends in North America and Europe, reports on the circulation of the major metropolitan daily newspapers in Australia suggest a continuing decline. Of the 18 major metropolitan dailies, all but six were reported in June 1981 to have experienced a drop in circulation compared with 1980. For the first time in the last three audits, the two Sunday newspapers in Sydney lost circulation. Even the prestigious Melbourne Age, with one of the most consistent circulation growths in the newspapers industry in Australia in recent years, registered a drop.[3]

This is the background against which must be considered movements in Australian laws affecting access to information. Computers linked by telecommunications are rapidly penetrating the economy. Broadcasting of various kinds is undergoing significant changes. In the commercial media, there have been changes in patterns of ownership. The print media continue, relatively, to decline. Reports by Parliamentary Committees, Law Reform Commissions, the Administrative Review Council and special inquiries chart the future directions of the law governing movement of information in Australia. No civilized society guarantees unlimited, enforceable rights of access to all information. Access to information is not an absolute good. It is one relative to other legitimate social claims, including claims to orderly government, national security and defence, personal privacy, the fair administration of justice, respect for personal honour and reputation and so on. Precisely where the balance between these competing claims is struck and according to what criteria, differs from one society to another. The tension between demands for information and claims of legitimate restriction upon access to that information is an enduring feature of every modern society, whether relatively 'open' or relatively 'closed'. Australia remains a relatively open society in terms of the communication of information. This essay will sketch some of the chief, recent developments that are relevant.

FREEDOM OF INFORMATION LAWS

Legislation to provide an enforceable right of the citizen to gain access to official information possessed by government officials and agencies was introduced into the common law by the United States adoption of a Swedish precedent. The United States was probably the most natural gateway for a law of this kind in the common law world. It enshrines a commitment to free speech and a free press in the First Amendment to its Constitution. There is no equivalent constitutional provision in Australia. Freedom of the press and the generally free movement of information depend more upon tradition than upon legally enforceable guarantees.

Following moves in certain of the Canadian Provinces[4] and later at a Federal level in Canada[5] and coinciding with Private Members' efforts in Britain[6], Australia has now entered a phase of enacting legislation designed to permit enforceable access by the individual to much information in the possession of government that was hitherto not disclosed. Not surprisingly, given the Australian inheritance of the somewhat secretive approach to administration developed at Westminster, the effort towards freedom of information legislation took a decade before its first fruits could be savoured. In the 1972 Federal election campaign, Mr. Whitlam, who was then elected, committed the Labor Government to the introduction of a Freedom of Information Act 'along the lines of the United States legislation. .... Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the Government or its agencies'.[7] The first of two Interdepartmental Committees was established. The report recommended the adoption of the scheme in the United States Act with modifications thought to be necessary as a consequence of Cabinet Government and ministerial reponsibility.[8] The debate was complicated by the contemporaneous delivery of the report of the Royal Commission on Australian Government Administration. A minority report by one of the Commissioners, Mr. Paul Munro, contained a draft Bill envisaging fewer exemptions, stricter time limits for response and more ample powers of review of claims for exemptions.

Following a second interdepartmental committee report[9] a Freedom of Information Bill was introduced into the Australian Federal Parliament on 9 June 1978. The Commonwealth Attorney-General (Senator P.D. Durack) described it as a 'unique initiative' and 'a major step forward in removing unnecessary secrecy from the administrative processes of government'.[10] The Bill was widely discussed throughout Australia. In September 1978 the Senate resolved to refer the measure and the accompanying Archives Bill to the Standing Committee on Constitutional and Legal Affairs. That bipartisan committee in 1979 delivered a report proposing 93 recommended changes to the principal measure.[11] In September 1980 the Attorney-General tabled on

behalf of the government the response to the committee's recommendations.[12] Among the principal points of difference which emerged were a refusal to accord retrospective operation of the legislation, a postponement of rights of access to personal information pending the privacy report of the Australian Law Reform Commission, a refusal, in terms, to reduce the 60-day period for responding to access requests to 45 or 30 days as proposed by the Committee, and 'the major difference of opinion', the scope of the appeal jurisdiction conferred on the Administrative Appeals Tribunal to review a decision to deny access.[13] Briefly, the Senate Committee rejected conclusive ministerial determination which would deny access by the Tribunal (whose presidential members are judges of the Federal Court of Australia) to certain documents, including Cabinet documents. The Senate Committee drew support from the decision of the High Court of Australia in Sankey v. Whitlam.[14] In that case the Court held that the ultimate responsibility for deciding whether the claim of privilege should succeed rested with the Court, after balancing the competing public interests at stake. The Attorney-General explained the Government's resistance:

> [T]here are documents which pertain to the most sensitive areas of government, the defence and security of the country, the conduct of international relations and the maintenance of proper relations between the Commonwealth and State Governments. Secondly, there are documents which are central to our Cabinet system of government and to relations between ministers and their advisers. Ministers should feel free to exchange views amongst themselves and with senior officials with complete frankness and in the knowledge that they are entitled to keep the records of their discussions confidential. Whatever may be the case where the public interest may require the production of documents in judicial proceedings, a matter on which the courts have held that they are entitled to rule, the need to protect confidentiality in the deliberative and policy-making processes of government must take precedence over the more diffuse public interest recognised by the Freedom of Information Bill. In that context it is entirely proper that the final decision on whether a particular document should be made available should rest with ministers and officials who are responsible to them. The Parliament itself provides the proper forum in which such a decision may be challenged.[15]

The Government's response has been criticised in the Parliament[16], in academic writings[17] and in the media. The 1978 Bill lapsed with the general elections of October 1980. A committment to its reintroduction was given in the Liberal Party's policy speech by the Australian Prime Minister, Mr. Fraser.[18]

About the need for less secrecy in Federal administration and for a generally wider, enforceable right, without special interest, to access to Federal Government information, there is now virtually no debate in Australia. The Australian Senate Committee explained the need for freedom of information legislation by reference to three principal arguments. The first concerns the right of the individual to inspect files held about him or relating to him: an attribute of individual rights. Some see this as an aspect of privacy.[19] Secondly, the Senate Committee urged that a government more open to public scrutiny would become more accountable and would therefore need to be more efficient and competent. 'Too much secrecy', declared Mr. Fraser, 'inhibits people's capacity to judge the government's performance'.[20] Thirdly, the Committee expressed the view that greater access to information would lead to greater public participation in the processes of policy-making and government. It would expand the sources of informed, relevant advice, and make citizen participation more significant and effective; taking it beyond the occasional symbolic gesture at the ballot box. A fourth reason is hinted at, namely the need to do something effective to remove the firmly entrenched bureaucratic tradition of secrecy which unacceptedly denies knowledge to others in the name of firm government by a few ministers and their select advisers.[21]

In 1981 a new Freedom of Information Bill was introduced into the Australian Parliament. It contained a number of changes designed to accomodate proposals of the Senate Committee. However, these changes were not sufficient in the opinion of a number of dissident Government senators who had served on the Senate Committee. They pressed for further changes. Because of the narrow majority enjoyed by the Government in the Senate, further changes became inevitable if the Bill was to pass. In the ultimate, the Government gave way on a number of points, the most important of which was the establishment of a 'Document Review Tribunal'. Most disputed claims for access to Government information are to be heard, in the regular manner, by the Administrative Appeals Tribunal, a permanent national administrative tribunal, headed by persons who are judges of the Federal Court of Australia. However, in respect of some classes of 'exempt documents', judged to be at the heart of the functions of Government, it was not initially intended to provide a review by the Administrative Appeals Tribunal. The process of review by that tribunal could be entirely avoided by a conclusive certificate. The classes of case to which this 'bypass' machinery applied included documents affecting national security, defence, international relations and relations with the States, Cabinet documents and Executive Council documents.[22] The decision to give such a certificate was not to be subject to review by the Administrative Appeals Tribunal.[23] The Tribunal was not entitled to require the production of the document referred to in the certificate.[24] The result of these provisions was to narrow the access which the

Administrative Appeals Tribunal might have had to documents when compared to those which a court in Australia might require the Crown to produce in order to judge a claim of Crown privilege.[25] This anomaly was pointed out when the Freedom of Information Bill 1981 was debated in Parliament. It was to meet these objections that a special and different review tribunal, the Document Review Tribunal, was created. Unlike the Administrative Appeals Tribunal, the Document Review Tribunal will comprise only persons who are or have been judges, whether of Federal, State or Territory courts. The President of the Document Review Tribunal is empowered 'having regard to the degree of public importance or complexity' of the question before it, to constitute the tribunal by three members.[26] The obvious intent of the creation of a special, new tribunal is to limit the personnel who may umpire disputes concerning access to Government information in particularly sensitive areas. The result of this compromise (and of other changes to the 1981 Bill) was that the Bill passed the Australian Senate and is expected to come into force in Australia late in 1981 or early in 1982.

The Federal measure is by far the most important in Australia. But it is supplemented by moves in the Australian States. In New South Wales, an interim report into government administration has foreshadowed that the final report (due late 1981) will contain draft freedom of information legislation. In Victoria, the Government is said to be awaiting the final outcome of the Federal moves. Meanwhile, the Opposition Labor Party has prepared a draft Bill for the coming session of the Victorian Parliament, reportedly modelled on the Canadian measure.[27] In South Australia, a Working Party on Freedom of Information was established in 1978 and it published a paper early in 1979.[28] Following a change of government in the State, there is no indication of the priority now attached to this reform. Just as Australians can utilise the United States legislation to secure information that would be denied them in Australia, so it is likely that the passage of one measure in Australia will lead on to pressure in most, if not all, of the States for the adoption of like legislation. When the administrative tradition of secrecy gives way to greater openness, it is unlikely that the haemorrhage will be contained in one jurisdiction.

Critics of freedom of information legislation point to its costs. Law reformers of the future will need to adopt a more realistic approach to the costs and benefits of their proposals than has tended to be the case in the past.[29] It is, of course, relatively easy to identify and quantify the costs of public access to government documents. The numbers of applications may be multiplied by the average time taken and the public servant's salary. The cost of copying, posting and reporting must be added. All of this is ultimately ascertainable. The benefits are more intangible. But they may be just as important. The Franks Committee stated the problem thus:

> A totalitarian government finds it easy to maintain secrecy. ... A democratic government ... cannot use the plea of secrecy to hide from the people its basic aims. ... A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propoganda agencies, will lose the trust of the people. It will be countered by ill-informed and destructive criticism. Its critics will try to break down all barriers erected to preserve secrecy, and they will disclose all that they can, by whatever means, discover.[30]

The Australian Senate Committee reminded the readers of its report of how 'destructive of the fabric of democracy itself excessive secrecy can be'.[31] It referred to the loss of trust and public confidence in government institutions which arose from the Watergate 'cover-ups' in the United States and, closer to home, illustrated the difficulties which even elected members of Parliament had in extracting information about government activities.[32]

Three objections of principle are frequently mentioned whenever freedom of information legislation is proposed in a country of the Commonwealth of Nations. First, it is said to be inconsistent with the Westminster system of ministerial government. However, the growth of the role and expectations of government, of the size and duties of the public service, and of the development of quasi-autonomous statutory authorities, make the theory of ministerial control and responsibility, at least as a universal rule, dubious and unworkable. Already, particularly in Australia, important reforms have been adopted which expose increasing numbers of administrative discretions to administrative and judicial review, including in some cases, on the merits.[33]

Secondly, it is said that the proper scope of Executive and Crown privilege and the limitation of the courts to their proper functions would be undermined by freedom of information laws which committed to courts rather than ministers ultimate decisions about the public interest. The decision of the High Court of Australia asserted for that Court the power to rule on any claim of Crown privilege. No claim by the Executive Government, whether in respect of Cabinet documents, national security, diplomatic relations or otherwise was to be conclusive against review by the Court.[34] Specifically, the claim that disclosure would imperil the frankness and candour of official advice to government was held not to outweigh the interests of justice. Mr. Justice Stephen asserted that 'recent authorities have disposed of this ground as a tenable basis for privilege'. The argument about candour was described as 'the old fallacy'. Public servants, it was declared, were 'made of sterner stuff'.[35] Likewise, Mr. Justice Mason, who was himself at one time the Commonwealth Solicitor-General, dismissed the argument about candour as being:

so slight that it may be ignored. ... I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.[36]

Thirdly, it is said that an effective freedom of information law would diminish the traditional role of parliament and the function of the member to secure, on the public's behalf, or on behalf of a particular constituent, such access to official information as may be allowed. The same argument was advanced against the establishment of the Office of Ombudsman, the success of which in New Zealand so profoundly influenced its adoption throughout the Commonwealth of Nations. The Australian Senate Committee voiced its view that, far from diminishing Parliament, a wider range of access to official information would revitalise the parliamentary ability to scrutinise and question government and administrative action, and to hold the Executive accountable.[37]

It does not require any special prescience to predict that public rights of access to official information will expand greatly in Australia during the next decade. The growing computerisation of information, official and otherwise, will not only expand the quantity of information stored. It will also facilitate efficient, swift and inexpensive access in a great many cases. Information technology will come to the aid of important legal and political reforms. The debate in Australia will probably be about the extent of access, the exceptions, the machinery for determining the public interest, the costs and the pace of change. A sceptical editor in New Zealand speaking of the concurrent efforts towards freedom of information legislation in that country, spoke for most countries considering legislation along these lines when he suggested that the passage of amending legislation would be the easy part. 'A much more difficult task lies in persuading the bureaucracy to change its attitude'.[38]

OFFICIAL SECRETS REFORM

Linked to the provision of an enforceable general right of access to information in the hands of government and its agencies is reform of official secrets legislation. Many countries, including Australia, enacted legislation adopting, substantially, the United Kingdom Official Secrets Act of 1911. Although popularly imagined to be aimed at countering espionage, the legislation, in terms, reinforces an administrative regime of confidentiality and secretiveness. It is for this reason that both in Britain and in other countries efforts have recently been made to reform the legislation in a way that will be more compatible with a more open system of government.

In Australia, the provisions equivalent to the Official Secrets Act are found in the Crimes Act 1914 (Cwlth) Part VII. Section 79 of the Act, dealing with official secrets, is in language whose lineage is plainly the imperial Act of that name. The ready availability of photocopying equipment, a group of ever eager political journalists, growing questioning of and frustration with perceived administrative secretiveness, and other motivations — some of them pure, some of them less so — have led in Australia to an almost weekly rash of revelations of supposedly secret official information. Much of this has been innocuous, merely reflecting the excessive caution of current rules. Occasionally, 'leaks' appear even to be officially inspired. But it is not always so. In August 1980, the Australian Budget, traditionally one of the most secret of secret documents — fell into the hands of a journalist, and was disclosed two days before it was delivered in Parliament. Later, a confidential telegram from the Australian High Commissioner in New Delhi, containing comments on one view critical of the Indian Prime Minister, was published in the Australian press. In another matter, in the early hours of Saturday 8 November 1980, the Commonwealth of Australia acted. A book titled Documents on Australian Defence and Foreign Policy 1968-1975 was to be serialised in a Sydney and Melbourne newspaper. The Commonwealth obtained an ex parte injunction from Mr. Justice Mason of the High Court of Australia. The Department of Foreign Affairs claimed that the documents, to be published in the book and extracted in the newspapers, included classified material and were of 'current sensitivity'. The injunction was issued but not before large numbers of the newspapers had already been distributed and a number of copies of the book itself sold by booksellers, including to embassies in Canberra of countries said to be affected by the disclosures.

On the motion to continue the injunction, Mr. Justice Mason heard arguments based upon s.79 of the Crimes Act, the disclosure of confidential information and the infringement of copyright. Only on the last ground did the judge decide to continue the injunction, pending the hearing of the action.[39]

The issue of the injunction to restrain a breach of the criminal law was declined. It was described as 'exceptional'. The provision of s.79 of the Act was appropriate to create 'a criminal offence' and 'that alone'.[40] The Commonwealth's claim for the injunction against the publication of confidential information improperly or surreptitiously obtained was more relevant for present purposes. Reflecting a view entirely consistent with the approach of the Court in Sankey v. Whitlam, Mr. Justice Mason stressed that the claim for protection was not self-evident and would not be established merely by the asking:

> The equitable principle [of protection from breaches of confidence] has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive Government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that Equity will not protect information in the hands of the Government but it is to say that when Equity protects Government information it will look at the matter through different spectacles.
>
> It may be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action. Accordingly, the court will determine the Government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[41]

Mr. Justice Mason was not impressed by the security classifications ranging from 'TOP SECRET' downwards. He examined the documents and was 'not prepared to assume that publication of any of the documents will now prejudice national security'. Specifically, he was critical of the fact that 'no regular procedure for reconsidering the classification of documents' existed with the consequence that 'the initial classification lingers on long after the document has ceased to a security risk'.[42]

Mr. Justice Mason claimed for the Court the entitlement to balance the degree of embarrassment to Australia's foreign relations against the interim protection of confidential information which would flow from continuance of the injunction. The decision was greeted with paeans of praise in some quarters. The Age (Melbourne), published by one of the defendants, declared that the case had 'laid down general principles that may signficantly advance the cause of public information. Official secrecy has long been a debased currency in Australia'.[43]

The Annual Report of the Federal Attorney-General's Department in Australia for 1979-80 discloses that a Task Force to review ss.70 and 79 of the Crimes Act 1914 'has now been re-activated' under one of its officers.[44] The report discloses

that the activities of the Task Force had been temporarily suspended for reasons which included the need to ensure consistency of its proposals with the freedom of information proposals. A newspaper statement ascribed, typically enough, to unnamed 'sources in the Attorney-General's Department' said that no one incident had triggered the examination of the Act but 'no doubt it had been done with leaks in mind'. It was also conceded that imprisonment of journalists was one of the options being studied, as well as 'action against anyone else involved in handling leaks of secret information'.[45]

The Australian cases cited probably have their parallels, to a greater or less extent, in most countries with an uncontrolled press and freely available photocopiers. They illustrate the difficult balance which must be struck between the public's 'right to know' and the legitimate claims to secrecy of some information. Some of the criteria to be considered in striking the balance are mentioned in Mr. Justice Mason's judgment. But the adoption of new procedures, of greater sensitivity than the old official secrets legislation, providing for regular review of classifications, more realistic penalties and appropriate defences, needs to be worked out. Most responsible journalists accept that there are certain areas, notably those relating to national security and personal privacy, that require protection. In Australia, as in Britain and elsewhere, most media interests are voluntary parties to the 'D' Notice system under which they agree not to publish material relating to specified areas of national security.[46] Even this sytem is now subject to proposals for reform.[47] Freedom requires the defence of the secrecy of at least some government communications. Different views may be taken concerning the publication of 'a morass of official prose about stale news'[48], on the one hand, and a contemporaneous assessment from a serving diplomat, on the other. As in Sankey v. Whitlam, in advance of legislation, the Australian High Court has asserted its ultimate right to review and to determine where the balance is to be struck. As an extraordinary measure in an unusual case, that may be necessary. As a routine procedure for review, it is patently undesirable and unworkable. Lawyers will watch whether the Attorney-General's Task Force in Australia can do better than counterparts in England, in the endeavour to reform this controversial legislation.[49]

PROTECTION OF PRIVACY

The revolution in the techniques of communication has aggravated the problem of protecting the privacy of the individual in today's society. The proliferation of files and personal dossiers (an increasing number of them computerised) concerning most people in society continues apace in Australia. As a result of 'data profiles', increasingly in computerised information systems, large numbers of vital decisions are made affecting

individuals, sometimes adversely. Initially, the law confined its protections to interests in bodily integrity and territorial surroundings. Outside the United States, the common law did not develop comprehensive rules for the systematic protection of the quality and security of information about an individual.[50] It is for that reason that a series of reports in Britain[51], Canada[52] and Australia[53] have addressed the legal reforms necessary to provide adequate protection for the information concerning an individual 'on the basis of which he may be perceived by his fellows and decisions made vitally affecting him'.[54]

Concern about private information has a dual aspect, each reflecting the legitimate claim of the individual generally to have some control over (or at least knowledge of) the way others are still perceiving him. The first is the concern to ensure that access by strangers to personal information is subject to proper limits. The second is to ensure that the personal information is accurate, complete and kept up to date for the purposes for which it is to be used. Determination to maintain these principles has led, over the past decade in Europe, North America and elsewhere to privacy legislation. Because of the universal and instantaneous nature of the technology of information, it has also led to attempts in a number of international organisations to define the 'basic rules' of information privacy, in order to harmonise domestic laws on the subject. Guidelines adopted by the Council of the Organisation for Economic Co-operation and Development (O.E.C.D.), of which Australia is a member, contain a number of 'basic rules' for privacy protection, of domestic application.[55] The most notable provision is the so-called individual participation principle.[56] That principle states the general rule that:

> an individual should have the right:
>
> (a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
>
> (b) to have communicated to him, data relating to him:
>
> (i) within a reasonable time;
>
> (ii) at a charge, if any, that is not excessive;
>
> (iii) in a reasonable manner; and
>
> (iv) in a form that is readily intelligible to him;
>
> (c) to be given reasons if a request made under sub-paragraphs (a) and (b) is denied, and to be able to challenge such denial; and
>
> (d) to challenge data relating to him and, if the challenge is successful, to have the data erased, rectified, completed or amended.

The explanatory memorandum accompanying the Guidelines acknowledges that this principle 'is generally regarded as perhaps the most important privacy protection safeguard'.[57] It is the safeguard reflected in the legislation of all those countries which have at present enacted information privacy or data protection laws.[58] In Australia, the principle has been embraced in discussion papers of the Australian Law Reform Commission.[59] The Australian Senate Committee on the Freedom of Information Bill stressed the desirability of a Right of Privacy Act and the power to have correction of personal files in the possession of government or its agencies, found, on access, to be inaccurate or misleading.[60] Following the amendments moved in the Australian Senate, the Government ultimately accepted a change to its Freedom of Information Bill 1981. As enacted, this Bill will contain specific provisions for the amendment of personal records established to be 'incomplete, incorrect, out of date or misleading'.[61] The provisions therefore adopt, in respect of Federal administrative records in Australia, the central principle of overseas privacy protection legislation. The adoption of this principle elsewhere, including in the private sector, is yet to be accomplished. It is to be noted that the machinery of individual amendment and correction of personal records is the consequence of a more open system of government information, in which individuals have enforceable rights of access to such information.

The Australian Law Reform Commission's proposals for Australian privacy legislation have been ventilated at public hearings held throughout Australia. It is anticipated that the report of the Commission on this subject will be completed and available early in 1982. The Australian Government has already committed itself to the introduction of privacy protection legislation, defensive of the individual, following consideration of the Australian Law Reform Commission's report. In many ways, the adoption of comprehensive Federal privacy legislation will complement the advances already made in the Freedom of Information legislation.

CONCLUSIONS

This note has not attempted to cover all of the develoments in Australia relevant to the revolution in the technique of communications and freedom of information. For example, important changes in Australian copyright law, affecting in particular the use of photocopiers, came into force in August 1981. A report of the Administrative Review Council has suggested important changes to the Broadcasting and Television Act governing the procedures of the Australian Broadcasting Tribunal, which has functions to oversee the ownership and standards of commercial broadcasting in Australia.[62] Suggestions that the budgetary monopoly of the Telecommunications

Commission should be abolished or modified have been made by ministers in the Australian Government. The advent of a domestic satellite and the continued adoption of new information technology throughout Australia will force the pace of legal change and law reform.

Already laws are in force which expand the individual's rights of access to government information. As has been pointed out, the common law governing Crown privilege has been significantly restated in Australia in recent years, to uphold the power of the courts to review executive government claims for Crown privilege. Federal legislation for administrative law reform have enhanced the power of the individual, in dispute with government or its agencies, to gain access to reasons for decisions and the facts and evidence upon which the decisions were based.[63] In addition to these developments, Federal freedom of information legislation can be expected to be enacted in Australia towards the end of 1981 and to be in force in 1982. Comprehensive privacy legislation will follow.

The development of radio and broadcasting and of nationally distributed print media has demonstrated, in recent years, the problems that arise from having differing State laws on such matters as defamation, contempt of court, journalists privilege, and so on. Here too, progress may be expected. The Australian Law Reform Commission has delivered a report proposing a uniform law of defamation.[64] The Commission is also working on the reform of the law of evidence in Federal courts. This project takes into consideration the issue of journalists privilege, a matter that has already been the subject of a report by the Law Reform Commission of Western Australia.[65] Laws governing the closure of courts in Australia are coming under review and it may be anticipated that the Family Court of Australia and even childrens courts will be open to journalists (and hence to the community) but subject to rules limiting the identification of parties in any material that is published about their proceedings.

Enough has been said to demonstrate that the impact of the new technology, and the influx of new ideas concerning the openness of government are already having their effect upon the Australian legal order. The boundaries of access by the individual to information are being pushed forward. The movement is a healthy and desirable one. It is one that is facilitated and extended by the new information technology itself.

Footnotes

*. This paper is a revised and updated version of a paper titled 'Freedom and Information' and of a supplementary paper 'Freedom and Information: More Information', delivered by the author to the New Zealand Law Conference, Dunedin, New Zealand, 22 April 1981.

+. Chairman of the Australian Law Reform Commission. Between 1978 and 1980, Mr. Justice Kirby was Chairman of an Expert Group of the Organisation for Economic Co-operation and Development (O.E.C.D.) on Trans Border Date Barriers and the Protection of Privacy.

1. Notably the report by S. Nora and A. Minc, L'Informatisation de la Societe, Paris, 1978 (France) and Report of the Consultative Committee on the Implications of Telecommunications for Canadian Society (Clyne Report), Ottawa, 1979. See, generally, Privacy Protection Study Commission, Personal Privacy in an Information Society, Washington, 1977 (United States) and Report of the Committee on Data Protection (Lindop Report), Cmnd. 7341, London, 1978. See also report by a Swedish Government Committee (SARK), The Vulnerability of the Computerised Society: Considerations and Proposals, (Trans. J. Hogg), Stockholm, 1979.

2. Report of the Committee of Inquiry into the Australian Broadcasting Commission (A. Dix, Chairman), 1981.

3. As reported Australian Financial Review, 4 June 1981, p.12.

4. SNS 1977 c 10 (Nova Scotia); SNB, 1978 c R-10.3 (New Brunswick).

5. Canadian Task Force on Government Information, Report: 'To Know and be Known', Ottawa, 1969; Bill C-15 (Canada), Oct. 1979; Bill C-32 (Canada), ('Access to Information and Privacy Act 1980').

6. Protection of Official Information Bill 1979 (U.K.), since withdrawn.

7. E.G. Whitlam, Australian Labor Party, Policy Speech 1972, Sydney, 1972, p.38.

8. Australia, Attorney-General's Department, Proposed Freedom of Information Legislation: Report of Interdepartmental Committee, Canberra, 1974, p.2.

9. Australia, Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee, Canberra, 1977. See FOI Report, p.8 (para. 2.12).

10. Commonwealth Parliamentary Debates (The Senate), 9 June 1978, p.2699.

11. Report by the Australian Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information, 1979 (hereafter FOI Report).

12. Commonwealth Parliamentary Debates (The Senate), 11 September 1980, p.798ff.

13. id., p.809.

14. (1978) 53 ALJR 11.

15. Commonwealth Parliamentary Debates (The Senate), 11 September 1980, pp.809-10.

16. id., p.818ff.

17. For example, (1980) 5 Legal Service Bulletin 251.

18. J.M. Fraser, Policy Speech, 10 September 1980, p.27.

19. FOI Report, p.21 (para. 3.3).

20. J.M. Fraser, 'Responsibility in Government', (1978) 37 Aust.Journal of Public Admin., 1, p.2.

21. FOI Report, p.26.

22. Freedom of Information Bill 1981 (Aust), cll. 28, 29 and 30.

23. id., sub-cl. 48(4).

24. id., sub-cl. 54(3).

25. Sankey v. Whitlam (1978) 53 ALJR 11.

26. Freedom of Information Bill 1981 (Aust.), cl. 81.

27. The Age (Melbourne), 8 January 1981, p.5.

28. South Australian Premier's Department, Issues Paper on Freedom of Information, 1978.

29. Cf. Mathews v. Eldridge, 424 US 319 (1976).

30. Franks Committee Report, Vol. 1, 12 (para. 12).

31. FOI Report, p.24 (para. 3.13).

32. id., Appendix 5.

33. G.D.S. Taylor, 'The New Administrative Law', (1977) 51 ALJ 804. As well, important provisions for persons affected by Federal administrative decisions for access to government information are contained in the 'right to reasons' set out in Administrative Appeals Tribunal Act 1975 (Cwlth), s.28 and Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s.13.

34. Sankey v. Whitlam (1978) 53 ALJR 11.

35. id., 31 (Stephen J.).

36. id., 44 (Mason J.).

37. FOI Report, p.27 (para. 3.25).

38. The New Zealand Herald, 9 December 1980, p.6.

39. Commonwealth of Australia v. John Fairfax & Sons Limited (1980) 32 ALR 485.

40. id., p.491.

41. id., p.492-3.

42. id., p.494.

43. 3 December 1980, p.11. See also The Advertiser (Adelaide), 4 December 1980, p.6.

44. Australia, Attorney-General's Department, Annual Report 1979-80, p.29.

45. The Canberra Times, 21 November 1980, p.3 ('Change to secrets law studied').

46. The Age, 3 December 1980, p.11 ('A surfeit of secrets').

47. As reported in The Times, 8 August 1980, p.3. See House of Commons, Third Report from the Defence Committee: The D Notice System, 1980.

48. T. Sykes and A. Reid, The Bulletin, 25 November 1980, p.26, in this way described the material in Documents on Australian Defence and Foreign Policy.

49. Cf. the recent Classified Information Procedures Act 1980 (US), P.L. 96-456, 49 LW, 187 (1980). See also Church of Scientology v. Woodward, (1980) 54 ALJR 542.

50. Australian Law Reform Commission, Discussion Paper No. 14, Privacy and Personal Information (ALRC DP 14), 1980. See comment (1980) 15 NZLJ 329; (1980) 130 NLJ 793.

51. Report of the Committee on Privacy (Younger Report), Cmnd. 5012, 1972; Lindop Report, 1978. For criticism of the lack of action on these reports, see House of Commons, First Report from the Home Affairs Committee, Home Office Reports, London, 1980, p.iv.

52. Canada, Department of Communications/Department of Justice, Privacy and Computers, Ottawa, 1972.

53. W.L. Morison, Report on the Law of Privacy, Report to the New South Wales Attorney-General at the request of the Standing Committee of Commonwealth and State Attorneys-General (Australia), 1973; Law Reform Committee of South Australia, 50th Report, Regarding Data Protection, 1980; ALRC DP 14. Note that the Australian Law Reform Commission, the Victorian Statute Law Revision Committee, the Law Reform Commission of Western Australia and the New South Wales Privacy Committee have current responsibility to report on privacy law reform. ALRC DP 14, p.15 (para. 17).

54. ALRC DP 14, p.19 (para. 22).

55. OECD document C.80(58)(Final), 23 September 1980.

56. id., p.4 (OECD Guidelines, para 13).

57. id., p.27 (Explanatory Memorandum, para. 58).

58. For an analysis, see M.D. Kirby, 'Trans Border Data Flows and the "Basic Rules" of Data Privacy', 16 Stanford Journal of International Law, 27 (1980).

59. ALRC DP 14, ch. 4.

60. FOI Report, p.265 (para. 24.17).

61. Freedom of Information Bill 1981 (Aust), cl. 48(a).

62. Administrative Review Council (Aust), Report on the Procedures of the Australian Broadcasting Tribunal, A.G.P.S., 1981.

63. The most notable is s. 13 of the Administrative Decisions Judicial Review Act 1977 (Aust) (commenced October 1980). This provision requires that where persons are affected by administrative decisions of Federal officials under Federal law in Australia, they are to be given, on request, the reasons for the decision, findings of fact made in reaching the decision, and a reference to the evidence relied on. Certain decisions are exempted by schedules to the Act.

64. Australian Law Reform Commission, Unfair Publication: Defamation and Privacy (ALRC 11) 1980.

65. Law Reform Commission of Western Australia, Privilege for Journalists (Project no. 53), Perth, 1980.