missioners, one of whom is required by the Act to be a barrister or solicitor in private practice, one a legal practitioner employed by the Crown Law Department and one a member of the University of Western Australia Law Faculty. The Commission is supported by a full-time research and administrative staff. The new arrangements have now been operating for over 12 months and the WALRC reports an improved ability to service the steady flow of new references from its Attorney-General. The WA Commissioners believe that the ability to combine full-time Commissioners with the independent input from private practitioner, Crown Law and University constitutes a sound basis for prompt, independent and constructive law reform proposals.

privacy progress

> I might have been a goldfish in a glass bowl for all the privacy I got.
>
> Saki, *The Innocence of Reginald.*

o e c d privacy guidelines. The last quarter opened with the adoption by the Council of the Organisation for Economic Co-operation and Development in Paris of recommendations to member countries of the OECD in the form of guidelines concerning the protection of privacy and trans border flows of personal data.

The OECD Council urged member countries to 'take into account in their domestic legislation' the principles concerning the protection of privacy outlined in the guidelines. The guidelines were developed by an Expert Group chaired by the ALRC Chairman, Mr. Justice Kirby. They seek to lay down an international regime which will strike the appropriate balance between the movement of information and protection of individual privacy of personal information. Though not confined, in terms, to computerised data, the Guidelines specifically address the problem posed by the rapid movement of personal data occasioned by the linkage of computers by telecommunications ('computications'). They are now before the ALRC in its privacy inquiry.

Allowing for exceptions and supplement, the 'basic principles of national application' will be of special use to countries such as Australia which are presently designing privacy or 'data protection' laws. A list of the titles of the privacy principles adopted will give some clue as to the subject matters dealt with in the OECD Council resolutions:

- Collection limitation.
- Data quality.
- Purpose specification.
- Use limitation.
- Security safeguards.
- Openness policy.
- Individual participation.
- Accountability principles.

The key provision is the so-called 'individual participation principle'. This urges that an individual should normally have the right to obtain confirmation of whether data is held relating to him and to have such data communicated to him. This is to be done within a reasonable time, and in a manner and form and at a charge, if any, that is not excessive. This 'right of access' is the so-called 'golden rule' of modern data protection laws. It provides a common link in privacy legislation so far enacted in the Western world. Accompanying the OECD guidelines is a detailed Explanatory Memorandum. So far, the Australian Government has abstained from participating in the recommendation of the OECD, specifically to permit consultation with State Governments about their privacy initiatives. The Guidelines are placed before the international community in the attempt to promote harmonisation of the law in a technology which is at once universal and rapidly proliferating.

a l r c public hearing circuit. Within Australia, the ALRC public hearings and seminars have been completed. The last was held at the beginning of December 1980. They were an outstanding success, attended in several parts of Australia by State officials concerned with privacy laws. In Western Australia, a significant first took place, namely a joint sitting and joint seminar organised by

the ALRC and the WALRC. At the joint hearing in Perth, the chair was taken by Mr. David Malcolm Q.C. (WALRC Chairman). Mr. J. Mazza (part-time Commissioner, ALRC), joined his WALRC colleagues. A large number of State administrators came forward to express problems and reservations based on the ALRC discussion papers on privacy. One matter which was raised in the Perth hearing and which was subsequently repeated in other public hearings is the delicate problem of doctor/patient relationships and the loss of privacy suffered when police seize patient records in the course of investigating doctors for various offences. A psychiatrist, Dr. Gerald Tewfik, complained about Australian Federal Police action in taking psychiatric records. A similar complaint was made by the Royal Australia and New Zealand College of Psychiatrists at the public hearing in Melbourne.

Speaking to the Annual Conference of the NSW Branch of the Australian Computer Society in Terrigal, NSW, the ALRC Chairman listed the themes which had recurred during the course of the public hearings and seminars on privacy law. They were:

- Police and Customs powers of intrusion.
- Use of government records for locator and other purposes.
- Direct mail and telephone canvassing.
- Insurance blacklists and surveillance.
- Criminal and child welfare records and 'living it down'.
- Access to credit records in the consumer credit society.
- Privacy of social security claimants.
- Access to employment and referees' reports.
- Privacy and medical records.
- Children's privacy.
- Effective sanctions and remedies to defend privacy.

children's privacy? One of the most vigorous debates concerns the ALRC tentative proposals that, from the age of 12, children should be entitled to object to complete parent access to private and confidential medical, health and like records e.g. religious counselling. Parents presently have *no* enforceable right of access to any record of personal information concerning a child held by a school or other authority concerned with the education, health or welfare of that child. The Commission's proposal would give that right, but with the qualification set out above. The ALRC proposed that the last word, in the event of any dispute concerning this new right, should rest with the professional (the doctor or teacher involved). Parents' organisations, religious spokesmen, the Festival of Light and other concerned groups and citizens reacted strongly against the proposal, seeing it as an attack on family integrity and on parental rights. Though some rested their case on 'mercantile' considerations such as provision of board and lodgings, others urged that parents were typically in a better position than professionals to judge the 'best interests' of their children. Most were prepared to concede exceptions, where a child's complaint related to incest or child abuse. However, it was urged that the ALRC had its bias wrong. Normally parents *should* be told. Refusal to disclose a child's confidences should be the exception, not the rule. The debate focused on the problem of age: at what age does the 'right of access' pass from a parent or guardian to the child himself? Some urged 21. Others 18. The majority position appeared to be 16. Disappointing was the failure of most concerned civic groups to address, in addition to the issue of children's privacy, the very important questions of computer privacy, powers of entry of officials, listening and optical surveillance and new business canvassing techniques. Yet on each of these, important and useful submissions were received. These are now being considered by the ALRC, in company with State colleagues.

remedies that work. Perhaps the keenest debate of all relates to the legislative model to be proposed for effective privacy protection in Australia. Some, including the Executive Member of the NSW Privacy Committee (Mr. W.J. Orme), urged going no further than the

model of that Committee: a body set up to conciliate, mediate and persuade on issues of privacy. Others have urged the ALRC to go beyond this model to provide residual rights of access to the courts in at least some privacy complaints. Reasons typically cited during the public consultations were:

- The unrivalled community confidence enjoyed by the courts.
- The international development of remedies that go beyond persuasion to enforcement of just standards.
- The need for a hearing of privacy complaints, not just an administrative process.
- The dangers of trial by media where access to the courts is not available to enforce persuasion according to fair standards.
- The danger that mediation bodies may 'trim their sails' to achieve the possible rather than the desirable.
- The inhibitions that might exist in administrative bodies against vigorously criticising government where this is deserved.
- The wider remedies of injunction and damages that are only available in courts.
- The need for a national approach is more likely to be obtained through the courts than through administrative bodies.

The ALRC Chairman said that the issues posed by the privacy inquiry concerned nothing less than the future of the individual in Australian society:

> Are we to become a society of virtually unlimited official powers of entry upon our property, of optical devices in every room, of unrestricted personal and commercial use of eavesdropping machinery and unlimited intrusions by canvassers and telephone advertisers? Are we have to have no enforceable rules for security, quality, accuracy, fairness, up-to-dateness of computerised personal information? Are we to rely on good manners and fair dealing in disciplining such important and powerful new technologies? Is the data subject of the 21st Century to be able normally to see how others are perceiving him in his computer profile? Or are decisions increasingly to be made in an impersonal scientific world on automated information of which the subject knows nothing, which he cannot see and of which he suspects the worst? This is no longer an Orwellian spectre. This is the world which is already in embryo. ... We all have a concern to defend a zone of personal privacy, without which creative individualism cannot flourish.

Under the direction of the Commissioner in charge of the privacy reference, Associate Professor Robert Hayes, the ALRC is now moving into the 'home straight'. The Commission is considering the design of future federal privacy legislation, in light of submissions received through the public hearings and arising from publication of the discussion paper. This subject will be discussed with the ALRC consultants, some of whom sat with the Commissioners at the public hearings. It will also be discussed with State consultants who are being appointed to study State laws on privacy. In Queensland, the Deputy Premier and Treasurer, Dr. L.R. Edwards, has released the Liberal Party policy on the protection of privacy. The policy commits the Queensland Liberal Party to:

- Support the establishment of a Privacy Committee.
- The committee's powers would extend over the whole community, both government and private, and have power to call for information or documents relating to privacy matters.
- The committee would have power to mediate and recommend solutions and to table regular reports in parliament at not more than six monthly intervals.
- The Queensland Law Reform Commission would be asked to consider the recommendations of the ALRC on the introduction of legislation to give rights of action for certain serious unlawful invasions of privacy.

With the return of the Coalition, the Commission's liaison with the Queensland State Government on trends in laws protecting privacy will be resumed.

australian moves. What of other Australian developments?

- Regulations to allow the Australian Federal Police drug investigators to intercept telephone calls were gazetted in November 1980. Federal police are empowered to intercept telecommunications and inspect telegrams under a warrant of a federal or a State Supreme Court judge. Information obtained can be used only in narcotics inquiries.
- Victorian Chief Commissioner of Police, Mr. S.I. Miller, has called for federal legislation to allow State and federal police to use telephone interception to combat 'organised crime'. In the police journal, *Police Life* (October 1980), Mr. Miller said that present legislation permitting phone tapping only for national security and narcotics matters was inadequate. According to a report in the *The Bulletin* (21 October 1980), New South Wales Police have been lobbying for federal approval to tap phones without conflicting with federal laws. Mr. Miller asserts that unless positive action is taken to give police power to intercept communications, they would be 'unable to cope with professional criminals involved in organised crime'. The ALRC discussion paper on privacy did not favour extending powers of interception, lest it 'chill' use of the phone by good citizens fearing interception or involvement in an interception net.
- In September 1980 it was revealed that an American company had hired a private detective to investigate a distinguished Australian obstetrician, Dr. William McBride, who was called to give expert evidence in a case. The detective approached an Australian Admiral to try to get police and court records on Dr. McBride. Instead he was given 'a dissertation on the activities of the Privacy Committee'.
- Commercial espionage is much more widespread than many suspect. At one of the ALRC seminars, the chairman of the Australian Computer Society Technology Committee, Dr. William Caelli, said that the widespread availability of computer and communications technology was 'the biggest issue to be faced' by industry and lawmakers in the 80s. He pointed out that 'unfortunately it is not difficult to get into most systems. All you need is to buy a freely available $48 kit. Dr. Caelli pointed out that scrambling and encryption devices were now available to foil 'computer break-ins'. He urged that higher standards of security be adopted as universal procedures. 'Our regulatory system is failing to keep pace with the new technology. The ability of our politicians and public servants to keep up with technology is unbelievably slow'.
- *The Guardian* (26 September 1980) urged the United Kingdom Government to appoint a 'Minister of Information Technology' to co-ordinate government strategy across the converging areas of computing, telecommunications and automation. It is not known whether Mr. Fraser saw this. But, significantly, when the new Australian Federal Ministry was announced after the Australian elections, a new Ministry of Science and Technology was created under Mr. David Thompson M.P.
- The Australian Federation of Consumer Organisations on 3 November 1980 urged legislation to protect consumers against supermarkets manipulating prices through checkout computers. Other issues raised by the checkout 'point of sale' phenomenon includes work-stress and surveillance of employee activity, possible with the new technology.
- In South Australia it has been announced that the arrangements under which Mr. Justice White of the S.A. Supreme Court inspected and reported on South Australian Police

Special Branch files has been terminated. Instead, a former Supreme Court judge, The Hon. David Hogarth Q.C., has been appointed to make an inspection at least once a year. The Premier told Mr. R. Millhouse Q.C. during Question Time in parliament that the Special Branch's activities would be directed specifically at terrorism. The change in arrangements followed consultations with the Chief Justice of South Australia, Mr. Justice King, who concluded that it would not be appropriate for 'a continuing audit' to be conducted by a Supreme Court judge.

social implications of informatics. Privacy is only one of the implications of the new computer technology. Other implications were unveiled at the OECD High Level Conference on Information, Computer and Communications Policies in the 1980s, held in Paris in early October 1980. Session D of that Conference dealt with aspects of the private interest raised by the new technology. Among problems for lawyers identified in the papers and debates were:

- The increasing vulnerability of computerised society to terrorism, accident, industrial unrest and crime.
- The need to redefine crimes to cover new anti-social conduct involving computers and telecommunications.
- The 'haemorrhage' of the government monopoly over telecommunications arising from the proliferation of satellites with inexpensive earth stations permitting the by-pass of orthodox 'secure' public telecom systems.
- Implications of computications for the workplace, work stress, unemployment, vulnerability of particular work groups and geographical areas.
- Delivery of legal information, including internationally, by computerised means.
- The need to revise intellectual property law, including copyright and patents.
- The need to work out a new regime for 'conflicts of laws' applicable to a medium which is transient, ephemerial and international.

living with the data base. From England comes the report that a Department of Trade Green Paper will be issued on the subject of computer copyright shortly. Attached to an article by A. Kellman, 'Copyright and Computer Programs: A New Approach', in *Computer Bulletin* (September 1980) 8, is a draft Copyright (Computer Programs and Digital Recording) Bill. It boasts such unlawyerly words as 'retransmutation', 'cross-transmutation' and 'non-linear processes'. Lawyers it seems must learn to live with the data base. Also from England is the report in *The Times* (1 December 1980) that pressure for privacy laws is now coming from an unexpected source: business interests. It is pointed out that seven countries of Europe have already enacted data protection laws. British computer firms are now losing business in Europe because there was no legal guarantee that private information could be enforceably protected. A Swedish contract with a British firm for the manufacture of plastic health cards on thousands of people was cancelled because there was no guarantee that the privacy of the information could be protected. The Home Affairs Committee of the House of Commons is reported to be about to publish a statement criticising the Home Office for its tardy action on privacy laws in Britain. Meanwhile, in Australia, Professor Hayes is aiming at the second half of 1981 for the draft ALRC report with privacy legislation for the federal sphere in Australia.

new zealand reform

> The past is a foreign country; they do things differently there.
>
> L.P. Hartley, 'The Go-Between', c.1956.

falling behind? The New Zealand legal profession is now gearing itself for the forthcoming Conference to be held in