

reform

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1984 arrives

We do not destroy the heretic. We convert him, we capture his inner mind, we reshape him.

O'Brien to Winston in Orwell, *Nineteen Eighty-four*, 205

glasshouse society. On 14 December 1983 the Federal Attorney-General, Senator Gareth Evans QC, tabled in the Australian Parliament a three-volume 1400-page report of the Australian Law Reform Commission on Privacy. An interesting innovation is that the third volume is entirely on microfiche — surely a first in the world of law reform

commission reports!. The report, prepared under the direction of past ALRC Commissioner, Associate Professor Robert Hayes, represents the results of a seven-year inquiry. According to Jane Ford, technology correspondent for the *Australian* (15 December 1983) the release of the report shows 'impeccable timing', being made public on the eve of 1984 — the year of Orwell's grimly prophetic story. In fact, the report drives home the significance of Orwell's symbolic year:

Ever since George Orwell wrote *1984*, that year has stood as a symbol of the way in which authoritarian attitudes and intrusive modern technology could undermine freedom and individual privacy. *1984* might have been a fantasy and a parody for Orwell. However, enough reality already exists to constitute a warning to Australia that carefully designed legal responses are needed.

Identified in the report as the chief threats to privacy in modern Australia are:

- growing official powers of intrusion;
- new invasive business practices;
- new information technology, computers linked by telecommunications;
- new surveillance technology, telephone taps, listening devices and hidden cameras.

According to Professor Hayes, Australians now live 'in glass houses':

All Australians, rich or poor, celebrated or notorious, distinguished or undistinguished, now live in glass houses. Physical barriers of distance and matter no longer protect us from the spy or voyeur, or the thief of valuable information. Ordinary Australians are no more insulated by the mundane and repetitious nature of their lives than the rich and powerful are by sophisticated counter-surveillance technology. What is boring can become interesting when massed together in a computer data bank for purposes such as market research or direct marketing. With every advance in data security and debugging techniques comes a technical change capable of thwarting its fleeting protection. The law in this area cannot be expected to stand in the way of societal change wrought by the new technology ... But the law can ensure that technological change meets human needs by shaping and modifying it so that its worst features are less destructive and its impact less immediate. That is what the Privacy report has attempted to do.

privacy watchdog. Spread across the lead headline in the Melbourne *Age* (15 December 1983) was the central recommendation of the ALRC report: 'Privacy Watchdog Urged'. To improve present Australian Federal laws for the protection of privacy, the ALRC proposes:

- creation of a Federal Privacy Com-

missioner as a statutory guardian for privacy;

- enlargement of the Human Rights Commission to assume new and special responsibilities for privacy protection as contemplated by the International Covenant on Civil and Political Rights;
- provision of statutory guiding rules for the evaluation of complaints about privacy invasion;
- specific limitations on specially invasive body cavity searches by Federal officials;
- new Federal legislation to control secret surveillance by listening and optical devices;
- extension of present legislation to tighten up rules against telephone tapping and intrusions into the privacy of the mail.

In developing its proposals the ALRC has called attention to the need to:

- expand the suggested model so that it will apply in the States, whose laws presently govern the great part of privacy regulation in Australia;
- expand Federal regulation by utilising relevant Federal heads of constitutional power such as those which permit laws on banking, insurance, corporations and external affairs; and
- develop Australia's laws in the context of international developments in information technology and fast-expanding international rules governing informatics (the linkage of computers and telecommunications).

The ALRC report specifically rejects the creation of a vague and general tort of privacy protection. It also rejects confining privacy protection to computerised personal information systems. It acknowledges the general desirability of facilitating the free flow of information which can sometimes lead to a clash with privacy interests. It suggests that privacy laws should be developed to supple-

ment present Australian laws which already partly protect this interest. But it urges early attention to its recommendations:

Unless legislative and other actions are taken for the better protection of privacy, this important attribute of freedom may be irretrievably lost.

golden rule. Central to the ALRC proposal for better protection of information privacy in respect of personal information is the recommendation of a right of access:

- there should be a right, enforceable under Federal law, by which the individual will be entitled, unless excluded by law, to have access to both public and private sector records of personal information held about himself;
- where it is found that this information is incorrect, incomplete, out of date or misleading, procedures for correction of the record or addition of appropriate notations should be available;
- in addition to this enforceable right, rules are proposed to govern the use, disclosure and security of personal information. Suspected breach of these rules can be investigated by the Privacy Commissioner and be the subject of ombudsman-like remedies.

The ALRC report points out that the 'right of access' is the 'golden rule' of all privacy and data protection laws so far enacted in Western Europe and North America. To some extent, this rule is already reflected in the Australian Freedom of Information Act 1982. However, the ALRC report expands and clarifies the right and pushes it for the first time into the private sector in the context of Federal regulation of the Australian Capital Territory. The report makes it plain that the ALRC was limited by its terms of reference and the Australian Constitution from expanding the central privacy right of access to a much wider field in the private sector. It leaves this expansion as a task for

the future. Many functions for the development of privacy remedies in tune with new technological problems are identified and left to the Human Rights Commission and the Privacy Commissioner.

vanishing veil. The last chapter of the ALRC report on 'The Future' discloses remarkable developments in technology which threaten still more the 'vanishing veil' of individual privacy. Amongst considerations listed are:

- the possible introduction of cable and subscription television, with the collection, for billing purposes, of data on personal viewing habits;
- the rapid expansion of personal computers, with the burgeoning growth of personal information systems not readily susceptible to regulation and policing as to their fair use;
- offshore key punching in developing countries to save costs and to keep procedures running three shifts a day. Such developments diminish the capacity of domestic laws to protect and regulate effectively the privacy of local citizens;
- trans border data flows, with the rapidly expanding amounts of personal information circulating around the world via satellite and otherwise, also diminish the power of local parliaments to alone control the destiny of their citizens;
- the use of satellites linked to computers, the so-called 'spy in the sky', reportedly permits monitoring of international telecommunications and even activities of humanity on earth.

These and other technological developments outlined in the ALRC report present a formidable array of challenges to the preservation of privacy in modern Australia.

serious consideration. Tabling the ALRC report, which came in three volumes and with a handy 40-page summary for general public consumption, Federal Attorney-General

Evans offered hope of early action:

It is an extremely thorough and thought-provoking document. It details and analyses threats to privacy ranging from the powers of public officials to intrude into the lives and property of the individual to the challenges posed by the new information technology. The Report presents a balanced and flexible approach to the problems faced in the area of privacy protection in relation to Commonwealth activities and in the Territories, especially the ACT. The Commission recognises that, notwithstanding their importance to the individuals affected, privacy interests are not absolute and must be weighed against such competing public and private interests as the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way. The Commission proposes a flexible mechanism to handle complaints of privacy invasion and to regulate practices which have serious privacy implications ... The government will be giving serious consideration to the matters raised in the report and the recommendations of the Commission. I will be bringing the report to the attention of responsible Ministers in the States and the Northern Territory and will be proposing discussions with them on aspects of the report that are of mutual concern.

Commenting on the 'impeccable timing', Justice Kirby told radio interviewers that, although reference to Orwell's book would be seen by some as a cliché, the coincidence of the report and 1984 might provide the necessary catalyst to serious attention to the report proposals and to early action for the protection of individual privacy:

If this happens, George Orwell's book will have done a service to the protection of the individual in 1984 Australia.

other moves. Meanwhile, other moves relevant to privacy protection can be noted:

- At the beginning of December 1983 press reports detailed a reported refusal by the Australian Labor Party Caucus in Federal Parliament to approve the introduction of legislation to permit the special Commission of Inquiry in New South Wales under Justice Cross to have access to information from Federal Police phone

taps. The reports recorded opposition by the MPs, complaining that the legislation, as proposed, was 'too broad'. According to the *Australian* (13 November 1983) the draft Bill allowed the passing of information from Federal police phone taps to State police forces where the offence was serious. The ALRC Privacy report (above) suggests numerous provisions to tighten up the Telecommunications Interception Act. One proposal is the tabling in Parliament of statistical details on the numbers of intercepts authorised annually and a curtailment of the present maximum period of permissible interception.

- In late September 1983, tabling the Annual Report of the NSW Privacy Committee (NSWPC) for 1982, NSW Attorney-General Paul Landa commented that the growth of information held on computer data bank files had created the possible need for special legislation to protect privacy of individuals. The NSW Privacy Committee, a pioneering Australian legislative effort, recommended in its Annual Report that legislation should be introduced to replace voluntary guidelines to protect people from the misuse of information. Mr Landa said that the potential breaches of privacy would be minimised by the introduction of legislation to codify central principles on the collection, storage, access and amendment of such information. It seems clear that the NSWPC, which influenced the ALRC proposals for a Federal Privacy Commissioner, has, in turn, been influenced by the ALRC view that privacy principles should be stated by Parliament, not left exclusively to voluntary guidelines or discretion of the privacy guardian.
- In Queensland, a Privacy Committee has been established along lines gener-

ally similar to the NSWPC. Introducing the legislation, the then Attorney-General, Mr Doumany, said in August 1983 that the proposed committee would consist of seven members with power to conduct research, collect and collate information on matters referred to it by the Minister and report with recommendations to the Minister, including on complaints about alleged violations of privacy. Reports to the Minister would not be published without the prior approval of the Minister. No attempt is made to provide a definition of privacy, nor is there an enforceable right of access to personal records provided in the Bill.

- In Western Australia the WALRC is now reported busily at work on its report on privacy in that State. The ALRC has been having extensive discussions with the WALRC during its inquiry and a major report on WA laws on the subject can be expected early in 1984.
- Coinciding with the publication of the ALRC report come numerous news items expressing concern about aspects of the impact of new information technology on individual privacy. In the *Age* (12 November 1983), Helen Penridge wrote of the danger of computers in the library permitting scrutiny of reading habits of library users. In the same journal (22 October 1983) a news item reported that Mr Alan Asher, on behalf of the Australian Consumers' Association, expressed concern that plans to introduce a national public access videotex service in Australia could permit analysis of individual consumer habits which could mean unchecked invasions into privacy.

1984 has arrived. Was Orwell right?

data law '84

In 1972 Australia graduated 100 PhDs in Physics. By 1982 the figure was 35. I don't think we can stand too much of this kind of progress.

B O Jones MP, Minister for Science and Technology, National Technology Conference, September 1983.

sleepers waking. The present Federal Minister for Science and Technology, Barry Jones, is, as every Australian knows, an ex quiz champion. But he is also a ministerial stirrer determined to shake Australia into a 'shock of recognition' of the impact of science and technology on society. In late September 1983, after the copy for the last issue of *Reform* went to press, Mr Jones convened a national technology conference, dubbed by journalists 'the Technology Summit'. 140 delegates gathered at the Canberra Rex Hotel to hear the Prime Minister, Mr R J Hawke, offer a strong commitment to new technology. Whilst condemning Australia's technological development record as 'pathetic', Mr Hawke pointed to Australia's 'poor record' in product development and commercialisation. He maintained that years of protection against imports had 'dulled the enterpreneurial spirit' and reduced competitive pressures in manufacturing industry:

The record is pathetic. The gap between research and product development must be closed. The slow rate of technology transfer into new products and processes must be accelerated. We must learn, not only how to develop the product but also to focus on what is required to market it. Australia's research institutions are too isolated, intellectually and physically, from industry; academia has given insufficient attention to possible economic implications of its research; and industry has not conducted enough of its own in-house research and development.

At the close of the conference, Mr Jones took a theme from his recent best-selling book '*Sleepers Wake!*' (OUP):

Candour compels me to say that the 'shock of recognition' has not been as successful. The sleepers may be waking. But they are still very drowsy. In the OECD tables, Australia ranks 23rd of 24 nations in the value of technology-intensive imports over exports, with an imbalance of 9.5:1. This figure alone suggests the need for ringing a few alarm bells