

Privacy (clause 30)

Privacy—the general issue

24.1 Both locally and internationally, there is a clear legislative and administrative trend towards the protection of privacy. In our own country there has been an insistent demand that legislation be enacted safeguarding personal privacy since Sir Zelman Cowen, in 1969 in delivering the ABC Boyer Lectures, *'The Private Man'*, expressed the view that a claim to privacy is 'one of the truly profound values of a civilised society'.¹ Professor Cowen described how the privacy of people is invaded by a massing army of government and officialdom, commerce and industry, the plainly curious, mass media, computer banks, technological wiretapping and eavesdropping, wide discretionary powers of policy entry, search and apprehension, and intrusive employment inquiries. The first comprehensive report on the laws relating to privacy in Australia was prepared in 1973 by Professor W. L. Morison of Sydney University Law School, for the Standing Committee of Attorneys-General.² In the main, what this report indicated was that in Australia little positive protection or recognition is given to privacy, either in legislation of the various Parliaments or in the common law as developed by the courts.

24.2 Isolated legislative reforms have surfaced at the State level. For instance, four States (Victoria, New South Wales, Queensland and South Australia) have enacted statutes in relation to electronic eavesdropping, which make it an offence to use a listening device to record or listen to a conversation except in certain circumstances. Queensland in addition has an *Invasion of Privacy Act*, 1971, which regulates private inquiry agents and credit reporting agents. In two States, Tasmania and South Australia, bills were introduced in 1974 creating a civil cause of action for the violation of privacy. Neither Bill has been passed at this stage.³

24.3 Privacy has also been regularly in the news during the last few years due to the efforts of two bodies in particular. The first is the Australian Law Reform Commission which was given a very comprehensive reference on privacy in 1976. The Commission has conducted a number of public seminars and debates on relevant issues, in addition to publishing papers in two areas: privacy issues arising from the publication of personal facts,⁴ and the Census.⁵ The most recent publication on privacy is an extensive report, *Unfair Publication: Defamation and Privacy*,⁶ published in June 1979, that contains the Commission's conclusions on that aspect of its inquiry. In brief, the Report recommends the

¹ The Australian Broadcasting Commission, Sydney, 1969, p. 11.

² Australia, *Report on the Law of Privacy*, Parl. Paper 85/1973, Canberra, 1974.

³ On State legislation, see generally H. Storey, *Infringement of Privacy and its Remedies*, *Australian Law Journal*, 47, 1973, p. 498; and Jane Swanton, *'Protection of Privacy'*, *Australian Law Journal*, 48, 1974, p. 91.

⁴ Australia, Law Reform Commission, *Defamation*. Background paper on present law and possible changes, Working Paper No. 4, ALRC Sydney, 1977; *Defamation—options for reform*, Discussion Paper No. 1, ALRC Sydney, 1977; *Privacy and publication—proposals for protection*, Discussion Paper No. 2, ALRC Sydney, 1977; *Defamation and publication privacy—a draft uniform bill*, Discussion Paper No. 3, ALRC Sydney, 1977.

⁵ Discussion Paper No. 8, ALRC Sydney, 1979.

⁶ Report No. 11, AGPS, Canberra, 1979.

enactment of uniform legislation throughout Australia, replacing and revising the existing law on defamation and enabling individuals to take action with respect to the publication about them of sensitive private facts. The other body that has been active in this area is the N.S.W. Privacy Committee. This Committee was established in 1975, and has since actively encouraged government and private industry to adopt voluntary codes of conduct and to implement guidelines relating to the collection, storage, dissemination and destruction of information of a private nature. The Privacy Committee has also done much to foster public interest in, and concern with, questions of privacy, by participating in public seminars and discussions, publishing information bulletins, making submissions to inquiries (such as our own into freedom of information), and publishing to date close to fifty background papers on privacy issues.⁷

24.4 The other general area where developments have occurred, and to which preliminary reference should be made, relates to personnel files. Because of the highly personal nature of the information that these files often contain, the obvious career implications of such information being inaccurately maintained, and further because of the effect that the mere existence of this information can have on the stability of a person, much attention has focused on privacy issues and there has been a substantial development of ideas and rules. For instance, in N.S.W. the Privacy Committee has published draft *Guidelines for the Operation of Personal Data Systems* for the use of those controlling record holdings in the private or the public sector.⁸ Federally, the Public Service Board has also reached the stage of circulating for comment a draft of *Guidelines on the Keeping of Personal Records on Staff in the Australian Public Service*.⁹ The Guidelines will regulate such matters as the nature of the information which may be contained on files, correction of errors, custody of the records, disclosure to third parties, and access by the party affected.

24.5 We mention these developments, which are not directly related to this Bill, as we feel it is important to view an exemption like clause 30 in the light of the wider changes that are occurring in relation to privacy. Developments that occur in one area can clearly have an effect on the development of doctrine in another area. For instance, it is relevant to our inquiry that the emphasis in the development of rules on personnel data systems appears to be on permitting individuals to inspect their files (including adverse or critical assessments that may be contained thereon) and on providing a mechanism for challenge to, and correction of, allegedly false or inaccurate information. This question of correction is taken up later in this chapter.

24.6 Another reason why we think it is important to bear in mind the general trends in relation to privacy is that there appears to be a view in some quarters that freedom of information and privacy are conflicting objectives: that, while the trend of legislative and administrative reform is to safeguard private information about individuals, this Bill seeks to create a right of access which emphasises the disclosure and dissemination of material. In our opinion there is no conflict between freedom of information and privacy so long as freedom of information legislation contains an exemption permitting the government

⁷ The work of the Privacy Committee is well demonstrated in one of its recent publications, *N.S.W. Privacy Committee Report 1975-1978*, Sydney, 1979. The published papers of the Committee are listed in that Report.

⁸ N.S.W. Privacy Committee, Background Paper no. 31, Sydney, The Committee, 1977.

⁹ See discussion in *Transcript of Evidence*, pp. 902-3; see also the PSB's Submission (no. 47), incorporated in *Transcript of Evidence*, pp. 842-4, which discusses the PSB's holdings of records containing personal information.

to withhold from public access information of a personal nature. Ideally, separate legislation could be enacted, a privacy statute, placing an *obligation* upon the government to withhold and safeguard personal information. We note that the United States has adopted this course, and we return to this matter later in the chapter.

24.7 Furthermore, it is our understanding of the history of the concern with privacy that one of the main elements of that debate has been the need to enable individuals to ascertain when information is held about them, in part to dispel fear and ignorance, but also to enable correction of false or misleading information. This Bill goes some way towards the pursuit of those objectives, and to that extent is compatible with the concern for privacy. More is said in the second part of this chapter about the need for some mechanism in the Bill to enable individuals to correct information which is held about them.

Protection of privacy in the Bill

24.8 The clause protecting documents which affect personal privacy is clause 30. It provides as follows:

30. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

(2) Subject to sub-section (3), the provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the principal officer of the agency, or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the principal officer or Minister may direct that access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to him but is to be given instead to a medical practitioner to be nominated by him.

24.9 The need for this exemption is apparent, and indeed many departments gave examples of their personal record holdings that would clearly qualify for exemption. Some claims were made, however, especially in the submissions from government departments, that clause 30 is not broad enough to enable departments to protect personal information from general distribution. The Department of Immigration and Ethnic Affairs in its submission pointed out that they had approximately 180 000 active personal files, with information ranging from intimate personal and family details to fairly basic passenger movement records maintained in respect of persons entering and leaving Australia. They pointed out that numerous persons and organisations, including debt collection agencies and private investigators, would be interested in seeing the passenger movement records. The Department feared that it might not be able to withhold these, as it may not be able to establish that disclosure would involve the unreasonable disclosure of information relating to the personal affairs of a person.¹⁰ A different concern was expressed by the Commonwealth Employees' Compensation Tribunal. It was indicated that a claimant is sometimes asked to leave a hearing room when medical evidence is given about him which it is not in his interest to hear—for example, evidence in psychiatric cases or where a claimant has a terminal illness. However, when the Bill is enacted the Compensation Tribunal

¹⁰ Submission no. 158, incorporated in *Transcript of Evidence*, p. 2341.

may not be able to withhold such information from an applicant, and at best will be able to refer it to a medical practitioner chosen by him.¹¹ The Commissioner for Employees' Compensation also expressed the same fear. In addition, that office thought that, by combination of clauses 20 and 30 of the Bill, it might be required to disclose a person's compensation application to another person with the name of the claimant deleted.¹² The Commissioner felt that this would, in any case, still constitute an unreasonable disclosure of information relating to the personal affairs of the person.

24.10 We do not intend in this Report to answer all of the individual criticisms and fears which may be expressed about the operation of clause 30. In our opinion, after carefully considering the matter, clause 30 lays down an adequate standard to regulate disclosure of personal information. In the cases just outlined, the agencies will have every opportunity to present to the Administrative Appeals Tribunal their opinions as to why disclosure would be unreasonable in the circumstances; there is every reason why sensible argument should prevail. We also feel many people frequently overstate the calamity that will result if individuals are given access to their own files, particularly medical files. For instance, the Department of Health strongly opposed the disclosure to patients of the results of pathology tests and clinical notes of doctors. One of the reasons advanced was the difficulty patients would have in correctly interpreting the information.¹³ By contrast, the N.S.W. Privacy Committee reported on moves it had successfully taken to persuade hospitals to allow patients access to their own files, either directly or via a medical practitioner nominated by the client, and concluded that:

So far these procedures have satisfied all requests . . . Nor have we heard of any instance where access has had a harmful effect on a patient's medical condition. In addition, where psychiatric files were the subject of access requests, it was thought that granting of access would be both tedious and fraught with difficulty. In fact, accesses have been carried out without complications. The emerging view appears to be that those patients who wish access to their files are few in number and are more likely to be harmed by the fear of a secret file than by actual access.¹⁴

Mr W. Orme, the Executive Member of the Privacy Committee, also reported in evidence that a United States joint House and Senate study of privacy and access reported in July 1977 that it had not been able to find a single instance where direct or indirect access to a medical file had caused a problem.¹⁵

24.11 We should also mention that most departments expressed satisfaction with the exemption and, indeed, we were encouraged by the constructive attitude that some are already adopting towards its interpretation. For instance, the Departments of Social Security and the Capital Territory indicated that they would not confine an individual's access to personal information created after the date of the commencement of the Bill. They intend to show individuals their full files.¹⁶ The Department of Social Security also indicated that their files will henceforth show the decision which has been made and that staff will be provided to enable them to understand the information recorded on their files.

¹¹ Submission no. 55, p. 3.

¹² Submission no. 99, p. 3.

¹³ Submission no. 83, incorporated in *Transcript of Evidence*, pp. 1031-33; and see extensive discussion of this matter in *Transcript of Evidence*, pp. 1034-59.

¹⁴ Submission no. 87, incorporated in *Transcript of Evidence*, p. 496.

¹⁵ *Transcript of Evidence*, p. 503.

¹⁶ Submission no. 117 (Social Security) incorporated in *Transcript of Evidence*, p. 2132-34; Submission no. 149 (Capital Territory) incorporated in *Transcript of Evidence*, p. 2235.

24.12 While, in general, submissions to the Committee were critical of the use of qualifying adjectives like 'unreasonable' there seemed to be broad acceptance that that standard was appropriate in clause 30. Mr Orme indicated that his Committee preferred to work with broad standards of that nature, and that in practice they could be utilised effectively on a case to case basis.¹⁷ Our only hesitation in accepting the clause without qualification concerns the inclusion of the words 'disclosure under this Act'. Mr Curtis (First Assistant Secretary, Attorney-General's Department), indicated that this meant 'disclosure to the world at large'.¹⁸ That is, when a request is received for information that contains some personal or private details, the agency must assess whether it would be unreasonable to disclose the information generally, rather than whether it would be unreasonable to disclose to the particular applicant. This means that researchers, or trade union groups, could not seek preferential access (as they can under the United States Act)¹⁹ on the basis that the documents requested will be used for research purposes and not otherwise published. While we can see the benefit in having a clause that operates in this broader fashion, we are inclined at the moment to retain clause 30 as it is because of the general principle underlying all clauses that all persons have equal rights of access, and no person need establish a need for a document. Whether this principle should be amended in relation to clause 30 is obviously a matter which can be reconsidered when a review of the Bill is undertaken after 3 years of operation (see Chapter 32).

24.13 Recommendation: The privacy exemption in clause 30 should be retained in its present form but it should be given particular attention when the legislation is subject to its first major review.

Desirability of a Right to Privacy Act

24.14 It has been suggested to us that the Freedom of Information Bill should contain provisions designed to protect the personal privacy of those who are, or could be referred to, in government records. We have reached the conclusion that it is impracticable for us to make general recommendations on the form of privacy legislation. While the Freedom of Information Bill is simply an access statute, privacy legislation would have objectives going far beyond access to personal records. In general, such legislation is designed to enable individuals to control how, when and to what extent information about them is communicated to others. Consequently, privacy legislation normally contains provisions designed to control the national data bank of personal information, with controls on collection, storage, dissemination, retention and correction of personal information. There are numerous issues arising on each of these points which this Committee is not in a position to consider. We refer again to the fact that the Australian Law Reform Commission presently has a reference that encompasses these matters.

24.15 The United States enacted in 1974 a general Privacy Act dealing with all the matters listed in the previous paragraph. A consideration of developments under the United States Act also suggests the difficulty of legislating generally on privacy at this time. The United States Act, broadly speaking, imposes upon agencies a large number of record-keeping obligations with respect to each 'system of records' maintained by the agency. As many as 8000 individual systems of

¹⁷ *Transcript of Evidence*, p. 524.

¹⁸ *Transcript of Evidence*, p. 148.

¹⁹ See e.g. *Getman v. N.L.R.B.* 450 F. 2d 670 (D.C. Cir. 1971).

records have been uncovered since passage of the Act (compared to an estimated 850 before passage).²⁰ In addition the cost of administering the Act in its first year of operation (September 1975–September 1976), excluding one-time start up costs, was \$36.59 million (though the estimate had been as high as \$200–\$300 million per year.²¹ In 1977, 1 417 214 requests were received under the Act (1 355 515 being granted in whole or in part).²² These figures alone indicate that there will be resource implications which will also have to be investigated before general privacy legislation can be enacted.

Correction of personal files

24.16 However, there is one matter which has been suggested to us in many submissions about which we do feel confident enough to make a recommendation, and that is the correction of personal files. It is convenient at the outset to summarise the provisions of the United States Privacy Act on this point. An individual is empowered to request the amendment of a record relating to him to which he could lawfully have access under the Act, on the basis that the record or any portion thereof 'is not accurate, relevant, timely, or complete'. The agency must acknowledge the request within ten working days of receipt, and thereafter promptly amend the record or notify the individual of the refusal, the reasons therefor, and of the right to seek a review of the refusal. If an internal review is requested, this has to be completed within thirty days. Judicial review is thereafter available if the applicant is dissatisfied. In addition, an applicant who has been unsuccessful on an internal review may file with the agency a concise statement setting forth the reasons for his disagreement with the decision of the agency. If the disputed information is thereafter disclosed, the disputed portions must be noted and the applicant's statement must be appended; the agency may also append a concise explanation as to why the applicant's request was rejected. Further, any correction or notation of a dispute must be notified to any person to whom the record was earlier disclosed, where an account of that disclosure has been maintained. If the earlier recipient of an amended record was also a Federal agency, it must amend its record accordingly.

24.17 We are of the opinion that a similar scheme modified to complement Australian legislative provisions should be contained in the Freedom of Information Bill. Following are the main features which in our opinion should be inserted in the Bill:

- (a) the right of correction should apply to any personal information of a factual nature contained in a document which is public or has been released or obtained under the Freedom of Information legislation. That is, the right of correction would be tied to the release of information under the Freedom of Information Bill. No additional right of access would be created for the purpose of enabling a person to ascertain whether information is liable to correction.
- (b) The right of correction should extend to those prior documents to which we have recommended in Chapter 14 that access should be granted.

²⁰ United States, University of Missouri, School of Journalism, Freedom of Information Centre, *FOI Digest*, 18, January–February 1976, No. 1, p. 2.

²¹ See Submission by K. P. O'Connor (no. 88), incorporated in *Transcript of Evidence*, p. 537.

²² Report compiled by the Office of Management and Budget presented to President Carter on 20 July 1978—see *Access Reports*, Newsletter on Freedom of Information and Privacy, 8 August 1978.

- (c) Information should be subject to correction on the grounds that it is inaccurate, or is incomplete and would give a misleading impression. We do not recommend that the other grounds stated in the United States Act, 'relevance' and 'timeliness' be adopted in Australia. Those standards have meaning only in the context of their Act when read with other provisions which regulate the nature of the information which departments may collect, and the purposes for which they may retain that information.
- (d) Basically the same access procedures and time limits in the Freedom of Information legislation should apply to the right of correction as are applicable to requests for information generally.
- (e) The same mechanisms available under the Freedom of Information legislation for an applicant to challenge an adverse decision—that is, internal review, complaint to the Ombudsman, and appeal to the Administrative Appeals Tribunal—should also apply to the right of correction.
- (f) An applicant whose request that a record be amended has been rejected should be permitted (as in the United States) to lodge on the record a concise statement of the reasons for his disagreement.
- (g) While it is difficult to reproduce in Australia the United States stipulation that earlier recipients of information be notified of any correction or notation of dispute, as, unlike the United States, no record of disclosures is required to be kept in Australia the Bill should contain an exhortation to the effect that agencies should make all practicable efforts to notify significant changes or notations to earlier known recipients.
- (h) To ensure that these provisions are manageable, we recommend that the right to seek correction of records should be limited to Australian citizens and permanent residents.

24.18 Recommendation: The Bill should be amended to incorporate a system whereby rights are conferred upon Australian citizens and permanent residents to request the correction of inaccurate or misleading facts concerning personal information pertaining to the applicant.