AN END TO PRIVACY

By The Honourable Mr Justice John Vincent Barry*

Events in 1960, embracing the passing by the Federal Parliament of the Telephonic Communications (Interception) Act and the presentation to the House of Commons of the White Paper, by Viscount Simonds, Lord Morris and Lord Thomson, containing observations on the use of evidence obtained by the interception of telephone conversations,† make this excellent book[1] highly topical. Although it contains a chapter on wire tapping in England, in which the 1957 report of the Privy Councillors' Committee is discussed, the work is primarily concerned with telephone interception (wire tapping) and the use of electronic devices for eavesdropping ('bugging') in the United States. It is the result of an investigation sponsored by the Pennsylvania Bar Association Endowment, and its contents are presented in three parts: *Eavesdropping: The Practice,* written by Samuel Dash, a distinguished trial lawyer and former District Attorney of Philadelphia; *Eavesdropping: The Tools,* by Richard F. Schwartz, Ph.D., a highly qualified development engineer and teacher; and *Eavesdropping: The Law,* by Robert E. Knowlton, a professor in the Law School of Rutgers University. The story unfolded of American experience is both extraordinary and perturbing, and deserves to be widely known.

Blackstone stated

> eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to harken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance . . .[2]

He went on to say that eavesdroppers are 'indictable at the sessions, and punishable by fine and finding securities for good behaviour'. Lord Goddard C.J. thought differently; he asserted that eavesdropping was never an indictable offence,[3] a view accepted by the Supreme Court of Canada,[4] but doubted by the Full Court of Victoria.[5]

Distaste for eavesdropping is so strongly rooted that it is more than likely that Blackstone correctly stated the common law. During his second reading speech on the Telephonic Communications (Interception) Bill, in the Federal Parliament on 5 May 1960, the Attorney-

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† Report of the Departmental Committee on Powers of Subpoena of Disciplinary Tribunals, 1960 Cmnd 1033, para 30.

[1] Samuel Dash, Robert E. Knowlton and Richard F. Schwartz, *The Eavesdroppers* (Rutgers University Press, New Jersey, 1959), pp. 3-484.

[2] *Commentaries* (1771) iv, 168.

[3] *R. v. London Sessions* [1948] 1 K.B. 670, 675.

[4] *Frey v. Fredoruk* [1950] 3 D.L.R. 513.

[5] *Haisman v. Smelcher* [1953] V.L.R. 625.

General, Sir Garfield Barwick, Q.C., described well the attitude of the Australian community:

> . . . eavesdropping is abhorrent to us as a people. Not one of us, I am sure, would fail to recoil from the thought that a citizen's privacy could lightly be invaded. Indeed, many citizens no doubt feel that far too many intrusions into our privacy are permitted to be made in these times with complete impunity. Many things which might fairly be regarded as personal and of no public consequence appear in print without the citizen's permission and without his encouragement; but in particular all of us, I think, dislike the feeling that we may be overheard and that what we wish to say may reach ears for which we did not intend the expression of our thoughts. Much of our normal life depends on the confidence we can repose in those to whom we lay bare our sentiments and opinions, with and through whom we wish to communicate.

Most citizens believe that during and since World War II telephone tapping occurred in Australia, and still does, though the Attorney-General's figures of 182 telephone intercepts over eleven years, if they are complete, suggest that its extent has been much less than is commonly suspected. But while strong views about this intrusion upon privacy are generally held, there are few people who are conscious of the more serious evils that will develop if the common United States practice of using a concealed microphone (or 'bug', as for some esoteric reason it is there known) or electronic device for the purpose of recording private conversation, finds its way into 'the Australian way of life'.

As it is now a feature of social organization that every national government maintains a security service, it is outside practical politics, despite popular distaste and opposition, to expect that wire tapping will be completely outlawed. On this assumption, Sir Garfield Barwick's Telephonic Communications (Interception) Act may be regarded as a sensible and realistic piece of legislation. It prohibits any person, under penalty of £500 or imprisonment for two years, from intercepting a communication passing over the telephone system. Authorizing, suffering or permitting an interception by another person, or doing any act or thing by which he or another person is enabled to intercept, is also forbidden under the same penalty.[6] Interception of a communication consists of listening to or recording, by any means, a communication in its passage over the telephone system without the knowledge of the person making the communication.[7] Divulging or communicating or making use of or recording any intercepted communication is prohibited under penalty of £500 or two years' imprisonment.[8] Offences against the Act may be prosecuted summarily or on indictment, but a summary prosecution re-

[6] S. 5 (1). [7] S. 4 (1). [8] S. 5 (3).

quires the consent of the Attorney-General, and if summarily prosecuted the penalty may not exceed £100 or imprisonment for six months.[9] 'Telephone system' means the telephone system controlled by the Postmaster-General's Department.[10]

The effect of section 4 (2) and (3) is to exclude from the meaning of interception overhearings arising from crossed lines or technical defects, or in the use of a party line, or of an extension or switch legitimately provided on a telephone service within a house or establishment. These apart, all interceptions are forbidden except (a) interceptions by officials of the Postmaster-General's Department in the course of their duties connected with the installation, operation and maintenance of a telephone line or preventing its misuse,[11] and (b) an interception under warrant from the Attorney-General.[12]

Sections 6, 8, 9, 10, 11 and 12 create an elaborate protective procedure for the issue by the Attorney-General of warrants authorizing interceptions. Only the Attorney-General may issue a warrant, and he may do so upon a request from the Director-General of Security only if he is satisfied that the particular telephone service is, in brief, being used, or likely to be used, for 'purposes prejudicial to the security of the Commonwealth', *and* the interception by the Australian Security Intelligence Organization is likely to help it in carrying out its function of obtaining intelligence relevant to the security of the Commonwealth. If in an emergency he is satisfied national security is likely to be seriously prejudiced, the Director of Security may (providing certain conditions exist) issue a warrant authorizing an interception, but he must forthwith report and justify his action to the Attorney-General.[13] Records of communications not relevant to security must be destroyed.[14]

This Act amounts to a recognition that the vast majority of Australians regard Mr Justice Oliver Wendell Holmes' description of 'wire-tapping' as 'a dirty business'[15] as apt and justified. It recognizes, too, that the values and traditions of the Australian people require that the practice should not go beyond what is claimed by the powers that be as imperatively and unavoidably necessary in the interests of national safety. It has been wisely observed that it is of more value to form good habits than to frame good laws, but if good laws help in the forming of good habits in those entrusted with great and intrusive powers, such laws should be eagerly welcomed. The great merit of this Act is that it removes the practice of telephone tapping from the murky regions of caprice and arbitrariness. It declares as a principle of policy that only the Australian Security Intelligence

[9] S. 5 (4). [10] S. 3. [11] S. 5 (2) (a).
[12] S. 5 (2) (b). [13] S. 7. [14] S. 10.
[15] *Olmstead v. U.S.* (1928) 277 U.S. 438, 470.

Organization may have recourse to telephone tapping, and then only for specified reasons. Its consequential effect is that no law-enforcement agency, Commonwealth or State, may lawfully do so, and that the traditional methods of criminal investigation will not be openly supplemented by telephone interception.

The measure thus possesses some features of comfort, and as the habits of law observance by police and special agencies are, as yet, more firmly ingrained in Australia than in the United States, there is some ground for hoping that the practices which, as Mr Dash reveals, are rife in his country, will not establish themselves here.

American legislation against interception of communications goes back to 1862, when California made it an offence to intercept telegraph messages. The first telephone was exhibited by Alexander Graham Bell at Philadelphia in 1876, and in 1878 the first commercial switchboard began to operate at New Haven, Connecticut. It had twenty-one subscribers. In 1885, there were 155,800 telephones in the United States. By 1895 the number had grown to 339,000, and in that year wire tapping was in use by the New York police. It was, however, not confined to police; a newspaper management would intercept conversations by its rival's reporters, this practice existing in Boston, New York, Chicago and San Francisco. In 1895, Illinois enacted prohibitory legislation, and in 1905 California extended the 1862 law relating to telegraph messages to embrace telephone interceptions. The story of the legislative attempts to outlaw wire tapping is too long to be told here, and it is to be found extensively set forth in the work reviewed. But the strange situation that now exists in connection with the Federal Communications Act should be described. The combination of counter-espionage measures in World War I with the enforcement of the Eighteenth Amendment prohibiting the manufacture or sale of alcoholic liquor, and legislation made under it, stimulated wire tapping practices, which soon exhibited fantastic aspects. In 1935 (or 1936) an apparatus was discovered that enabled telephone conversations of the Justices of the United States' Supreme Court to be intercepted, and in 1934 and 1935 even the White House lines were tapped by a telephone company watchman said to be in search of 'entertainment and recreation'. The mayors of New York and Philadelphia, as well as various private political and business gatherings and innumerable other concerns and individuals were the victims of telephonic prying. The obstacles to doing so were (and are) far less in the United States, where telephone systems are not state-owned, and presumably the incentives are greater, than in Australia. But politicians use telephones and often need to do so in privacy, and in 1934 Congress passed the Federal Communications Act. Section 605 of that Act has been declared by

the Supreme Court of the United States to be part of the paramount law of the land.[16]

Statutes in some states, however, authorize the use of wire tapping for the purpose of obtaining information to detect crime. In New York telephone conversations may be intercepted upon a court order; in Louisiana, the statute prohibiting wire tapping exempts officers of the law who do so for crime detection. In Massachusetts, a statute authorizes wire tapping by any person who gets the permission of the District Attorney or the Attorney-General, but if there is no intent to injure another or to procure information concerning an official matter, no permission is needed. But there must be grave doubts of the constitutional validity of such provisions as these, because the United States Supreme Court has flatly declared that section 605 is of general application. The section begins by prohibiting any person from divulging or publishing any interstate or foreign communication by wire or radio, but it is not limited to such communications. It proceeds, 'no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person'. The next clause prohibits any person not entitled to receive interstate or foreign communications from using information thereby gained for his own use or for the benefit of a person not entitled thereto, and the fourth clause forbids any person who receives or becomes acquainted with such an intercepted communication with knowledge of the way it was obtained from divulging or publishing or using it. The matters excepted are radio communications by amateurs for the use of the general public or relating to ships in distress.

On ordinary principles of statutory construction, there would seem to be a great deal to be said for the view that the operation of section 605 was confined to foreign and interstate communications, but the Supreme Court's decision in 1957 in *Benanti's* case[17] recognizes no such limitation; indeed, it expressly rejects it. In that case, New York police, suspecting Benanti of violations of state narcotics laws, obtained a court order permitting them to tap a telephone used by him. As a result of information thus obtained, the police seized a shipment of liquor which did not bear tax stamps. Benanti was prosecuted in a federal court for breach of a federal liquor tax statute. A police witness admitted that the liquor was discovered because of a telephone conversation intercepted by an officer of the New York police department.

A conviction was reversed by the United States Supreme Court,

[16] *Benanti v. U.S.* (1957) 355 U.S. 96.
[17] *Ibid.*

the Justices being unanimous in holding that the interception violated section 605, and that the section's prohibition made inadmissible all evidence obtained as a result of the information thus gained. The trial was invalidated not only for this reason; the divulging to the jury of the existence of the interception also violated the section and vitiated the trial. The unanimous opinion was based squarely on the terms of the section, the Court expressly declining to invoke the Fourth Amendment, which prohibits unreasonable searches and seizures. The decision is, of course, essentially one of policy; as it is put in a comment:[18] 'In *Benanti* the contending policy considerations of securing convictions of known criminals, of discouraging wiretapping whether by state or federal officials, and of preserving the integrity of the federal courts seem to have been resolved in favor of the latter two considerations.'

Such a result could not occur in Australia. If a law-enforcement officer were so temerarious as to resort to wire tapping to obtain evidence, it would seem from the opinion of the Privy Council in *Kuruma v. The Queen*[19] that the manner in which the evidence was obtained would be immaterial. Their Lordships acted on the view that, at common law, evidence illegally obtained was none the less admissible, and declared it to be the law that the test to be applied, both in civil and in criminal cases, in considering if evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained. Their Lordships specifically excepted non-voluntary confessions from their ruling. Presumably the rule recognized by the High Court of Australia in *R. v. Lee*[20] that a judge in a criminal trial has a discretion to exclude voluntary admissions if they were improperly obtained is not affected by *Kuruma's* case, but it is unlikely that it could be successfully invoked to exclude evidence obtained by telephonic eavesdropping, even though the eavesdropping constituted a criminal offence.

Mr Dash reveals that in the United States even where interception is commonly, and in their view, legitimately used by the police, they are reluctant to proffer the results at a trial. They prefer to use the information thus garnered as a 'lead', and to seek to establish guilt by evidence obtained by traditional and more acceptable methods. Mr Dash found, too, that even in states where telephone interception was forbidden by law, illegal practices, both by police and private enquiry agents, were widespread. Despite its penal prohibitory laws, 'California is perhaps one of the most active areas for wiretapping

[18] 'The Supreme Court, 1957 Term' (1958) 72 *Harvard Law Review* 77, 153.
[19] [1955] A.C. 197.
[20] (1950) 82 C.L.R. 133.

and bugging in the country'.[21] Private investigators openly advertise their ability to provide electronic surveillance and secret recordings.

For obvious reasons, the extent to which private individuals are equipped with the necessary apparatus is difficult to ascertain, but Mr Dash was able to get some idea of the variety of police equipment. It will suffice to give some description of the state of affairs in California, where it is worse, but only in extent, than in some other states. In the new police building in Los Angeles the seventh floor is given over to a scientific sound laboratory. There are sixty listening posts throughout the building. An operator in the laboratory can switch in on any listening post and record a conversation. 'Bugging', or recording conversations by a concealed device, is constantly employed in San Francisco, and presumably elsewhere in the state. Microphones are frequently used in jails and prisons (which are separate and different institutions in the United States), and in detention rooms in police stations. Police departments in that state also make extensive use of photographic equipment for eavesdropping purposes. According to Mr Dash, 'They meet the problem of how to observe without being seen by using high-powered telescopic lenses on still, motion-picture, and television cameras. The Los Angeles Police Department is one of the first police departments to use closed-circuit television in criminal investigations.'[22]

The extraordinary range of the equipment available both to law-enforcement agencies and private individuals was described by the California Senate Judiciary Committee in a report presented to the Legislature in 1957. The Committee observed:

> The electronic tools for monitoring private conversations are both subtle and, literally, far reaching. Their amoral physical capabilities suggest, without need for elaboration, the extent to which the power of surveillance is outstripping the walls of personal privacy. Almost all of the facilities, of course, have a legitimate use, but their design makes clear their illegitimate potential, too.
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> The issues raised in this field for both public officials and public opinion can be accurately discerned only if the hard central facts of the problem—the tools themselves—are understood. A brief description of the principal equipment now commercially available in California can perhaps most readily help provide that.
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> For "bugging" purposes, there are available small, high-quality microphones that will pick up conversations and carry them directly to attached recorders, or broadcast the discussion to a receiving set and recorder located in the next room, next building, a vehicle out on the street, or any place else a block or two, or more, away.
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> Equipment with the "mike" attached to the recorder is exemplified by several commercial lines of pocket-size, push button, precision re-

[21] Dash, Knowlton and Schwartz, *op. cit.* 208.
[22] *Ibid.* 206.

corders that can make speech transcription for up to five hours on a single reel. A small hand mike, concealable pin mike, and wrist watch mike are offered with the recorder. Also available are a score of lesser accessories, including a telephone adapter and a shoulder holster to conceal the unit under a jacket. The pocket mike and recorder unit are available at a price of about $300 and without any restrictions through at least 20 supply houses in the Los Angeles area alone, thereby obviously placing the device within the reach of a large part of the community.

A variation of the same basic type of equipment is a unit that operates undetected in a closed, ordinary brief case which can be carried by a person to a conference or left in an office and later picked up. It can monitor a conversation up to 60 feet away and is "light to carry *** no wires or plugs *** lasting up to 350 operating hours *** vibration proof *** no tube warm-up delay *** fully automatic ***." It sells for $350 to $800, and can also be rented for about $50 a day. Select members of the bar and others are regularly invited to private showings of the brief case.

Even more mobile than the combined mike-recorder unit is the wireless microphone which broadcasts to receiver and recorder equipment that can be located hundreds of feet away. The mike is so sensitive that if placed in an average sized room, it can pick up whispering anywhere in the room. It weighs less than four ounces, is about the size of a regular package of cigarettes, and can operate on its own power for 20 continuous hours or more. It sells for about $200.

A variation of the wireless mike is a unit which can be attached to a car to pick up all that is said within the vehicle and also transmit when the car starts and stops and in what direction it is going.

Still another variation is a small, wafer-thin disk mike using complex printed electrical circuits. It can be placed on windows, wall pictures, door panels, or many other places. Still another invention is the carbon button microphone that can be placed in the mouthpiece of a telephone and, using power obtainable there, pick up conversation in a room even when the phone is on the hook.

Another most unusual type of equipment is the so-called shotgun microphone. Specially constructed of different length pipes, it can be aimed at a location up to several hundred yards away and listen in on even a hushed conversation. It can thus overhear conversations in such diverse places as a boat out on a lake, or a room in a house or skyscraper across the street provided the window of the room where the conversation occurs is left open. Still another use for it as described to the committee was "on the inside of a truck and have the endgate down, with a very light black gauze covering the appearance from the outside; it looks just like an empty truck". It should be noted, however, that unlike the other equipment mentioned here, expert opinion appears to differ on the effectiveness of the shotgun mike. But its actual use by recognized experts in California was not controverted.

Still another basic type of equipment, as listed in the catalogue of a firm regularly selling bugging equipment in California, is the "wall contact microphone, drift pin type, for listening and recording through walls, with stud locater, drill, saw and carrying case", all for just under $50. Another device for listening through walls is the detectograph, an instrument so sensitive that when placed next to an ordinary wall,

it can pick up sound waves originating in the next room and amplify them for the human ear or a recording machine.

There is also more orthodox equipment such as standard, extra-sensitive mikes that can be concealed in a lamp, chair, heating vent, specially bored small hole in a room, or other place in a room and connected to hair-thin wire leading elsewhere. As indicative of the refinements in this field, one of the Nation's better-known bugging experts has stated that his regular equipment included extra-fine wire, tacks, and tape in a number of different colors to blend readily into practically any room. He also carried tools for boring holes sufficiently small that they would "not be seen with the naked eye" and soldering so small it would appear as only a flyspeck. Other refinements in his tool bag even included a hand vacuum cleaner and dustbag to clean up after he had bored a hole through a wall.

For use in conjunction with all the various bugging equipment there is a great variety of accessories available. Especially important are the batteries which can be used if electric current is not readily obtainable. Batteries can be obtained in sizes from that of a safety match box and with a life of at least two days, to much larger units lasting hundreds of hours. Transmitting devices small enough to fit behind an ordinary wall socket and operate off the building's electric power instead of a battery are also available.

In order to lengthen the useful life of both batteries and the recording tape being used, there are attachments which automatically activate and stop the equipment by the sound of the human voice. Another attachment provides for starting another recording machine when the first runs out of tape. All this, of course, makes it unnecessary for anyone to keep an around-the-clock vigil with the equipment.

Still other devices are available to build up weaker sounds and suppress louder noises so as to screen out unwanted interferences or make a faint voice on one end of a long distance telephone call as audible as a strong, clear speaker on the other end of the line.

For the less mobile practice of wire tapping, standard units for tapping up to six telephone lines at one time are marketed. Devices for automatically starting, stopping, recording and noting the numbers dialed are also made. In the more complicated applications of wire tapping, as in the tapping of thousands of New York City telephones from a single room, discovered not long ago, the activity required a vast array of tools and skills. But whether simple or complex, an expertly installed wire tap fits into a telephone network without static or any easy means of detection except the physical connection to the telephone wire.

A simple device which permits listening in on a telephone discussion without anyone actually tapping the wire is the induction coil. It can be unobtrusively placed under a telephone or parallel to the wire so as to be able to monitor both ends of the conversation. It is cheap, easily used, and generally available.

If these devices are manufactured, it is because there are purchasers for them, and the ambit of private eavesdropping can never be known. However, Mr Dash did endeavour to find out the extent of some official activities. The array of law-enforcement agencies in any large

United States city is bewildering to a British observer, and they usually function independently of one another. For example, in New York the District Attorney has his investigators, but Mr Dash considers that the most active wire tappers are not in his office, but in the police department. Within the police department are the Central Investigation Bureau, and the plainclothes section. Each uses interception techniques. In 1949 the Central Investigation Bureau admitted having installed 181 to 185 wire taps a year. These figures cannot be checked, but Mr Dash presents a conservative calculation that indicates that the Central Investigation Bureau's interceptions would exceed 3,400 a year. Seemingly there is no way in which even an approximate guess can be made of the number of interceptions by the plainclothes section. And, in any event, statistics as to the number of wire taps are not very meaningful.

> They do not reveal the quality or purpose of the wiretap, or the length of time the wiretap stays on and the number of conversations overheard. They do not identify the people whose conversations are intercepted, whether they are incidental callers, friends or family unrelated to the criminal activity; or professional people, such as lawyers and doctors giving confidential advice.[23]

Mr Dash and his colleagues have confined themselves to a dispassionate presentation of the problem and its ramifications. The factual accounts reveal that the new techniques of eavesdropping give rise to many evils, among them being blackmail, and corruption of law-enforcement officers. In a disconcerting experiment, Dr Schwartz revealed how properly equipped experts may tamper with a recording so that a person may be 'proved' to have made an utterance which is the opposite of what in fact he said.

> In a carefully controlled experiment, Samuel Dash made a sample political speech on tape. A sound studio specializing in tape editing for one of the large broadcasting studios then took this tape and edited it in such a way as completely to reverse its meaning. Finally, a third recording was made, this time of Mr. Dash reading the new, distorted version of the speech. The three recordings were compared by ear and by oscilloscope to see whether or not the editing was detectable. By ear it was noticeable only in one place where the editor had been hurried in his work. The oscilloscope could not reveal even this much because of the rapidly changing patterns on the screen. It was decided that the only way to examine the waveforms for purposes of comparison was to record them on motion-picture film; accordingly, equipment was set up for doing this. Although it was expected that the build-up or decay of sounds would be altered by cutting, so skilful had been the editorial manipulation that nothing of the kind was observed. Even after hours of studying the films, no sure clue revealing an editing job could be found.[24]

[23] *Ibid.* 43-44.

[24] *Ibid.* 368.

This disturbing volume shows how far modern societies have moved along the road to the nightmarish society described by George Orwell in the novel *1984*. It establishes, too, the validity of the comments of the California Senate Committee in the preface to their 1957 report. They wrote:

> Within the ambit of responsibility of State Government, two basic fields—law enforcement and the individual citizen's right of privacy—are confronted with problems of far reaching import due to electronic developments capable of intercepting private communications. . . .
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> This report is submitted with the frank desire to alert the Legislature and public opinion more fully to technological advances that inescapably challenge the boundaries of both permissible state surveillance and individual privacy. They reach into the most intimate as well as important aspects of daily living. And they raise social, legal and ethical issues as fundamental as any in that long Anglo-American history of working out the proper relationship between the individual and his government, and between individual and individual. Accommodating the electronic age to that continuing process is a task that immediately confronts all of us.

From experience in the United States it is clear that the evils will not be corrected merely by putting laws on the statute book and leaving them unenforced. In Australia, the Telephonic Communications (Interception) Act 1960 has outlawed all wire tapping except when undertaken for acceptable technical purposes or in the interests of the national safety. A potent protection against abuse certainly resides in the fact that the telephone system is nationally owned and controlled by a department with a Minister answerable to Parliament as its head and staffed by a public service with honourable traditions. But what effective protection can the legal machinery of the States, legislative and judicial, devise to meet the challenge that is inherent in the ease with which privacy can be irresponsibly and improperly invaded by the individual use of electronic devices? Under the existing constitutional framework, the problem would seem to be one for the States, requiring uniform action. The work reviewed is a sober account of the legally chaotic and socially pernicious state of affairs in a great nation dedicated at once to the highest ideals of democracy and the development and exploitation of modern technology. Can Australia, proclaiming the same dedication, learn in time from the frightening story of American experience, and devise effective measures to preserve individual privacy from irresponsible intrusion?