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**PRIVACY  
Balancing the Needs of Researchers and the Individual's Right to  
Privacy Under the New Privacy Laws**

**Session Two: The interests and concerns of researchers, including  
ethical issues**

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**PRIVACY AND THE PAST**

In one sense the whole enterprise of historical scholarship is an invasion of privacy. Historians uncover and analyze the private lives of people of the past, both great and small; they reveal and criticize the private workings of government, business and administration; they explore the private recesses of creative, deranged and delinquent minds; they probe the most intimate secrets of relationships. Every biography is an invasion of privacy, and even if the subject has authorized every word, the others depicted in that biography generally have not.

The historical enterprise, however, derives its moral and ethical legitimacy from its pursuit of truthfulness. Bad history is careless, inaccurate, injudicious, untruthful; good history is the reverse. Fundamental to our intellectual and religious culture has been the value of truth seeking in the conduct of a good life and a good society. The quest for truthful knowledge has become one of the hallmarks of humanity and civilization. The unexamined life and the

unexamined world are not worthy of living and inhabiting. The pursuit of truth has been an intrinsic good as a proper object of the mind; and an extrinsic good in that truth seeking benefits other enterprises. Above all, truth seeking constitutes the basis: of democratic process and practice; of just government and administration; of trust and reciprocity; and thereby of civic virtue. The successful conduct of everyday life depends on our trusting the truthfulness of others: that others will tell the truth when we ask the time of day, or directions, or give evidence in law, or report actions. If people around you are mostly untruthful, then life becomes impossible. In many jurisdictions, the truth of a matter is an intrinsic defence against libel or defamation: that the public interest in truth takes precedence over the private wrong of damage to reputation.

When someone chooses to enter public life, either as an elected politician, a public official, in business or public institutions, they have a responsibility of accountability for public trust. Often they benefit personally from that new public self, and because of the trust they must earn, they cease to be private citizens and become public citizens. And with that, the need to earn trust means that they must relinquish at least the privacy that pertains to actions and motivations that may affect public interest.. In other words, if you are accountable, you must relinquish some privacy. Therefore the freedom of scholarly inquiry is fundamental to democracy. The weak can only protect themselves against the strong if there are means to interrogate their actions and motivations. A closed, secretive, private society is a tyrannical society. Freedom depends on openness and openness must compromise privacy.

It can be objected that it is mistaken to equate privacy with secrecy; but in many of the inquiries undertaken by scholars—when they ask the hard questions that need to be asked of all societies—privacy and secrecy can amount to the same thing in that their effects can be similar. Thus while public officials guarding private records claim they are serving the ultimate good of privacy, they are also impeding the proper investigation of matters of public concern. The medical records disposed of now, make it all the more unlikely that we will be able to evaluate bureaucratic revolutions like Casemix; placing adoption records out of bounds to even the most scrupulous researchers prevents careful evaluation of past policy and practice and forces the historical record to rely only on the testimony of the aggrieved and the partisan; student school records destroyed now prevent for ever effective student-focussed histories of school education and of childhood and adolescence. And so on.

Indeed since the eighteenth century the rise of government bureaucracy has made ordinary people legible in their own times and to posterity. If we look at the development of historical writing in the twentieth century, perhaps the most striking achievement has been in the use of complex archives, either collected by the state or the Church, to reveal the life and minds of the forgotten, the common people. Thankfully the Spanish Inquisition considered it necessary to record in great detail its investigations into the private lives of the people of Montailou in order to root out heresy. Thankfully, the bureaucrats of the Soviet Regime kept careful records of grain supplies and famine deaths in the Ukraine in the 1930s so that we can now investigate one of the biggest political crimes of the twentieth century. Thankfully the young colony of Queensland was sufficiently regulated on the frontier for the finding of Aboriginal corpses to

trigger an inquest so that Professor Mark Finnane and his team at Griffith University can settle the matter of murder and massacre of indigenous people. No one would want us to be without those studies; yet if we are not careful, we could close off our present time to the essential scholarly inquiry of the future.

Under current NSW privacy legislation, Professor Stephen Garton could no longer write the path-breaking study of madness and medicine that he produced for his PhD. If I were a NSW scholar, I could not have written *Sex and Suffering*, my history of women's health and the Royal Women's Hospital. Under current university ethical guidelines about oral history, I probably could not have produced *Struggletown* and *Journeyings*. Both those books were well within the law of libel and were carefully checked; but my research methodology would not have passed the narrow and science-based protocols now in place at the University of Melbourne. Of course, as a freelance scholar—which is what I was when I wrote *Struggletown*—I could do what I like provided my sources remained anonymous.

Nine years ago, my colleague Mark Peel made inquiries on our behalf of the NSW Department of Education as to whether we could obtain access to student records so that we could write a comparative history of secondary education in NSW, South Australia and Victoria from the 1920s to the 1970s. We wished to find out what actually happened to the students: their social class, their gender, their scholastic attainment over time and through quite different state systems. We were assured that we could have access—the work in Victoria had already largely been done for my book on the Melbourne middle-class, *Journeyings*. Confident of access, we applied to the Australian Research Council and were awarded one of their scarce large grants.

By the time we had our grant, however, everything had changed. The department had suddenly become worried about privacy. No assurances of ours that we would extract only statistical information and would submit our work pre-publication for examination for any breach of privacy, were sufficient. Moreover the department claimed ownership of any work we did, and reserved the right to use it for its own purposes—at the time, the defence of selective schooling which was making its return to NSW—irrespective of whether we approved of that deduction or not. After a wasteful delay, the ruling eventually was made that we could not see anything that contained a student's name.

South Australia played even more games; referred us to a Privacy Committee that had been disbanded, and finally said no. We now know that they were destroying all their student records: the single most important archive of teaching, learning and human development that the state possessed. These were records that tell of the history of childhood, of health and sickness, of schools and schooling, of immigration and the processes of adjustment, of gender, ethnicity and social class in the training of Australian citizens.

Paranoia and secrecy are the greatest enemies of history. In Victoria, the full history of the Kennett years may never be written because most of the truly important documents are deemed 'commercial in confidence' and will never come under the Public Record Act. The fact that one party to those confidential agreements are the people of Victoria, apparently does not entitle them to scrutinise those transactions made with their own taxes. This is taxation without representation. We may have a Freedom of Information Act, but most documents arrive with all their substantive contents blacked out because of 'confidentiality'. If Victoria is less paranoid about its school records than NSW

or South Australia, it may be because IQ testing was not practised systematically in Victorian schools. (It was assumed from the 1920s to the 1950s that fewer than 5 per cent of state school students had the capacity for professional and semi-professional training, and everyone else automatically went to technical school to learn how to stay working class. The middle class, of course, had its own system of schooling in the private sector.)

We must not be afraid of the past and what it can teach us; with strong Public Record Acts, well-managed archives and professional care, we can protect the privacy of the living while preserving their stories for all time. The burden of good behaviour, therefore, rests on the historian. Perhaps if as a condition of obtaining access to sensitive records all scholars signed a contract to respect the rights of private individuals, then those who disclosed identities or misused private archival material could be prosecuted under privacy or archive legislation. Not sued for damages because that tempts the greedy into litigation and disadvantages the poor, but prosecuted for criminal breaches of the act. Professional ethics are not likely to be sufficiently powerful; nor must we permit our bureaucrats the chance to hide behind privacy legislation. We must remain committed to truth seeking, to open government, to exploring our human condition. And for that we need the historical record in all its forms.

History cannot exist without historical records. We cannot simply make it up. Oral history has its time limits. Preserving historical buildings and streetscapes is heritage, but heritage is only a small part of history. History is not about witchhunts, but it is about asking the hard questions, about the search for the truth of matters, about the discovery of how the world became what it did, about life and its meaning.

Great, untouched archives enable us to people our histories with the real men, women and children of the past. Yes, we have infringed their privacy; but we have also restored them to posterity so that we can share their lives and learn their lessons. We have made their lives count for the future, not be lost and forever forgotten. They become in imagination part of us, and in doing that we extend our humanity, not diminish it; as the freedom of historical inquiry defends our right to liberty and free speech