

LIBRARY ASSOCIATION OF AUSTRALIA

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ACCESS TO INFORMATION

Hon Justice M D Kirby

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The Honourable Mr. Justice M.D. Kirby
Chairman of the Law Reform Commission

THE PRIVACY REFERENCE

During the 1975 general election the Prime Minister undertook that if returned to Government the Law Reform Commission would be asked to suggest laws for the protection of individual privacy. The Government's legislative programme, announced on 17 February 1976, included the commitment that "after consideration of the Commission's report, the Government would introduce appropriate legislation". A Reference in the widest possible terms was signed by the Commonwealth Attorney-General, Mr. Ellicott, on 9 April 1976.

The terms of reference are comprehensive. They include a requirement to scrutinize current statutes against proper principles of privacy protection. They also involve a comprehensive scrutiny of privacy protection in the Territories. The Commonwealth probably lacks constitutional power to enact comprehensive laws for the protection of privacy throughout Australia. Suggestions that there should be a national uniform approach to privacy protection have so far failed to persuade the States. The disparate protection of privacy involves special problems, including the accumulation of intrusive information in those parts of the country with the lowest legal barriers.

PUTTING IT IN CONTEXT

The Reference to the Law Reform Commission should not be seen in isolation. It is important for the Commission and the community to see the development of new laws for the protection of privacy against the backdrop of an international movement which gained momentum after the Second World War. This is the international movement for the expression of certain fundamental human rights and for the development of machinery to permit their adoption by domestic law.

The International Covenant on Civil and Political Rights, which has been signed by Australia but not yet ratified, provides in article 17 that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation". The Human Rights Bill 1973 repeated this provision and provided certain machinery for its enforcement at a federal level. The Bill has not been proceeded with but it has been announced recently that a Human Rights Commission will be established in 1977. The precise functions and organization of that Commission are not yet known. Given the provisions of the International Covenant it is plain that such a Commission would have a function in relation to the protection of privacy in the context of other rights.

Also relevant is the announced intention of the Government to introduce freedom of information legislation. Access to information held by Governments could involve access to highly personal and private matters unless protections for privacy are created. The need for such protections have been specifically recognized by statements of the Prime Minister and the Attorney-General.

You might well ask why is there so much fuss about protecting privacy? Put briefly, it is the growing conviction that intrusions into that segment of the individual's life which is "his own" have increased, are increasing and will continue to increase unless society through Parliament calls a halt. There is also the conviction that present legal redress is disparate and in some respect inadequate to do battle with the challenges to the ultimate right to be let alone in some aspects of human existence.

THE CHALLENGES

What are the challenges? I would identify two. The first is the passion for information. The second is the capacity of modern science to feed that passion.

The Information Explosion

The services demanded of Governments increase every year. The sheer requirement of efficiently organizing business and government in modern times plainly requires far greater information about all of us than was necessary in days gone by. The census form, the taxation return and the credit bureau file are the necessary consequences of living in a highly interdependent community. No doubt occasionally information is accumulated for information's

sake. This is not often the case, for reasons of sheer economics. But it is because the symptoms of "infomania" have been detected that we are now in the process of identifying and isolating the strain. There are, by common agreement, some areas of a man's life that are his business alone. The readiness of the law to protect this area will reflect a growing sophistication of the law in protecting intangibles.

Technological Developments

There are certain developments of science which the law does not yet fully take into account. I refer to the availability of increasingly sophisticated surveillance devices which enlarge the potential for intrusions by the media and others. Although these devices are not confined to the pages of detective stories, they present nothing like the potential threat to privacy that exists in the enormously expanded use in our society of computers. Computers have a potential for privacy intrusion because of the amount of material they can readily amass, the ease and speed with which such material can be retrieved and the facility with which it can be transferred, analysed and combined. Add to this the fact that so much of this accumulated information is unintelligible to all but the trained eye and you have a classic peril. It is that of a small group of experts, what I once described as a potential "priestly caste" who would command the control of information about many aspects of our lives. The dangers for the present boundaries of privacy are plain to see. Now, the remedy for this is clearly not going to be a revolution in which we smash the computers and ban absolutely bugging and other surveillance devices. But it would be equally dangerous for us to do nothing because although citizens may have a fair conception of that part of their lives which is no business of others, except perhaps their families, the law in Australia does not provide many tools for groping with intrusions.

CONFLICT OF VALUES

It must be recognized that the protection of privacy may involve inherent contradictions. We must look to Government to protect us from Government intrusions into privacy. We must contemplate litigation, with attendant publicity, to protect privacy. The protection of any value necessarily involves the restriction of liberty. Many intrusions of liberty are inherent in our liberal society. These include the liberty to enquire, to gain knowledge and to publish. Any attempt to give maximum protection to privacy would run the risk of diminishing open society. The limits of the law to deal sensitively with all of the important values at stake here must be clearly recognized by those who seek to change the present balance.

PRIVACY & LIBRARIES - ACCESS TO LIBRARY RECORDS

The Library Association of Australia in 1975 incorporated in its policy Statements on Freedom to Read a clause which reads as follows -

"A librarian must protect the essential confidential relationship which exists between a library user and the library".

There seem to be four main issues affecting libraries:-

- (1). How much information about library users is necessary for the library to accumulate? When joining a library some libraries require prospective borrowers to fill in detailed applications setting out not only name and address but age, occupation, particular interests, length of residence at a particular address and length of employment at a particular place.
- (2). Is it necessary for libraries to maintain historical circulation files? There seems some misgivings about these files being made available to researchers and other inquirers. It is clear that circulation records kept over a period of time can give a complete profile on the prolific reader.
- (3). What is the relationship between the librarian and the borrower? Should a confidential relationship be recognised as being equivalent to that between doctor and patient, solicitor and client? It is clear that librarians obtain much information relating to their borrowers. There have been instances where borrowing cards have been made available for purposes other than library concerns.
- (4). There is undoubtedly a good amount of information kept about library employees. How much of this is necessary and what regulations are implemented to guard its confidentiality? These records, like other employment records, contain information relating to assessments, tests and other subjective information.

The following cases illustrate some of the difficulties that have arisen in the United States:-

In 1970 United States Treasury agents sought access to circulation files in several libraries seeking information about borrowers of materials dealing with explosive devices. In this instance, the city Attorney declared that there were no private records in a public library, and, as a consequence, the circulation records were released to the Treasury Department.

Also in 1970 Internal Revenue agents inquired about readers at The Atlanta Public Library who had requested militant or subversive books or books relating to explosives. The library refused this request.

Following these two instances the American Library Association took action to ensure more stringent guidelines to protect the privacy of individuals using libraries. Guidelines developed in 1970 addressed the question of government access to specific library records in justifiable situations. The guidelines make it clear that fishing expeditions will be prohibited.

A recent case reflects the changed attitude to the records held by libraries. In Rockford, Illinois, police secured a court order in March 1975 to search the public library's circulation records for clues to a kidnapper. Several youths had been kidnapped and sprayed with paint in a ritualistic fashion. The Authorities proceeded to an examination of files of occult materials in an effort to identify likely suspects.

In another recent case a Texas Open Records Act was invoked by an editor of the Odessa American in an attempt to determine who had borrowed art objects and prints from the Ector County Library's Fine Art Collection. On July 10, 1975 the Texas Attorney-General ruled that while library circulation records and confidentiality for library patrons were not protected by current Texas laws, and while there had been no previous judicial decisions relating to this specific privacy issue, he noted his beliefs that if the courts were squarely faced with the issue, they would hold that the First Amendment makes confidential that information in library circulation records which would disclose the identity of library patrons in connection with the material they have obtained from the library. The Attorney also noted that "if by virtue of the First and Fourteenth Amendments a State has no business telling a man sitting alone in his own house, what books he may read or what films he may watch...then neither does the State have any business telling that man's neighbour what book or picture he has checked out of the public library to read or view in the privacy of his own home".

The Impact of Computers on Libraries

There has not been a great deal of publicity, until recently, about computerisation of library files. Partly for this reason there has

not been a great deal of interest in the privacy issues associated with computerisation in this area. However, because of the increasing reliance on information for decision-makers in all walks of life, libraries will need to plan carefully in systems design if they are to ensure that privacy of their borrowers and users is maintained.

With the installation of computers there may well develop a tendency to collect more information on individuals than when that information had been handled manually. It may also be more difficult to ensure confidentiality of a computerised system as there are more access points to be controlled. The introduction of computers is also usually accompanied by a tendency to share information within a network of users which has the effect that more people have access to the same files who perhaps do not share the same loyalties as those who put the information on the file in the first place.

There are many systems operating relating to bibliographic and acquisitions materials. There has been press publicity of this in the Australian system recently. In addition it seems that in America the desire to collect information by this means has extended to circulation files and borrowers' files. Circulation systems can be a means of social surveillance.

Is it really necessary for individuals to have to make a trade-off between personal privacy and access to library services? To avoid such a situation it seems necessary that some standards should be set regarding information practices with record-keeping. In America, some libraries have begun looking for ways to safeguard circulation and borrowers' records in computer situations. Some of these safeguards are:

- (1) Separate storage of the registration file which records the borrower's name, from the computerised file which records information about the library. This may be achieved by filing registration cards manually;
- (2) The erasure of all circulation records containing names from the file when an item is returned;
- (3) Charging of books by an identification number instead of by a borrower's name;
- (4) Minimising data requested from patrons. Extra questions, if asked, to be clearly indicated as optional.

DEFAMATION LAW

The Law Reform Commission has at present before it a Reference relating to the law of defamation and is considering a thorough overhaul of the law as it operates at present. It has recently issued a Discussion Paper entitled *Defamation - Options for Reform* in which its tentative proposals are canvassed.

A further problem faced by libraries which has been brought to the Commission's attention concerns the law of defamation. I am told that as a result of a recent case in Western Australia, some libraries interstate have been informed that if they continue to have on their shelves material which has been found by the courts to be defamatory, they could be held guilty of disseminating defamatory material and be liable to legal proceedings.

The problem here is that many libel actions are not widely reported in the newspapers and it is indeed probable that the case which has given rise to concern in Western Australia is unknown to most librarians in the Eastern States. Further, the publication which caused the action for defamation to be taken was actually written and published 15 years before the action was taken. The action came about as a result of a review in a West Australian Literary Journal.

In respect of the case under discussion, I should mention that some protection is afforded to libraries at common law by the defence of innocent dissemination, provided that it can be established that they did not know that the relevant document contained a libel, that they were not negligent in not knowing and that they neither knew nor ought to have known that it was of a character likely to contain libellous matter.

In my view, any new Australian law should put them in a position not less favourable than they enjoy under common law. It may be desirable to actually ameliorate the position of disseminators of information. They certainly ought not to be in a worse position than persons who might take advantage of the expanded defence of fair report proposed by the Commission in its paper. Disseminators would have difficulty in affording a right of reply which is an ingredient of the fair report defence. Therefore, there may be merit in providing a defence of innocent dissemination but subject to the power of the judge to make an order restraining further dissemination or even, in extreme cases, to recall or amend material previously distributed

or currently made available to the public.

CONCLUSION

The question of access to and dissemination of information and, in particular, the protection of a person's privacy involve resolution of tensions. The principal tension is between the desire of the individual for solitude, retreat, anonymity, an area of intimacy which is his own and the legitimate desire of society for information about its members. The need to strike a new balance arises from the inadequacy of present legal protections trying to cope with growing demands for information about each of us, serviced by scientific and technological developments that can satisfy those demands. The law is an instrument by which society educates its members, states its standards and in the end enforces its will. At the moment, society's voice is muted.