LIBRARY ASSOCIATION OF AUSTRALIA

19TH BIENNIAL CONFERENCE, HOBART, TASMANIA

SUNDAY, 28 AUGUST 1977, 7 PM

OPENING SPEECH : LIBRARIES IN SOCIETY

Hon Justice M D Kirby

August 1977

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

INTRODUCTION

I want to say at once how privileged I feel to be invited to officially open your Conference. You have taken a forward-looking theme "Libraries in Society". You have many professional concerns which will no doubt preoccupy you. Upon these I cannot and will not embark. You have many distinguished guests, including some who have come from the other side of the world. Theirs will be the professional contribution and I must not compete with it. Because you have avoided the comfortable pastures of professional introspection, and chosen instead to look outwards to society, I come before you as a Commonwealth Officer with responsibilities that throw us together and require close consultation in the reform and renewal of the law of our land. Your theme "Libraries in Society" is a theme which throws lawyers and especially law reformers into close contact with librarians.

The national Law Reform Commission, of which I am Chairman, was established in 1975. It comprises 11 Commissioner chosen from different parts of the country, with different professional backgrounds but all with a concern for the way in which the law can serve society and promote the social ideals of our democracy. I leave your deliberations tomorrow to

return to a meeting of the Commission at which one of our part-time Commissioners, Sir Zelman Cowen, will be taking part for the last time. He goes on to grace the office of Governor-General of Australia. In his term as a Federal Commissioner of law reform he has brought wisdom and a strong sense of social justice to our deliberations. Nearly a decade ago he alerted this country to the importance of protecting privacy of the individual in the modern age. Responding to his call the Government has asked the Law Reform Commission to suggest ways in which privacy can be protected in Australian society. This is the major reference before the Law Reform Commission. Associated with it is an allied exercise designed to reform the laws of defamation in this country. These two important tasks closely affect the circulation of information in Australia. They will require the striking of a proper balance between the publication of information and its restraint. The Commission has many other tasks, all of which will affect librarians as citizens. Our reports will pass through your hands and the public way in which we enliven debate in the Australian community will no doubt come to your attention from time to time. But the two tasks which the Law Reform Commission has on privacy protection and the reform of defamation laws require more than your occasional contemplation as concerned, educated participants in this community. These tasks require your assistance to the Commission. It is for this reason that I want to use the occasion of my address to put before you the issues before the Law Reform Commission as they touch you as librarians. To "reform" the law and to modernise and simplify it, as we must do, requires the participation of all in assisting Parliament to achieve new and improved ground rules for society. The old way of reform was to leave the matter to the experts, working behind closed doors in Whitehall, Washington or Canberra. The new way is to secure the active participation of the community in designing laws by which it will be governed.

When he opened the Australian Legal Convention last month, the Prime Minister embraced this new procedure. He referred to the efforts of the Australian Law Reform Commission

in actively seeking to engender public interest in the tasks assigned to it by the Government. He referred to the informed discussion of our proposals and said :

> "This process has amply shown that the Australian community will respond to an invitation to participate in the process of legal renewal".

My presence here tonight is an extension of the effort of the Law Reform Commission to encourage the intellectual debate in this country. The theme for this conference requires you to consider the social responsibility and financial accountability of libraries and their changing role in current society. This theme takes this conference a long way from Finley Peter Dunne's assertion about libraries in 1910. You will recall that he said :

> *Th' first thing to have in a libry is a shelf. Fr'm time to time this can be decorated with lithrachure. But th' shelf is th' main thing.*

I know that nobody here will agree with that assertion. Libraries are the treasure-house of information. Information is the fuel of modern society. Librarians have a critical key position in the future. I now want to share with you some of the concerns before the Law Reform Commission, in the hope that you can be encouraged, whilst looking at the social responsibility of librarians, to devote some of your attention to the need of librarians to participate in the renovation of the legal system as it affects them.

PRIVACY : IS A DEFINITION POSSIBLE?

It is probably true to say that privacy has become a fashionable concept in recent years. This does not mean that the problems which we characterise as privacy problems were not with us before that. But there seems to be a greater consciousness of the problems because of the modern technological developments which have accentuated those problems.

The Law Reform Commission has been presented with a formidable task to suggest protections for privacy. The task is made the more difficult by the elusiveness of the very nature of privacy. Many studies in numerous countries have approached

the problem of definition with less than concrete results. The Canadian Task Force on Computers and Privacy concluded that privacy is "undoubtedly one of the more confusing concepts of contemporary culture". The United Kingdom Justice Committee on Privacy found it impossible to discover a precise and logical formula that could either circumscribe the meaning of the word privacy or define it exhaustively. The Committee gave two reasons for this. The first given was that privacy is grounded in men's emotions which are highly personal and not necessarily or always rational. The second reason was that the scope of privacy is governed by the standards, fashions, and morals of each society. Accordingly, the notion varies in time and place. The Justice Committee preferred to leave the concept undefined and to seek to identify particular areas where people should be protected from the intrusions of others.

In its report to the United Kingdom Parliament, the Younger Committee on Privacy also concluded that no useful purpose would be served by seeking yet again to attempt to formulate a precise and comprehensive definition of privacy. Instead, it set about defining particular areas of injurious or annoying conduct which the law ought to prevent or for which it ought to provide redress. Special areas singled out included the press and broadcasting; credit rating agencies; banks; employment; students, teachers and educational institutions; the medical profession; private detectives; surveillance devices; computers; and breach of confidence. One could have added, as I will show, the unique problems for privacy involved in the use of libraries.

The New South Wales Privacy Committee Act 1975 also makes no attempt to define privacy. The basis for this approach, it is said, is to permit flexibility in determining the concept to be given to privacy suitable to a particular situation in a particular time. It may be argued that such an approach gives little guidance to those involved in privacy protection and that it simply turns the problem over to administrators or to courts. What should the Law Reform Commission do, faced with these depressing conclusions?

THE NATURE OF PRIVACY

To protect privacy by legal means, it is important to have some idea of the features and characteristics of privacy, so that we understand what we are trying to protect and why. Privacy has been variously described as a "right", a "need", a "claim", a "condition", a "fact", an "interest", a "value", or an "ability". Such a variety of language underlines the multiplicity of meanings of privacy. Privacy may be used descriptively or as a principle involving a particular standard.

The origin of privacy has been traced to three sources. Some suggest that privacy is a value finding its origin in natural law ie. in fundamental laws inherent in the nature of man. Others suggest that it is simply an animal phenomenon rooted in the "territorial imperative", ie. each man's desire to control some territory as his own. Still others have said that its content is entirely culture sanctioned.

Most consider privacy as but one of a number of values. Privacy must be balanced against other needs and demands. Thus, for example, in the debate on freedom of information, the value of privacy inevitably arose. In proposals it has now been recognised, that special provision must be made for the protection of privacy in concert with freedom of information. Sometimes the adjustment between privacy and other values will be straightforward. At other times the balancing of values may not be amenable to easy resolution and a clash may ensue.

When it comes to providing legal machinery to protect values, some points are clear. First, we cannot allow the scope of a person's privacy to depend entirely upon his personal judgment however keenly he feels about it. Second, it is not appropriate for the law to deal with trivial interferences in privacy. The limits of the law should be recognised. It is impossible for the law to provide redress for vague feelings of dissatisfaction about collection of data or for irrational fears about loss of privacy.

PRIVACY AND LIBRARIES

Some of you will ask what all of this has to do with libraries. In talking about privacy, the relationship of the librarian to society is not the first one to come to mind. The instinctive reaction is to think in terms of privacy of the home or the privacy of certain relationships such as doctor/patient, priest/confessor. However, a number of incidents have come to notice which indicate the relevancy to librarians of the Commission's privacy reference. It is about them that I want to speak to you tonight.

Last week I was in Washington for talks with the U.S. Privacy Study Commission. That Commission has just delivered a major report to the President and Congress urging many new protections for the privacy of United States citizens. The Embassy officer, knowing of the purpose of my visit, booked me into the Watergate Hotel. He is obviously a man with a sly humour and will go far in our foreign service. I was within inches of the spot where the famous Watergate breakin occurred. Any of you who know about this dramatic event will know what a vital lead was given to the investigators (who ultimately brought down the President of the United States) by the records of borrowings in the Library of Congress.

But the case raises in a clear focus the question of how far - even in matters of high crime - it is legitimate to permit law enforcers and other investigators to track down what people read in libraries. Should it be a case of "no holds barred" or should there be limits? That is the question which the law makers must face. It is a question before the Law Reform Commission. It is a question before this conference.

A totalitarian state typically seeks to control not only people's actions but also their thinking. One does not have to look to totalitarian states to find instances of attempts to discover the way people think. What better means is there of doing this than by trying to ascertain what people read. Let me cite an example or two.

In 1970 in the United States, Internal Revenue Agents enquired about readers at the Atlanta Public Library who had requested militant or subversive books or books relating to explosives. The library refused to comply with this request. Nevertheless, there are instances where court orders have been issued and so forced the library concerned to surrender its files for scrutiny. One such incident occurred fairly recently in Rockford, Illinois, where police secured a court order in March 1975 to search the public library circulation records for clues to a kidnapper. Several youths had been kidnapped and sprayed with paint in a ritualistic fashion. Authorities wanted to examine circulation files of occult material in an effort to identify likely suspects. Was this a legitimate avenue of investigation by a hard pressed criminal investigator or was it the first step towards ascertaining and thereby controlling what people read and how they think consequently.

The most recent policy statement to be drawn up by the American Library Association's Intellectual Freedom Committee is intended to help librarians to cope with situations such as these. This policy deals with confidentiality of library records to protect all library records (not only circulation files) from scrutiny by official agents of local, State and federal governments. The recommendation is that all responsible officers of libraries should refrain from making available confidential circulation records and other information which identifies the names of library users unless "a proper showing of good cause has been made in a court of competent jurisdiction".

In Australia, there is no documented evidence available that similar enquiries have been made as occurred in the United States. This does not mean that the kind of incidents to which I have referred have not taken place. For instance, it has been alleged in statements made to the Law Reform Commission that certain overseas governments have sought to find out about the activities of their students who are studying here. One means of finding out such information alleged is by investigating various institutional libraries and noting information from

observations. Another, potentially more informative means, is by trying to find out the requests made by these students for books on particular subjects and by analysing books out on loan to students. These things are difficult to prove but that does not mean they are not taking place. More to the point, American experience teaches us that it can happen. If it can, should the law remain silent concerning the librarian's higher duty to society?

The Australian Library Association is obviously aware of these problems. In May 1976 the Commission received a submission from the Executive Director pointing out the particular concern of the library profession to safeguard the files of personal data which each library maintains concerning its readers and their reading habits. In particular, the Executive Director noted that he knew of at least one approach to a library in Australia for such information by a Government Agency. In 1975 the Library Association of Australia incorporated a clause into its policy statement on freedom to read, which states that "a librarian must protect the essential confidential relationship which exists between the library-user and the library".

What can we conclude at this stage about this issue? Firstly, librarians must be aware of the threat to privacy in a vital respect - freedom of private thought and ideas - which is in part their professional responsibility. Secondly, means of protecting this right to privacy needs to be looked at thoroughly for present protections in Australia are puny. With the introduction of computerisation in libraries, and, in particular, the record area, it will be easier for people wishing to have access to library records to do so at times without even librarians being aware of it, unless we face up to the issue that a vital freedom may be at stake.

Several suggestions have been put forward to provide safeguards. These include the following :

1. All circulation records should be erased from the file when the article is returned. A record should be kept showing how many times the book circulated, to allow the recording of the necessary information indicating the number of times books have been borrowed so that writers may be reimbursed through the Public Lending Right.

2. Books should be charged by an identification number instead of a borrower's name.

3. Registration files should be kept separate from the computerised file, to prevent proliferation and transfer of information on reading habits.

4. A minimum of data should be requested from readers. Where extra questions are asked these should be clearly marked as optional.

5. Only by proper authority - such as a court order - should information on an individual's reading be supplied.

You may consider this an over-reaction to the problem of privacy invasion. But it was President Kennedy who taught us :

> "A man may die, nations may rise and fall, but an idea lives on. Ideas have endurance without death"

If we are to protect ideas from the chilling effect of surveillan we must be vigilant to provide the guardians of ideas - including libraries, with modern weapons for their defence. I have outlined to you some of the problems that touch your responsibilities to society. I invite you to consider them and to bring your views to the attention of the Law Reform Commission That is the whole point of dealing with this subject through the vehicle of the Commission.

COMPUTERISATION OF INFORMATION RETRIEVAL IN AUSTRALIA

Modern technological advances have accentuated the problems for privacy that have been with us for some time. It is obviously essential that the Law Reform Commission should look into the future in its attempt to devise privacy remedies. But

we must avoid a Luddite reaction to developments that can be of enormous help in the distribution of information and knowledge. We have recently seen in Australia the attempt to harness developments that have been made in computerisation of legal information retrieval. There is no doubt that Australia lags seriously behind overseas counterparts in adapting computer technology to the law and, let it be said, adapting the law and its methods to computing. We also lag behind other disciplines within Australia where technology has played a larger role. This may be partly due to the inevitable conservatism within the legal profession and the lack of necessary funds.

As you may know there are at present three pilot schemes involving Australian legal data bases. One is the result of the establishment by the Australian government in 1974 of a Committee on Computerisation of Legal Data. The task of that Committee was to enquire into the establishment of computerisatio of legal data in relation to the statute law of the Australian Parliament. It was also required to examine the feasibility of extending such a data base to include a general legal information retrieval system. The report envisaged that there would eventually be established not only a data base of statutory information, but also one involving case law and secondary sources. Access to this system would at first be limited, but it was envisaged that at a later date any other interested bodies would be given access when the system was established.

The present system which has been established in the Attorney-General's Department is called (no doubt named by a lawyer not a librarian) "STATUS 1". Its data base consists of a complete text of the consolidated Australian Acts until 1973. In the future, it will contain all the Statutes and all Territory Ordinances and all statutory instruments. Once all these items have been added to the data base, it will be relatively simple to amend Acts textually and to retrieve parts or even words of statutes relevant to specific requests.

Another experiment in computerisation is the Trade

Practices Computerised Retrieval Project being jointly financed by the N.S.W. Law Foundation and I.B.M. Australia Limited. The object of this project is to create a system, based on existing technology, which would include non-legal as well as legal data and which could be used by a layman or non-expert in the Trade Practices field. This system is intended to combine the best features of the full text and index systems employed overseas. It is now operating in Sydney but is going through an evaluative stage.

The systems I have described are Australia's first major steps into the use of computers in legal information retrieval. Obviously, there is a long way to go before we will really discover the benefits. But once operational, the benefits will be great not only for the legal profession and its clients, but also for legal institutions like the Law Reform Commission which depend on research. It would speed up enormously the time and effort which is being put into finding the present law, the gaps and overlaps, analysing results, and comparing the file with what has happened or what is happening in different jurisdictions. There is no doubt that the future will require librarians to master the opportunities and methods of computerised information. Are you ready for this resolution?

Computers provide benefits but also pose problems. It is the task of the Commission to strike a balance between the efficiency of a system and the integrity of the individual. An iconoclastic approach would not suffice. But neither will the attitude of indifference and indolence in the face of real perils to the privacy of individuals.

DEFAMATION REFORM

The second reference to the Law Reform Commission which is of importance to libraries and the society they serve is the Commission's reference on defamation reform. There is no doubt that this area of the law is in great need of re-examination. The public at present sees the law here, rightly as bewildering or regards it as an opportunity for those who

have the financial backing and the necessary knowledge to attempt to acquire a fairly large sum of money, in a kind of litigious lottery.

The present laws of defamation have serious implications for librarians and libraries. At present every republisher of a libel is as responsible for that publication as is the original publisher. This rule is one of special significance to disseminators of information such as distributors and libraries. Out of tender regard for those secondary publishers, the law has devised a defence, invariably called "innocent dissemination". According to this defence a library or other disseminator will not be held liable for publishing defamatory material if it can establish that it did not know that the relevant document contained a libel, that it was not negligent in not knowing and that it neither knew of or ought to have known that it was of a character likely to contain libelous matter. This rule has been described as a rule of expediency founded upon the absurdity of expecting distributors and others to read all the material they distribute. Even a librarian's worst enemy would not wish that fate upon you.

It has been said that the rule does not afford a library sufficient protection. This is a question now under our consideration. A person may complain to the library that a particular publication contains matter defamatory of him prior to initiation of proceedings against the original defamer. If the library does not immediately remove the allegedly defamatory article, it will be fixed with notice of the defamatory matter and will be unable subsequently to rely on the defence. The current proposals of the Law Reform Commission alleviate the position of libraries to some extent. The proposed provision would accord a defence to libraries where a library was not aware that the matter was defamatory or was claimed by the plaintiff to be defamatory. A recent case which dealt with a libelous poem in a book of poetry which would have been availabl in libraries places the responsibility on the library to remove that book or obliterate the poem in question as soon as the librarian is made aware of the litigation. Should this be so?

Does posterity have the right to know accurately even of the contents of a libelous publication?

Some have said that the Commission's proposals should go further to protect libraries. Others have suggested that the Commission should develop an exemption for "creative writing". The Commission is sympathetic to these views. However, everyone knows what the *problems* are. The difficulty is to find *solutions*. A balance will need to be struck between competing interests. The Commission seeks guidance from all members of society about the balance to be struck and the kinds of defamation laws under which we want to live. All of the references given to the Commission are socially relevant. They are not "lawyers law" questions fit only for the initiated or select few. I have taken the opportunity of this address to identify, in a general way, two references of vital concern to librarians. The national Law Reform Commission is a new body : but an active and energetic one looking to all those involved with libraries to put forward proposals to deal with some of the problems to which I have referred. We afford you an opportunity to participate constructively in the process of legal renewal. This process will have a bearing not only on society as we know it at present, but also on the shape of our future society. A conference such as this, which seeks to assess the responsibility and accountability of libraries and librarians in society must consider where we in Australia should strike the balance between the importance we attach to the free flow of information and ideas and the integrity, privacy, anonymity and honour of the individual.

I invite you as librarians and as concerned citizens to contribute your ideas to the deliberations of the Law Reform Commission. As Australian society develops its intellectual horizons, new responsibilities will be cast upon you - including responsibilities to play a more active part in promoting the renovation of the laws by which we are governed.

With these words and without more ado, it is my privilege and pleasure to declare this conference open - and to wish its debates success and fruitfulness.