BOOKSELLERS' ASSOCIATION OF NEW ZEALAND

61ST ANNUAL CONFERENCE

FENTON CENTRE, ROTORUA, NEW ZEALAND

MONDAY, 26 APRIL 1982

BOOKS, BOOKSELLING AND THE LAW

The Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission
President of the National Book Council of Australia

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OF NEW ZEALAND AND THE FEDERATION

I am honoured to be invited by the Booksellers' Association of New Zealand to take part in the program of this 61st Annual Conference. I bring with me the greetings of the Governing Council of the National Book Council of Australia. Indeed, I am sure that booksellers and all those associated with the world of the book in Australia would want me to extend to you congratulations on the organisation of this conference in this wonderful and exciting city. I am always glad to come to New Zealand. I spent last Anzac Day in Dunedin. This Anzac Day, I spent en route to this conference.

It is perilous in the extreme to accept an obligation to speak on the subject assigned to me, 'Bookselling and Law'. I say it is dangerous because any attempt by a foreigner to master, with instant wisdom, the legislation of another country, is a course fraught with impossible difficulty. Even if I were to confine my remarks to the legislation of Australia, I would face problems which a New Zealand bookseller could not even begin to imagine. We are 'blessed', if that is the correct word, with the Federal system of government in Australia. Because the laws on books, bookselling and information generally were not assigned at the Federation in 1901 to the Australian Federal Parliament, the regulation of the industry remains very much in the hands of the individual States. It is State law and State legislation which covers most of the areas of regulation that concern the book industry : laws on shop opening and closing, laws on defamation, the criminal law, laws on sedition and blasphemy in books, most laws on consumer protection and most laws on obscenity are State concerns in Australia. Were I, therefore, to set about the task of

outlining to you the permutations and combinations of Australian legislation as it affects books and booksellers, you would be mentally and physically exhausted in less than half an hour and probably completely confused. Now, I know that it is often said that a good lawyer will set about softening up his audience — whether it be judge, jury or convention centre — by throwing dust in the eyes and then presenting a miraculous and fine-sounding conclusion. I propose to resist this temptation and to stick to just a few subjects with which I am most familiar. This may render my talk of less immediate concern to New Zealand booksellers. However, I hope that what I have to say will be of use and interest to you, for I have come a long way to say it.

Before departing from the Federal question I should say something else. It is not generally known that the Australian Constitution contemplated the admission of New Zealand to an Australasian Federation. The second item of the Preamble is in the following terms:

> and whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen

The sixth paragraph of the preamble defines 'the States' to mean

> such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia, including the Northern Territory of South Australia as for the time being are parts of the Commonwealth or such colonies or territories as may be admitted into or established by the Commonwealth as States ...

As we all know, New Zealand took a different course and founded its own Dominion with its own separate international personality. So far as I know your Constitution makes no claim to Australia. Federation is not all bad news, either for citizens generally or for books, literature and information in particular. In fact, a past Chief Justice of South Australia has said in the context of laws on obscenity that 'diversity is the protectress of freedom'. The diversity of the Australian Federation is undoubtedly very inconvenient at times, particularly in the matter of the law. It is sometimes confusing and leads to uncertainties. But on the other hand, the very diversity itself can also sometimes give rise to legal experimentation and to progress and liberalisation in the law in one part of the country which might never be ventured, if it had to occur, in the country as a whole. Although in my youth I looked across the Tasman to the simple, unitary, unicameral system of New Zealand with envy, as old age approaches, I am not so sure. All of the forces of technology and many of the forces of bureaucracy and politics today seem to be designed at collecting power in the centre. That is not necessarily a good thing for

individual liberties. It is not necessarily a good thing for the law as it affects literature, books and bookselling. Federation is a kind of planned legal inefficiency. In the world of computers linked by telecommunications, of growing administrative power and growing transnational business corporations, the dispersal of power in the Federal system of government may have some things going for it. It has been said that the founding fathers of the American Constitution, who conceived and implemented the Federal idea, were the most distinguished minds to come together since the times of Ancient Greece. It should be remembered that overwhelmingly they were Englishman in the American colonies imbued with English ideas of liberal democracy. Whether they got it right or wrong with a Federal system of government, the system does have its advantages. I believe this is something that should be said from time to time to sceptical audiences in New Zealand.

Putting aside entirely political, legal or formal constitutional ties, I would echo the editorial comment of the Australian newspaper on 15 April 1982 when it said, under the banner 'The old ANZAC spirit needs the kiss of life':

> For two countries founded by settlers of similar origin and both isolated from the rest of the world in the South Pacific region, Australia and New Zealand live strangely separate lives. They seem a little like a brother and sister who grew up together in the same house, but now communicate only occasionally and send each other Christmas cards.
>
> Of late the two countries appear to have drifted even farther apart. Rugby tours apart, very little news about New Zealand appears in the Australian press, despite the arrival of more than 100,000 migrants from across the Tasman in recent years. Tourism has sagged, and the drop in the popularity of New Zealand as a holiday destination for Australians is of serious concern in Wellington.
>
> ...
>
> What is needed is not a few minor concessions to improved trade, but a great leap forward.
>
> ...
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> As some are slowly coming to realise, resources of food will assume as great an importance in the 1990s as energy in the 1970s. Canberra and Wellington will serve the interests of the peoples of both countries by moving much closer together.

LAWYERS AS WRITERS

Let me now say something briefly about the link between the law and the world of books. The two disciplines have long been associated. 'Words', declared Lord Birkett, 'are the raw material of the legal profession, and the assiduous study of words and the proper use of words has always been part of the lawyer's most desirable accomplishments.[1]

Many judges write tediously in the law books, contenting themselves with a dreary succession of quotations concluded by an assertion that this or that result follows 'as an inevitable conclusion'.[2] This style, Mr. Justice Cardozo of the US Supreme Court, described as 'the tonsorial or agglutinative':

> The writer having delivered himself of this expression of a perfect faith, commits the product of his hand to the files of the court and the judgment of the ages with all the pride of authorship. I am happy to be able to report that this type is slowly but essentially disappearing.[3]

Many judges of our tongue have been not only great masters of the law but contributors to the treasury of literature. When John Somers 'broke the rod of the oppressor' in defence of the Seven Bishops, he enriched the annals of law and at the same time made a lasting contribution to literature. The greatest book of biography in our language, Boswell's Life of Johnson, was written by a lawyer. The Inns of Court of London were not only nurseries of the law. Bacon and Lamb, Thackery and Dickens, more recently Mortimer of Rumpole fame, and many more sharpened their talents in the rigorous study of legal precepts.

Cardozo most admired the style he called 'magisterial' : the voice of the law speaking by its ministers with calmness and assurance born of a sense of mastery and power. In America, John Marshall; in England, Lord Mansfield; in Australia, Sir Owen Dixon; in New Zealand, Sir Richard Wild.

This style is a little out of fashion on the Bench today. It remains the man in the street's stereotype of judicial literature. When the slave Somerset, captured on the coast of Africa and sold into bondage in Virginia, was brought to England by his master, the case came before Lord Mansfield on the return of a writ of habeas corpus. Lord Mansfield intoned:

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserved its force long after the reasons, occasions, and time itself from whence it was created are erased from memory. It is so odious that nothing can be suffered to

> support it, but positive law. ... [V]illianage has ceased in England and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. ... Let the negro be discharged.[5]

'Let the slave go free'. This conclusion and this case illustraste the link of law and literature. I, least of all, come here to assert that the law is perfect, that is has no 'slaves', that it does no wrong or that it is in need of no reform. Of course the law (like literature in the books) must be constantly scrutinised and submitted to fresh examination by each succeeding generation. The 'slaves' of today : the underprivileged, the timid, the ignorant, those who do not command our language, our culture or our ways, must be given special protections and assistance if true justice is to be achieved under the law.

But the case of Somerset, the slave, does illustrate on a grand scale the daily dramas which are played out in every local court. Disputes civil and criminal, human passions and tragedies, are paraded in a public place and determined, generally in a reasoned way, by the vehicle of words.

This combination of human predicament, verbal machinery and (not infrequently) competing ideas and high ideals is inevitably a theatre in which the lawyer even of the most modest talent, and the judge, play out their parts. Sleepless nights are spent by the advocate wrestling with the way a matter should be put, a personality projected, a question asked. The script constantly changes and all too often the author loses control of the direction taken by his plot. The fact remains that lawyers and bookmen and bookwomen work a similar craft. Their tools are words and ideas. This is one of the reasons I always feel at home amongst people who are involved in books.

TWO MUTUAL CRITICS

This is not to say that the relationship, though close, is always a warm and congenial one. Lawyers have become used to being the 'butt end' of the jests of writers. Shakespeare put in the mouth of one character a solution that has occurred to more than one revolutionary since : 'First, let's kill all the lawyers'.[6] Dickens, from the inside as it were, lampooned the tardy procedures of the courts and made a real contribution to the social movement for reform of court procedures in the 19th century. Lewis Carroll in Alice's Adventures in Wonderland struck a regular theme:

'In my youth' said his father, 'I took to the law;
And argued each case with my wife;
And the muscular strength which it gave to my jaw
Has lasted the rest of my life'.

More lately W.H. Auden in Law Like Love had this to say about people like me:

'Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law'.

Occasionally we judges can get our own back. George Bernard Shaw, a great bookman, wrote a will which was a long and complicated document, fatally composed by the combined hands of a legal draftsman and a vigorous critic of the law. He sought to set up a trust for a new alphabet but the trust failed on the ground that it was not 'charitable' and that its terms were uncertain.

Shaw anticipated the waywardness of the law. In clause 40 of the will he made alternative provisions for his estate should 'such trusts fail through judicial decision'. In the Court of Appeal, Lord Justice Harman, himself an Irishman, had (as judges are prone to do) the last word. His celebrated judgment opens thus:

> All his long life Bernard Shaw was an indefatigable reformer. He was already well known when the present century dawned, as a novelist, critic, pamphleteer, playwright and during the ensuing half century he continued to act as a kind of itching powder to the British public [and] to the English-speaking peoples. ... Castigating their follies, their foibles and their fallacies, and bombarding them with a combination of paradox and wit that earned him in the course of the years the status of an oracle. ... It was natural that he should be interested in English orthography and pronunciation. They are obvious targets for the reformer. It is as difficult for the native to defend the one as it is for the foreigner to compass the other. ...[7]

After striking down the trusts, the judge could not spare himself a reference to the artist's jibe in his alternative gift:

> The ... alphabet trusts ... must fail. It seems that their begotter suspected as much, hence his jibe about failure by judicial decision. I answer that it is not the fault of the law, but of the testator, who failed almost for the first time in his life to grasp the legal problem or to make up his mind what he wanted.[8]

But though we often have the last word, I will be letting out no judicial secrets if I confess that more judges than one feel frustrated that their pearls are too often locked away in legal books or that their training in the strict syllogistic mode limits the flights of fancy to which their pen can take them. A frank admission of this frustration is found in the judgment of Mr. Justice Holmes in describing a case of gross injustice which later led to the removal from the Bench of a New South Wales magistrate:

> The picture is one which shows how the poor, sick and friendless are still oppressed by the machinery of justice in ways which need a Fielding or a Dickens to describe the words and a Hogarth to portray pictorially. What happened that day ... to the applicant was only the beginning of the terrors which were to confront him before the proceedings before this stipendiary magistrate were completed.[9]

Words, ideas, emotions, people. These are our ultimate common concerns in the world of books and the world of law.

REFORMING THE LAW

One of the reasons for a tension in the relationship between lawyers and the writers and distributors of books is the legal minefield of dangers and traps through which book writers and booksellers must tread, whether in Australia or New Zealand. I leave aside the laws on obscenity, the criminal law generally, the law of contract and the law of contempt of court. I want to say something about the project that brought the Australian Law Reform Commission into contact with the legal problems of authors and booksellers. I refer to the law of defamation.

The Australian Law Reform Commission received a reference from the Federal Government in Australia aimed at modernising and simplifying, and above all unifying, Australia's eight different defamation laws. In Australia, every author must tread cautiously, and booksellers too, for fear of offending not only the defamation laws of his own State or the State of publication, but also the publication laws of any State into which the book is distributed. Effectively, in Australia, this means a search for the lowest common denominator of permissible publication. The lack of uniform laws on defamation is a serious blight upon free speech and free publication in Australia. This

is one area where Federal diversity has not protected freedom but has encouraged uncertainty and sometimes bizarre and unexpected results. Neither in New Zealand nor in Australia is there a constitutional guarantee of free speech and a free press, as there is in the First Amendment to the American Constitution. These are merely traditions in Australia and New Zealand. They can be undone if they do not have their stalwart defenders.

After two years of the most thorough consultations in all parts of Australia, and indeed beyond, the Australian Law Reform Commission delivered its report on Unfair Publication.[10] The report was commended to the Standing Committee of Attorneys-General by the Australian Federal Cabinet. That Standing Committee includes participation by the Attorneys-General of New Zealand and Papua New Guinea. Lately the Attorney-General for Fiji has also been attending. At meetings over the past year, as far apart as Perth, Western Australia and Queenstown, New Zealand, the Ministers have been examining the draft Bill which was attached to the Law Reform Commission's report. Progress is being made. There is announced agreement, at least amongst the Australian Attorneys-General, concerning the new uniform defamation law. The proposal by the Australian Law Reform Commission had the benefit of considering the report of the New Zealand Committee on Defamation. Amongst novel suggestions in the report for the planned Australia-wide Defamation Act were:

- implementation of a single code;
- new procedures to give defamation actions more speedy hearings;
- introduction of new remedies in the place of the virtually total reliance on money damages, including remedies by way of rights of correction and rights of reply;
- new protections for individual privacy as a substitute for the vague provision in the laws of some Australian States requiring a defendant to prove that a publication complained of was not only true but also published for the public benefit;
- clarification and simplification of the law so that it could be set out for all concerned : authors, booksellers, librarians and others so they could readily find the law without having to resort to inaccessible legal texts or extremely expensive legal advice.

UNFAIR PUBLICATION AND LITERATURE

In the course of preparing the report, the Australian Law Reform Commission received a number of submissions urging that there should be a general defence to defamation and privacy actions if it could be established that the relevant publication was contained in a work of literary, artistic, historical, scientific or educational merit. Inevitably, the creative writer draws upon material from his own experience. This is scarcely surprising. Somerset Maugham in his preface to his book Cakes and Ale described it thus:

> When the book appeared, I was attacked in various quarters because I was supposed in the character of Herbert Driffield to have drawn a portrait of Thomas Hardy. This was not my intention. ... I am told that two or three writers thought themselves aimed at in the character of Alroy Keir. They were under a misapprehension. This character was a composite portrait : I took the appearance from one writer, the obsession with good society from another, the heartiness from a third, the pride in athletic prowess from a fourth, and a good deal from myself. For I have a grim capacity for seeing my own absurdity and I find in myself much to excite my ridicule. I am inclined to think that this is why I set people ... in a less flattering light than many authors who have not this unfortunate idiosyncrasy. For all the characters that we create are but copies of ourselves. It may be of course also that they really are nobler, more disinterested, virtuous and spiritual than I. It is very natural that being godlike they should create men in their own image.

Esquire magazine described Arthur Miller for writing his book After the Fall following the death of Marily Monroe, his former wife, as 'blabbermouth of the year'. But submissions to the Law Reform Commission during our inquiry asserted that the fine line between malice and creative imagination, fact and fiction should not be disciplined by the law of defamation.

Creative writers have always had to contend with the rigours of defamation law. Yet, so far as we were informed, only two Australian cases, both rather special, actually came to proceedings before a court. One was the criminal prosecution of Frank Hardy, the author of the book Power Without Glory. The issue tendered in that case was identification; whether John West in the novel was the real-life Melbourne millionaire John Wren. The jury acquitted Hardy. The other case was an action brought in respect of a poem which was published in a book of poems. It referred to a family identifying the chief protagonist as 'my ex husband's wife'. The daughter of the family was described as 'autistic'. The poem referred, in disparaging terms, to each member of the family and his or her personal habits. The writer's 'ex husband' had, in fact, remarried and had a mentally retarded (though not autistic) daughter. The case was settled. The moral may be that it is not unreasonable to expect creative writers to make some attempt at disguise.

One of the problems presently standing in the way of a plaintiff suing an author is that he must show that the book about which he complains actually refers to him. Because, like Somerset Maugham, authors are generally careful to blend the characteristics of a number of people (or do so subconsciously) it is usually quite difficult to say that this or that character represents a particular person.

There is also the problem of the innocent victim. A novelist or playwright could, in entire good faith, create a character with a particular name and occupation who is a vicious bank robber. Should this work gain general currency, it would be rather hard to deny an actual person of that name who shared certain characteristics with his fictitious namesake, an opportunity of establishing that he was not the basis of the portrayal. Accidental defamation should clearly be cheaply and quickly disposed of. The Law Reform Commission emphasised from the beginning of its project that the road to defamation law reform lay chiefly in the reform of defamation procedures.

BOOKSELLERS AND DEFAMATION

One development in Australian defamation actions which needs to be watched in New Zealand is the growing tendency of plaintiffs to issue proceedings not only against authors but also against booksellers, news dealers, libraries and like distibutors. In part, this tactic has developed out of an attempt to frighten off such distributors and to misuse the procedures of the courts to intimidate distributors. By the common law of England, which applies in New Zealand and Australia, a person who republishes a libel is equally liable for it to the person damaged. In New Zealand, the position is modified slightly in the case of multiple publication of the same defamation by the provisions of ss.9 and 10 of the Defamation Act 1954. There is a defence of 'innocent dissemination'. However, there is a defence of 'innocent dissemination'. To take advantage of this defence, the defendant must show that he did not in fact know that the publication contained defamatory material, that he had no reason to believe that it was likely to contain such material and that his lack of knowledge was not due to any negligence on his part.[11] The inadequacies of this defence were forcefully put to the Australian Law Reform Commission by representatives of booksellers, distributors and libraries in Australia. They submitted that the rule imposed a too onerous burden on innocent disseminators in at least two ways:

- First, it required the distributor to prove that he was not negligent in not noticing the defamatory material in the book or journal he was selling or distributing. It was put to us that it was unreasonable to expect a bookseller or library to read all of the publications passing through its hands and to inquire whether the facts were true or the comments fair. Yet some of the law cases suggest that this must be done in order to negative negligence. Where a particular publication or type of publication has developed, a reputation of being contentious, controversial and often defamatory, the defendant would have to prove that a check was specifically made, virtually of every page, in order to demonstrate that he was not negligent.[12]

. Secondly, the rule was said to be unfair because it puts a disseminator, such as a bookseller, on notice of the likelihood of the existence of defamatory matter as soon as the person claims that he is handling a book or journal defamatory of him. The bookseller or librarian must immediately make an instant judgment whether to cease to handle the book or journal. In practice, most booksellers, libraries, news vendors and so on are not well equipped to make such a judgment quickly and soundly. In practice, it is simply not worth their while to take the risk of retaining the document. In many cases it would just not be worthwhile seeking legal advice. The effect is to stifle freedom of expression by imposing a virtual censorship without any intervention of a court. During the Australian Law Reform Commission's inquiry, this kind of censorship by the threat of a writ against a bookseller occurred on a number of occasions. It is a source of concern in Australia. It may be a concern in New Zealand, although the report of the Committee on Defamation recorded that it could find 'no New Zealand case where a bookseller has been held liable for defamatory statements made in a published book'. Only one case was discovered 'where a distributor of any form of printed matter had been independently and successfully sued for distributing a libel'. The availability of provisions for indemnity or contribution from other parties to the publication was thought sufficient to obviate the necessity of changing the law of innocent dissemination as it affects distributors.

However, the kind of problem that can arise was illustrated by two of the cases quoted in the report of the Australian Law Reform Commission. The first case involved the book of poetry I have mentioned. It was on the shelves of many Australian libraries. It was not the sort of work in which one would expect to find defamatory material. But, as I have said, a claim was made that a particular poem was defamatory. Letters were sent to various libraries and booksellers throughout Australia threatening them with action if they continued to 'publish' the book, by making it available to purchasers or borrowers. The libraries and vendors could hardly form a judgment on the question whether the book was defamatory; in any case it was not sufficiently important to run a risk. In practice, as the Law Reform Commission was informed, they withdrew the book. The second case involved a political biography. The subject sued the author, the publisher, the wholesale distributor and the retailer from whom his solicitor purchased the copy needed for evidence. Allegations were made that certain sections of the book were defamatory. All defendants, including the retailer, were on notice. The retailer was advised by his solicitor that he would not thereafter be able to rely upon the defence of innocent dissemination. He would have to depend upon such defences as truth and fair comment. The retailer lacked the

knowledge to make a judgment on those matters. In any case the total profits from likely sales would not approach the legal costs of an action. He withdrew the book from sale.[13]

Having considered the present law and the criticisms which libraries and booksellers had ventured of the law, the Australian Law Reform Commission recommended reform. It concluded that any rule must attempt to protect the interests of two parties who may be presumed to be innocent. In the first place, there are the distributors : the librarians and booksellers who cannot be expected to know the existence of defamatory material and who cannot reasonably be expected to take the time and trouble to resist a claim. In the second place, there are the persons who are interested in containing the spread of a hurtful libelous publication concerning themselves, including in books and journals distributed by booksellers, libraries and so on.

Subject to one qualification, the Law Reform Commission proposed that specified disseminators should be granted protection for publishing defamatory material solely in their capacity as disseminators. However, the Commission also suggested that the person who claims to be defamed should be given the right to obtain an injunction restraining republication by any person (including a protected disseminator such as a bookseller) if he could satisfy a judge that the material was defamatory and otherwise indefensible. In this way, the Commission sought to satisfy the two interests identified. It suggested that if the proposal were accepted, it would enable any of the disseminators to print, sell or lend the allegedly defamatory material with impunity unless and until a judge, after considering the relevant facts of the particular case, granted an injunction.

In discussing the definition of the group of disseminators who should have the benefit of this special protection, the Commission concluded that few would oppose the inclusion of libraries, news vendors and book retailers. The case of wholesalers of printed material, such as books, was considered more arguable. It was pointed out that they handled a greater volume of a publication than do libraries or small booksellers. Consequently they would have a greater financial stake in the distribution of the alleged defamatory material. On the other hand, wholesalers will often have little opportunity, in practice, to check material in advance. Frequently they simply take books and journals from printers and other reproducers and immediately distribute them to retailers, virtually as a conduit. Changing trading conditions were noted to be breaking down the traditional distinctions between wholesalers and retailers, including of books. It was thought that difficulties could arise from introducing a legal distinction between the position of the two. In the result the Commission concluded that wholesalers should also be removed from the damages remedy but, like other distributors, be subject to the specific injunctive relief proposed.

The draft clause of the proposed uniform reformed Defamation Act relevant to booksellers, suggested by the Australian Law Reform Commission, is as follows:

> 17(1) It is a defence to a defamation action that the defamatory matter was published by the defendant solely in the capacity of, or as a servant or agent of, a processor, a person conducting a library, a newsagent, a news vendor, a wholesaler or a retailer.

The defence is excluded where the disseminator was concerned in the content of the defamatory matter or imported it. The reason for excluding imported material is that a damages remedy against the local distributor may, in practical terms, be the only remedy available to a person defamed. Fairness to the plaintiff dictated, in the view of the Law Reform Commission, a qualification of the general rule relating to protected dissemination, excluding its application to any person who has imported books or other material from abroad.

Progress towards the acceptance of the Australian Law Reform Commission's proposals on defamation law reform seems steady. The meeting of the Attorneys-General at Queenstown on 15 February 1982 was under the chairmanship of the New Zealand Minister for Justice, Mr. J. McLay. Commenting on the decisions made at Queenstown, the Attorney-General of Australia, Senator Peter Durack QC, said that the Attorneys-General had 'substantially advanced progress towards uniform defamation law in Australia'. He said that they had 'now agreed on most of the major issues which would form the basis of a uniform defamation law'. Specifically, they have agreed on the preparation of a draft model Bill which will be placed before the next meeting. There has been some criticism of aspects of the Queenstown announcement.[14] But so far, there is no indication as to the attitude to the particular provisions of the greatest relevance to booksellers and innocent distributors. So, on this subject we are still in the dark — although I do not anticipate problems in the acceptance of these reforms. I know from his several announcements on the subject, that the New Zealand Attorney-General, Mr. McLay, is closely watching the developments in Australian defamation law. Specifically, he has expressed sympathy with some of the proposals contained in the Australian Law Reform Commission report. He has before him both our report and the report of the New Zealand committee. Whether he will feel persuaded to adopt the Australian proposals, at least in the case of adding new protections to the position of innocent disseminators such as booksellers, remains to be seen.

OTHER LEGISLATION

Sales Tax Legislation. Before closing, I should mention other legislation which needs to be watched. Of the first, proposals by legislation to impose a sales tax on books in Australia, I need say little. I know that my friend and colleague, Michael Zifcak, intends to outline to you the action taken to oppose the proposal made by the Federal Treasurer in Australia, Mr. John Howard, to impose a new broad based indirect tax, including on books. When the Australian budget of August 1981 was announced, it included a proposal for a new sales tax of 2 1/2% on a variety of goods including books, magazines and newspapers. Apart from a brief period in 1930-1932, when a duty-like tax was imposed on books and journals until it was removed, these goods had never been subject to duties or taxes in Australia. A most extraordinary campaign was mounted to raise opposition to the proposed tax. The National Book Council produced a case against the Australian tax on books with the polite but affirmative title 'Please Don't Tax Books'.[15] Generally, editorial comment was strongly supportive of the campaign. However, opposing points of view were also mentioned. For example, in the Melbourne Age[16] Claude Forell reacted:

> The Federal Government should not be astonished at the furore provoked by its proposal to tax books, magazines and newspapers. The scandalised cries of shock and horror, the indignant petitions and lobbying, were all to be expected from articulate influential sections of the middle class whose keen sense of propriety and self-interest had been so rudely pricked.

In the end the protests resulted in defeat of the legislation in the Australian Senate. Much of the campaign was directed at the overheads that would be incurred by responding to the proposed retail tax. I have noted from recent extracts of the New Zealand press reports that the New Zealand Government is said to be 'likely to opt for a 10% wholesale tax to allow a 10% reduction in personal tax'. The statement was attributed not to a government source but to the Executive Director of the New Zealand Retailers' Federation. Whether the so-called 'necessities of life' should be exempted and whether books and other publications fall within those 'necessities' is a matter for New Zealanders to sort out. Certainly, in Australia, that was the strongly expressed views of the opponents of the proposed tax on publications. The warnings of the New Zealand Newspaper Publishers' Association that some newspapers and magazines in New Zealand would almost certainly fold if the government decided to tax newspapers or advertising echoes similar warnings given by publishers in Australia.

Copyright Legislation. A further area of development both in Australia and New Zealand relates to copyright law. Amendments to the Australian Copyright Act 1968, a Federal Act, came into force on 1 August 1981. There are 28 sections in the amending Act concerned with providing a systematic new approach to photocopying. The general aim is to increase copyright owners' protection against so-called 'piracy' of their works by photocopying, by introducing severe penalties, including for summary offences. A new statutory licensing scheme enables multiple copying under certain conditions and this is an important feature of the new Australian Act.

An ruling by Mr. Justice McLelland of the New South Wales Supreme Court has recently clarified the interpretation of sections 40 and 53B of the Copyright Act. The judge ruled that schools in New South Wales must keep records and arrange for payment on parts of books photocopied in multiple form for students. Despite the fact that changes to the Copyright Act covering photocopying have been in force for some months, so far no claims for the royalties have been made by the owners of copyright. Instead, the owners, through their representative organisation, the Australian Copyright Council, have been negotiating with potential users in an attempt to reach agreement on aggregate charges. If no agreement can be reached, the matter will be submitted for determination to the Australian Copyright Tribunal chaired by a Federal judge.

The Executive Officer of the Australian Copyright Council, Mr. Peter Banki, welcomed the decision of Mr. Justice McLelland that schools should not be allowed to use s.40 of the Australian Copyright Act to avoid record-keeping and payment required by the provisions of the new s.53B in the case of multiple copying. Section 40 permits limited free copying by way of 'fair dealing'. But the judge held that teachers could not act as students' agents to make multiple copies of books -- or parts of books -- under the section. Mr. Banki claims:

> The decision reinforces the Australian Government's determination that recent amendments to the Copyright Act should result in payments to authors and publishers for photocopying. Mr. Justice McLelland has laid to rest the bogey of multiple copying without proper payment. The decision confirms our view that the purpose of the new law is to enable authors and publishers to be paid for multiple copying. I expect the NSW Department of Education will now join with other State and private and educational institutions in recognising this and will work with copyright owners to develop the simplest possible system of payments.[17]

It is reported that an appeal will be lodged against Mr. Justice McLelland's decision to the Full Court of the Federal Court of Australia. If this is done, that Court will have the opportunity to evaluate the interaction between the new photocopying technology and the rights of authors and book publishers. The technology is itself, in one sense, a great liberator. The need to avoid new legislation that is unduly restrictive and cumbersome and difficult to enforce is clearly recognised. 'Fair dealing' will allow individuals to make a single copy of pages from a book for study purposes without payment of copyright fee. But the question is now raised in Australian copyright law as to whether, when the photocopying goes beyond the needs of the individual and is done in multiple batches, this is something that should result in compensation to the initial publisher and author. The case is simply another illustration of the need to rethink our legal system in the light of new technological developments.

Across the Tasman, we have been watching with close interest the copyright case involving the New Zealand Listener. The need to overhaul copyright law in the light of new information technology is beyond question. Indeed, many aspects of our legal system will have to be reviewed in the age of computications : computers chattering away and linked by telecommunications, including across national boundaries. But in developing the new laws, we must keep steadily in mind the importance of the free flow of information to a free society. The imposition of outmoded concepts and cumbersome legislative procedures and the attempt by the law to create obstacles and impediments to the beneficial impact of the new technology, is bound in the end to fail and should be discouraged by law reformers who have an eye on the future.

CONCLUSIONS

I am conscious that in this address I have skimmed the surface only of some the concerns of booksellers, book publishers and the law. I have outlined to you the problem that confronts any Australian in approaching the task that was assigned to me. The laws governing booksellers and other distributors of information in Australia vary from one jurisdiction to another and are therefore daunting in their complexity. Legally speaking, things are much more straightforward in New Zealand. But that is not necessarily to say that things are better. Sometimes the very division of power that is inherent in the Federal system of government can be a protection of freedom and an encouragement to legal experimentation.

I have referred to the long history of association between the law and books. Quite apart from the fact that our rules and principles, statutes and decided cases are overwhelmingly captured in books, the law and literature have much in common. Both are concerned with ideas and words. Both are concerned with the human drama. Booksellers and lawyers offer service to the community, though I must confess that booksellers do so at a somewhat lower price!

I have concentrated in my review of legislation upon the future. That is the way of the reformer. I have referred especially to the work of the Australian Law Reform Commission on the reform of the law of defamation : a project that has not passed unnoticed in New Zealand. In that project we have made recommendations of specific relevance to booksellers and other distributors of publications. Time will tell whether the proposal to offer greater protections to booksellers and distributors will find their way into the laws of Australia and New Zealand.

I have mentioned briefly the developments in proposals to impose a tax on books and other publications. So far, those proposals have been defeated in Australia but will have to be watched in New Zealand. I have mentioned the changes in Australian copyright law and the attempt to come to terms with respective rights of authors and publishers, on the one hand, and the users of photocopy material on the other.

As the technology of information changes, the world of the bookseller will change. But I predict that the book that you can pick off the shelf, read, return to at your leisure, browse through and sample with delight, emotion and intellectual benefit, will continue to be a feature of our societies long after we are gone. I congratulate the booksellers of New Zealand for their continuing service to a civilised country. They are indispensible to an acceptable quality of life. And I am glad to be amongst you.

FOOTNOTES

1. Lord Birkett, Foreword, L. Blom-Cooper, The Law as Literature, 1961, ix.

2. B.N. Cardozo, Law and Literature, 14 Yale Review 699 (1925) reprinted in Blom-Cooper, 193.

3. id., 711.

4. id., 702.

5. Somerset v. Stewart (1772), Lofft, 1 98 ER 499 sub-nom Somerset's case.

6. King Henry VI, Part II, IV, ii, 86.

7. In re Shaw deceased; Public Trustee v. Day [1957] 1 WLR 729, 731.

8. id., 746.

9. Ex parte Corbishley; Re Locke [1967] 2 NSWLR 547, 549.

10. The Law Reform Commission (Aust), Unfair Publication (ALRC 11), 1978.

11. Emmens v. Pottle (1885) 16 QBD 354.

12. Gatley on Libel and Slander, 7th edition, London, 1974, paras. 241-3.

13. Unfair Publication, 98.

14. The Age 18 February 1982.

15. Australia, The National Book Council, Please Don't Tax Books, 1981, Melbourne.

16. C. Forell, 'Why Books Should be Taxed', the Age 16 December 1981, 9.

17. Australian Financial Review, 11 March 1983.