THE PROCTOR

NEWSLETTER OF THE QUEENSLAND LAW SOCIETY

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by the Hon Justice M D Kirby CMG

Law reformers in Australia must not be thin skinned. People who write books or speak on sensitive topics, rarely explored, must expect public criticism. Controversy stimulates new ideas and is an inseparable part of a free society. I therefore welcomed Justice Connolly's forthright, if somewhat irascible review, of my 1983 Boyer Lectures on The Judges. But, sadly, in important respects the review was misleading, personal, over-simplistic, superficial, based on out-of-date information, parochial and humourless. What should be done in such a case? Ignore it, and thoughtful people may remain misled. Doubtless conventional wisdom would suggest that judges should not engage in public exchanges. On the other hand, people have a right to form their assessments on correct information and not to be misguided, however innocently. This response is therefore offered to put the record straight and not for an instant to question the right of Justice Connolly, other judges or anyone else to differ strongly from ideas explored in the Boyer Lectures.

Let it be said at the outset that the easier course for me, when I was invited to deliver the Boyer Lectures, would have been to offer a series on law reform or social reform. But the judiciary is an increasingly important and rarely examined branch of government in Australia. That is why I chose the more difficult — and inevitably more controversial — task of examining what seemed to me to be a number of central controversies concerning our judges. My chief disappointment in Justice Connolly's review is that he failed (except occasionally by inference) to address himself to issues such as these:

- How should judges be selected?
- In the age of specialisation, should we train and retrain our judges?
- How will the judicial method fare if Australian judges are called upon to interpret a Bill of Rights?

- Should judges sit in Royal Commissions and other Executive Government bodies?
- Should we introduce a better system for handling complaints against judges than the sledgehammer of constitutional removal?
- What are the proper limits of judicial inventiveness and law reform?
- What impact will technology have on the judicial role?

At the end of Justice Connolly's review, I am left with the impression that he thinks everything in the judiciary is perfect and that there is no need to change or even reconsider our arrangements. That may be right. The purpose of the Boyer Lectures was to invite the legal profession and our citizens to consider these questions. Does anyone seriously dispute that the issues are legitimate matters of community concern? Indeed, if they look back on the Lectures, some, at least, of the issues seem to have assumed a greater relevance in 1984 than when they were put on paper in 1983.

Misleading

Much of the critique offered by Justice Connolly is based upon his reading of the first chapter and first broadcast of the Lectures. This dealt with the appointment of judges. It raised the question whether Australian Governments, Federal and State, should be concerned about the serious under-representation in the judiciary of diverse elements of our population. Singled out for special mention were women and what are now usually called people from 'ethnic' (non-British) backgrounds. But also mentioned were lawyers from the solicitors' branch, the public sector and academic life.

As presented by Justice Connolly, I am suggested to be urging the spectre of a flood of unqualified women and migrant amateurs, appointed in a 'disgraceful' move to 'debase' the Bench. I can only assume that because of pressure of work, Justice Connolly could not read my essay carefully. I pointed out that not everyone agreed with the notion of diversity. I conceded that 'for many members of the judiciary in the legal professions these views are anathema'. What Justice Connolly failed to tell his readers was that I had stressed:

> There must be qualities of mind and character first.

I also stressed that any change must come 'gradually and patiently'. I specifically denied notions of 'exact proportionality of minority groups'. My simple thesis was that governments, while still maintaining a judiciary 'excellent in quality' should, in their appointments, move to reflect the variety of the community judges serve.

This is not, as expressed by me, a terribly, radical doctrine, worthy of the anathemas of Justice Connolly. On the contrary, one of the important achievements of Senator Peter Durack, past Liberal Federal Attorney-General, was his conscious endeavour to appoint more women, more academics, more solicitors, more public lawyers and more people from ethnic backgrounds to the Federal judiciary. Indeed, in Queensland, events have rather overtaken Justice Connolly. In the self-same issue of The Proctor in which his review appears are announced the appointments of three new judges of the Supreme Court of Queensland. One of them was a distinguished professor (Professor Kevin Ryan QC). Another was a distinguished public lawyer (Justice Vasta), formerly Chief Crown Prosecutor and from a non-Anglo-Celtic background.

Justice Connolly criticises my use of a 1972 survey of the High Court of Australia. Yet every lawyer knows that there has been precious little judicial biography and analysis in Australia. Neumann's portrait of the High Court of Australia from 1903 to 1972 is the most up-to-date such analysis now available. In any case, is it truly misleading to quote that author's conclusion that High Court justices are typically

> male, white, Protestant, raised in Sydney or Melbourne (or much less frequently, Brisbane) and of British ethnic origins?

Admittedly, Brisbane has stepped up its representations, Catholics are more heavily represented and we rarely nowadays talk of 'British' origins. But the point made in 1972 remains highly arguable 12 years and nine appointments later.

This is not a criticism of the High Court or of governments who have appointed justices to that Court. It is simply a statement of fact, legitimately drawn to the notice of the people whose lives are so profoundly affected by High Court decisions.

Justice Connolly ascribes to me an assertion that 'Judges are not attuned to reform — he refers to 'the alleged disinterest of Australia's judges in matters of law reform' which he describes as being 'a particularly sore point' with me. If I had said or even implied such a thing it would be, as the judge says 'baseless and should never have been made'. But I said nothing of the kind. On the contrary, I drew attention to the leading work of judges out of court and in court in the reform of the law. I drew attention to their efforts, working after court in law reform agencies. I specifically asserted that the view that reform was no part of the judicial task was nowadays 'a minority view'. Indeed, I pointed out that judges themselves were now urging that their law-reforming function should go further. In direct language I asserted that 'the judges do more than most to right wrongs'.

Superficial

Surely it was the heavy burdens of judicial responsibility, rather than pre-existing prejudices, which led to the over-simplistic and superficial treatment of the actual content of the Boyer Lectures:

- Assertions by Justice Connolly that the 'courts' have 'always unfailingly upheld' freedom of speech as 'one of the pillars of individual liberty' are simply not borne out by experience, including recent Australian experience. Indeed, the present references on reform of contempt law in the Australian and Queensland Law Reform Commissions reflect the concern evidenced in the divergent views in the High Court of Australia itself about the competition between freedom of speech and other important values. See Gallagher v Durack (1983) 57 ALJR 191. There are many other instances that would cause a thinking commentator to question the judge's grand but inaccurate assertion.
- His claim that the under-representation of women in the legal profession 'would seem, in the past, to have been their own choice' evidences touching ignorance of the dynamics of the legal profession, particularly at the Bar. In a male-dominated community, where the prospects of significant advancement appear to be limited, the element of free 'choice' may be limited.
- His attribution to me of a frank call to judges to become 'social engineers' quite misreads one of the primary points I was seeking to make. This was to call attention to the dangers of reposing ever-widening functions (including public inquiries and interpretation of Bills of Rights) upon judges from such relatively narrow, unrepresentative and ill-prepared backgrounds.

Personal

A leading part of what Justice Connolly had to say (and a part that secured widespread publicity) was highly personal. Justice Connolly could have spared himself the hours of searching for my published judgments by reading sub-section 12(3) of the Law Reform Commission Act 1973 (Cth). That provision requires the Chairman of the Australian Law Reform Commission to be a full-time Member. This was because all major political parties in the Federal Parliament took the view that part-timism had been an enemy of effective law reform. Accordingly, they resolved to ensure that the Chairman would give virtually his whole effort to the work of the Commission. So I have done. It is true that since my appointment to the Federal Court of Australia I have sat, by arrangement with the Chief Judge, in a limited number of cases. That arrangement will continue until I relinquish my post in the Law Reform Commission.

There is a hidden premise in Justice Connolly's review. It is that only a sitting judge, and indeed one of long-standing who has written many judgments, has the real warrant to write or talk about the judicial office. That is a view I reject. In my novel duties as Chairman of the national Law Reform Commission, I have had a rare opportunity to see the entire operation of our legal system from new perspectives, to meet most of its dramatis personae, to travel to all parts of the country and to engage in a dialogue with lawyers and citizens, such as has not been previously been attempted. Of course, my opinions may be debatable. Some may be erroneous. But the way to criticise such opinions, in an ancient profession of high intellect and great integrity, is to address the issue. It disappointed me that Justice Connolly allowed himself, instead, the luxury of making personal and patronising remarks.

May I also admit to an objection to a frankly political point made by the judge? After referring to his misinterpretation of my calls for 'social engineers' he comments:

> It is a curious feature of those whose political philosophy lies to the left of centre that they have so little respect for the democratic process.

I can only assume that he is endeavouring to characterise my political philosophy. I object to being neatly stereotyped. The whole effort of the Australian Law Reform Commission (as indeed of the law reform agencies everywhere) is to make the democratic branch of government work better. It is to help the Executive and the Parliament to address problems that will otherwise be shelved, thereby putting inevitable pressure on the judicial branch to make new laws, discovering it in the Aladdin's Cave of the common law.

Parochialism and error

Finally, there is, in Justice Connolly's review, a distinct flavour of provincialism and a frankly out-of-date understanding of the work of the Australian Law Reform Commission.

So far as provincialism is concerned, he 'hates to crow' but boasts of the law reform system in Queensland. I am second to none in my admiration of the Queensland Law Reform Commission. The Australian Law Reform Commission enjoys a co-operative professional relationship with that Commission and meets with its members regularly. We have some common projects (such as the current inquiry into Admiralty law). We exchange views and information. It is not necessary to promote the QLRC by denigrating the ALRC.

Such endeavours strike people in other States as evidence of parochial lack of self-confidence. There is more than enough work in law reform for all of the agencies. I only wish that, for the tasks in hand, the budget of the Australian Commission was 'immense' as claimed. In fact it amounts to about 10 cents per citizen per year. This is a paltry investment in the improvement of our national legal system.

Furthermore, Justice Connolly was well astray with his charge that very little in the way of legislation seems to have emerged from the ALRC. All but one of the reports of the ALRC is either in law, in Parliament or under active consideration by the Federal Government, with ministerial commitments to their implementation. The exception was tabled only 13 months ago and it too is under consideration by the government. In Parliament at the moment, for example, is legislation for a major overhaul of the law of insurance contracts in Australia. It is by any account an immense task of significant reform. Other legislation that has been promised during the current session of Federal Parliament relates to reform of the Lands Acquisition Act 1955 (Cth) (ALRC 14), Insurance Intermediaries (ALRC 16) and Criminal Investigation (ALRC 2). In addition, action by the Executive Government on proposals concerning the sentencing of Federal offenders has been promised, as has legislation to enact the reforms of child welfare law in the Australian Capital Territory. Justice Connolly may refer disparagingly to he laws of Canberra and the Federal Territories. But, as the ALRC report on Human Tissue Transplants showed, work nominally done for those Territories in the ALRC can be adopted throughout the country. It is a commendable fact that it was Queensland that first adopted the human tissue transplants proposals (see Transplant & Anatomy Act 1979). As to the proposals for uniform defamation law reform, these can, it is true, be traced to the Australian Law Reform Commission's report Unfair Publication (ALRC 11). But the New South Wales Attorney-General's comment 'Can it! ', which Justice Connolly reports with relish, was addressed not to the Commission's carefully balanced proposal, but to one that emerged after a languid tour through seven meetings of the Standing Committee of Attorneys-General over three years, and which reflects the inevitable compromises and changes that make it a distant cousin to the ALRC package.

The denigration of the Australian Law Reform Commission is specifically insulting to the fine lawyers from Queensland who, as Commissioners or otherwise, have played a vital part in this important national institution. We have always valued our links with Queensland. Mr F G Brennan QC was one of our original Commissioners. Sir Zelman Cowen also played a vital part as does Justice G E Fitzgerald. In fact, I first heard of Justice Connolly's review on a sunny Saturday afternoon when the Law Reform Commissioners were working on the report concerning the Federal laws of evidence upon which the Queensland Law Society and Bar have been generous in providing much thoughtful and practical help.

Humourless

In addition to all this, there is the sad lack of humour in Justice Connolly's review, despite the paraded virtues of humour to which he aspires. Apparently Justice Connolly is a stranger to irony. When I quoted Chief Justice Gibbs' witty extract from Lord Elgin's 'urgent words' in Earl of Radnor v Shafto in 1805 ('Having had doubts upon this will for 20 years there can be no use in taking more time to consider it') I said that this statement was received by 'an open mouthed audience'. Our serious reviewer took this to be a 'solemn' comment and drew the implication that 'the audience understood the Chief Justice to be seriously advancing these historical gems as evidence that it was for the best in the best of possible worlds!'

If Justice Connolly could bear to listen to the broadcasts — or even the tapes of the broadcasts which are now selling well — he would have heard the reassuring peals of laughter on the record of Sir Harry Gibbs' statement. Irony and humour are needed even in broadcasts — especially if such broadcasts are aimed (as the Boyer series is) at hundreds of thousands of ordinary citizens, not just 300 judges or even 15 000 lawyers.

Reassurance?

Many other things could be said. The remarks by a judge about 'destabilising decisions' of the High Court of Australia during 1983 which he implies upset the essential Federal nature of our system may be considered by some to do much more damage to the integrity of and respect for our judicial system than any remarks of mine in presenting, with attempted fairness, the legitimate debates concerning the future of the Australian judiciary. The remarks about Justice Murphy and Dame Roma Mitchell, I will ignore, they are, as Justice Connolly charged of the Lectures, ungracious. The name-calling at the end of the review ('shallow, superficial, trendy and, it must be said, ungracious') I have sought to meet with this short response.

Is there any consolation in all this? First, I have received many messages of support from judges in all parts of Australia. I am sure Justice Connolly is not alone in his views. But it is reassuring to know that so many Australian judges do not share them. One very senior Australian judicial officer has informed me of his intention to organise a series of extensive seminars of judicial officers in his State to examine, chapter by chapter, the issues raised in the Lectures.

Secondly, the Boyer Lectures are now being described as the 'controversial' Boyer Lectures, as a result of Justice Connolly's review. Undoubtedly, this will cause many more judges, lawyers and fellow citizens than otherwise to listen to the rebroadcasts and to buy the cassettes or published book of them. For my own part, I am content to leave their merits and defects to the good judgment of this audience.