

ADMINISTRATIVE REVIEW COUNCIL

THURSDAY 7 FEBRUARY 1980

SCARTH ROOM, UNIVERSITY HOUSE, AUSTRALIAN NATIONAL UNIVERSITY

RETIREMENT OF MEMBERS OF THE ADMINISTRATIVE REVIEW COUNCIL

Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission
Member of the Administrative Review Council

February 1980

ADMINISTRATIVE REVIEW COUNCIL

THURSDAY 7 FEBRUARY 1980

SCARTH ROOM, UNIVERSITY HOUSE, AUSTRALIAN NATIONAL UNIVERSITY

RETIREMENT OF MEMBERS OF THE ADMINISTRATIVE REVIEW COUNCIL

Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission
Member of the Administrative Review Council

OF VIRTUES & SAINTS

We are collected here tonight, in the distinguished presence of Your Excellency, Ministers of State, present and past Members of the Council, to do honour to three of our retiring colleagues.

Lord Denning recently acknowledged to the Law Society's National Conference at Jersey that he had all of the Christian virtues, save that of retirement. The three members of whom I speak come before us here tonight, their virtues unblemished by the lack of that singularly important quality that has so far escaped the Master of the Rolls.

Each of them is a modest man and though the fame of each has spread, it is sobering to remind ourselves that even one so unique, idiosyncratic and colourful as Lord Denning is not known to all. He told the same National Conference at Jersey that as Master of the Rolls he keeps the records and one of the most treasured records received by him was in the following terms :

"Dear Lord Denning,

I am an Indian citizen. I graduated in Mechanical Engineering at the University of London and was awarded a Master of Science degree. I believe I have the necessary qualifications, motivation, energy, drive and personality to begin a successful career in an automobile industry. I will ever remain grateful to you if you will kindly help me begin my professional career with your company, the Rolls Royce Motor Company".

It is not recorded whether the Master of the Rolls was able to dissuade the Indian student from his misapprehension as to the extent of his sway.

I have no misapprehensions about my task tonight. It is to invite you to rise in your place to acknowledge three distinguished Australians, foundation members of the Administrative Review Council, who have taken a leading part in our labours. The adversary trial system which we enjoy in Australia requires that there should be an advocate for these three, but scrupulously fair because it is ex parte. Most of you will know, certainly Your Excellency will be aware, of the trial of one blessed English saint, St. Thomas More. The record of that trial is told in Your Excellency's splendid address now published in the Law Journal.

But most of you are probably not aware of an earlier trial of an English saint. I refer to St. Thomas a'Becket. King Henry VIII (over whom Mr. Justice Brennan and I have had countless disputes) became restive and upset at the doings of this martyr. According to Lord Campbell's "Lives of the Chancellors" Henry procured a writ of Quo Waranto to be taken out against the deceased saint, commanding that he show by what warrant he procured his sainthood. It is not told how service was effected on the dead St. Thomas. It says something of the arrogance of our system of law that the King's Courts of England were quite sure that their writ ran beyond the British Isles, beyond the overseas

plantations, to the very doors of Heaven itself. I will not leave you in doubt about the judgment in this matter. Search as you might, you will not find it in the Law Reports. The fact is that the Courts ordered a Judgment of Ouster against the dead St. Thomas, depriving him of his sainthood and remitting him to the company of ordinary mortals.

There are some overseas observers (and indeed some closer to home) who are surprised at the boldness of the jurisdiction that has been conferred on the Administrative Appeals Tribunal of Australia. The power of the Tribunal to substitute its views for those expressed in the name of an elected Minister brings gasps of disbelief in various quarters. Yet those who express surprise must surely be ignorant of the history of the judicial arm of government in our tradition. It has rebuked Kings, taken part in the trial of at least two sovereigns, and as I have said, administered the trial of two saints, remitting one to his death and the other to Judgment of Ouster.

It must be said for Henry that he appointed counsel to appear for the dead St. Thomas a'Becket, to make sure that the trial did not miscarry for want of due process of law and that this purported saint had someone to speak out for him in his absence.

Our martyrs for tonight are here with us. Their deeds really require no words from me and though Ouster has been voluntarily accepted, I urge that their deeds, if not yet quite worthy of beatification, are certainly deserving of our nation's praise and our enthusiastic applause.

THE MINISTER

Gathered around this table are virtually the Founding Fathers of the Administrative Review Council and most of those responsible for the new Commonwealth administrative law. It is a great tribute to our guests

that Your Excellency has paid by being here. The Minister, however, can take much of the praise. He was, as they say, present at the creation. As our first guest of honour, Mr. Justice Brennan, put it at the very first meeting of the Council, when the Minister was the Attorney-General :

"You, Mr. Attorney, have been alive to these problems for a long time. Your name is to be found in the reports of the committees who pioneered the Australian notions of administrative review. You were largely responsible for the amendments to the Administrative Appeals Tribunal Bill which summoned this Council into existence".

We all know that when the Labor Government introduced the Administrative Appeals Tribunal Bill, they did not include provision for a Council of this kind. It was the determination and skill of the Minister, then in Opposition, that secured the amendments of the Bill which led on to the establishment of the Council, with its profoundly important tasks of assisting government in the detailed application of the new administrative law and pointing the way for the general directions in which that law should proceed.

What most of you probably do not know is that Robert Ellicott was planning these innovations from his days at school. I have been doing some inquiries about the Minister. They would no doubt call it "investigative journalism" today. He happened to go to a splendid school in Sydney and in 1942, R. Ellicott, Class 4D, was editor of the school magazine. The school was Fort Street. The magazine "The Fortian".

Some time late in 1942, he submitted to himself and accepted for publication, a piece which tells us much of the future founder of our Council. Titled "A Melancholy Reflection" it was written at a gloomy time of War. After a few observations on the tyrannic fury of the struggle, the young Ellicott painted a picture of "Utopia".

"I am happy now; an exacted glory has replaced my earthly gloom and my sad thoughts ... I can see a land of righteousness merged in the splendour of my Utopia - the land of my dreams".

Obviously, the young Robert was perceiving a world in which authority was submitted to discipline and the Rule of Law spread its banner into the dark corners of the bureaucracy and administration. He ends the piece :

"I wish I could think of you always, O Utopia, but I must return now, recede from my heights, thy splendour and ply my sordid task on earth".

The establishment of the Council, the appointment of Mr. Justice Brennan as the first President of the Tribunal and Chairman of the Council, the appointment of Sir Clarrie and Des Linehan and indeed the very insistence on the need for such a Council represent the Minister's continuing quest for his Utopia amidst the sordid tasks of earth. We should not be ashamed of idealism. Let there be no doubt. Behind the administrative reforms in our charge, is a strong element of passion for justice, for ordinary fellow citizens in their dealings with the enormous power of modern government.

MR. JUSTICE BRENNAN

You, Mr. Attorney, will well know our first guest of honour. Both of you emerged through the "test of fire" of the old National Union of Australian University Students. I have been doing some inquiries amongst the "old persons" of N.U.A.U.S. (I use that word to avoid the modern charge of "sexism" and because I do not wish to reveal my sources). I am told that you were both extremely powerful figures in the conclaves of N.U.A.U.S. You, Mr. Attorney, as President of the Guild and Your Honour a lad from Rockhampton and Toowoomba, both rose to be President of the National Union of Students. I hesitate to say this but it is alleged that each of you was of the "wheeler-dealer" disposition in those days, both impressive on your feet, both allegedly "smooth

operators". They were great days for N.U.A.U.S. Of my five Attorneys-General, two (Senator Greenwood and Senator Durack) took a leading part in the student affairs of that time. I am told that none doubted that you would each go on to high office in our country.

Of course, I got to know Mr. Justice Brennan before he was Chairman of our Council, indeed before he was appointed a judge. Through the intercession of Frank Mahony (also a strong supporter of administrative reform) he took part in the earliest work of the Law Reform Commission and was a part-time member until his duties led him to resign in 1978. That was the time when Your Excellency also sat at the Law Reform Commission table. They were heady days of great intellectual debate. Both Your Excellency and Mr. Justice Brennan have a very special and unusual cast of mind. It is the mind of the conceptualist. It is unusual because the very methodology of the common law of England is to encourage case-by-case resolution of issues and to come at concepts only where it is absolutely necessary and then only by a process of deduction to the general from a proliferation of specifics.

Mr. Justice Brennan's greatest contribution to the work of our Council, to the early decisions of the Administrative Appeals Tribunal and to the work of the Law Reform Commission is now the special gift he brings to the labours of the Federal Court. It is a gift much needed at a time of great change. It is the capacity to stand back from issues, to reflect calmly about them, to perceive the general principles that are at stake and then, with robust self-confidence, to make a decision and to lead others by persuasion to see the right of that decision.

In the Administrative Appeals Tribunal, if I can say so, His Honour's special talents saw the Tribunal through the first difficult years when its novel powers were untested, ill-known and rarely understood. It was his very perception of the great power and responsibility reposed in the Tribunal

that made Mr. Justice Brennan an ideal first President. Lord Devlin has recently written of the vital part which the judges play in the government of England. Our country was fortunate, as the new administrative law was launched, that at the helm of the ship was a man with such sensitivity to the government of Australia.

Of his personal qualities, I need say nothing to this present audience. His gentleness of spirit are a legend. His attention to the personal opinions of members of the Council was unfeigned and arose from a true intellectual charity. Though we did not always agree and although many of us had not considered issues as long and as deeply as he, he never allowed dogmatism to stand in the way of reception of new ideas from his colleagues. Yet he did not vacillate but gave us the intellectual leadership to which we paid tribute at our last meeting. Those of us who know Mr. Justice Brennan know that there is within him, constantly doing battle, a profound respect for the law and its institutions and a deep concern for the ordinary individual, and particularly the individual with disadvantages : whether they arise from poverty, race, lack of opportunity or otherwise. This is not an unusual schizophrenia. The Prime Minister recently referred to the special mixture we have in Australia of conservatism and radicalism. But in Mr. Justice Brennan's case, the battle is ever an acute one. I suggest that in the early work of the Review Council, and the A.A.T., we needed someone with these warring factions, held in equal balance. When we drink Mr. Justice Brennan's toast we will reflect on his abilities as a scholar, lawyer and conceptualist, his attention to the views of us all, his personal kindness and gentleness and his sensitivity to the great issues that were placed in his care. Australia was uniquely fortunate that such a special man should lead the first three years of administrative law reform.

SIR CLARRIE HARDERS

Sir Clarrie has had so many speeches made about him, so many eulogies and paeans of praise sung in his honour that I imagine that my earlier mention of beatification came as no surprise to him tonight.

In his case too, I have done some investigation. I have spoken to some of his earlier Ministers, speaking to both sides to ensure that I could present tonight a balanced and scrupulously impartial review.

The one spoke of a time when urgent attention had to be given to the powers and procedures of calling out the troops in Papua New Guinea. The deceptive gentleness of Clarrie Harders should fool no-one. Swift in action and sound in his legal judgment, rapid advice was given, the sources searched and the advice confirmed. Another Attorney-General to whom I spoke (and whom I shall identify but not name) said that on the change of government there was a period of uncertainty, soon replaced by loyal support and above all plain good old-fashioned legal advice that was right. This identified but unnamed Minister said that what he most admired about Clarrie Harders was his unorthodoxy. Whereas most departmental heads sought to distance the Minister from the grass roots levels of their department, Clarrie would always bring along the young junior officers working on a problem : being sufficiently unconventional to reject the strict hierarchy of the Commonwealth bureaucracy.

It was natural that a person so unorthodox about the bureaucracy should take a leading part in its reform. Even before the establishment of the Administrative Review Council, Mr. Harders (as he then was) orchestrated the energetic flurry of legislation which inaugurated the new administrative law and some of which has yet to come to fruition.

I remember well Sir Clarrie's advice to me in the early days of the Law Reform Commission. "Guard your

independence", he said. "We do not need a pallid, miniscule version of the bureaucracy. What we need from the Law Reform Commission is original, forward-looking, bold and innovative thought". I would suggest that that advice is also the recipe for success of the Administrative Review Council. At our table Clarrie Harders, the innovator, the reformer, the supporter of the Rule of Law, led us in many projects, none of which will, in the eye of history, be more important than our report on the Judicial Review Act. How fortunate we were to have the coincidence of a succession of sympathetic Ministers, a reflective first President and at the head of the Department of State most intimately concerned in our affairs, a man who, though of the bureaucracy, was wholly in sympathy with submitting its great power to external review.

MR. DES LINEHAN

The coalescence of this good fortune was supplemented by the presence in the first Council of Des Linehan. I well remember at our first meeting how, the ceremonial parts over, we turned to the practical business of setting up a new Commonwealth authority. I had been through it all once before, sitting in the anteroom of the Bankruptcy Court in Sydney, and later in a tiny office in which I first met Mr. Justice Brennan. At the first meeting of the Council, we had before us a paper prepared by Des Linehan on the practical business of our staff, our research unit and the necessary internal arrangements to supplement the part-time activities of the Council. Des had a most interesting background in the Trade Union movement. Before his appointment as a Commissioner of the Public Service Board, he had been Federal Secretary of the Administrative and Clerical Officers' Association. He had also held Presidential posts in the Commonwealth Public Service Union. He therefore brought to our deliberations specialised knowledge. He was aware of the great difficulties of mounting such radical reforms at a time of economic restraint, staff ceilings and budgetary cutbacks. He was sympathetic to the problem of officers of all levels adjusting to new external critics who must, on occasion, have seemed out of

sympathy with the well-established ways of doing things. But quite apart from his specialist knowledge and experience, he brought a genuine concern to make the procedures of the administration better "at the counter". The end product of all our labours should be this : to improve the way administration deals with the ordinary citizen. It is perhaps the greatest tribute to the Commonwealth Public Service that a man such as Des Linehan, coming to us from the Manager's Office, as it were, was nonetheless in sympathy with, and anxious to further, the new administrative reforms. He, Sir Clarrie and I took part in the sub-committee which worked on the Judicial Review Act. His practical commonsense and fund of wisdom, humanity and good humour, sustained us through the hours we faced and affronted airlines and other prickly personages seeking to escape from the beneficial coverage of the Act.

ADMINISTRATIVE REVIEW

This is not the occasion for philosophical reflections on the future of administrative review, assessments of the work of the Administrative Review Council, tributes to our staff (and particularly Graham Taylor) or mutual self-congratulations. It marks, however, a watershed in the life of the Administrative Review Council. We have a new President, a new Chairman, Alan Neaves has replaced Sir Clarrie, Bob Young has replaced Des Linehan. We are now at full complement. We are in the midst of what I believe to be most radical profound, difficult reform attempted in recent years in Australia. Mr. Justice Brennan declared our task in the first words uttered at the first meeting of the Council :

"The duties of this Council touch the essential processes of government, for we are concerned with the exercise of power. Power is essential to orderly government but the manner of its exercise marks the quality of government administration".

In more than three years, there have been many achievements. I believe the government is to be commended for following so promptly many of the recommendations of the Council and enacting important legislation as suggested by the Council.

Recently, Lord Chancellor Hailsham was hurrying down the corridors of the Palace of Westminster, bewigged, begaited and robed to preside in the House of Lords. He spied in the distance his old friend Neil Martin, whom he had known when he was simply Quintin Hogg M.P. "Neil", he shouted. Just then a troupe of American tourists entered the corridor. After the disappearing Martin, the panting Chancellor shouted again, "Neil". The American tourists sank as a group to their knees, doubtless believing that this was the honour due in the Parliament to the Lord High Chancellor.

For our three guests, I now invite you to stand. They have helped us to find the thread of Ariadne that will lead us through the labyrinth of the new administrative law to the Utopia foreseen by the Minister or at least to better government and fairer administration.

I invite you to join the toast to our retiring members.