

# OPINION

## 'KEEP A DIARY AND ONE DAY IT WILL KEEP YOU'

So said Mae West, a social commentator of the 1930s.

For this writer the most memorable aspect of the ICAC inquiry into the Metherell affair in New South Wales has been the use of the diaries kept by Dr Metherell. They enabled all involved to determine the actual events that occurred.<sup>1</sup>

For we 'mug punters' out here observing the antics of government, the hardest job is to know what really happened: who did what, said what and to whom and who might have been fibbing.

At the time of going to print (25.6.92) the Premier and two other Ministers had resigned and the matter was still to be dealt with by the New South Wales Court of Appeal.

It appears that none of the facts of the case as determined by ICAC are in dispute, only its interpretation of the law. I am not going to get into this here except to note the matter should end up in the High Court.

The ICAC Report suggests that Mr Temby has thumbed through his copy of Dicey on the Law of the Constitution (perhaps after noting Mark 14:36) and there is an irony in the possibility that the fate of the New South Wales Government might be determined by about ten judges rather than in Parliament.

If the matter does end up in the High Court it would be of interest if it followed its decision in *Chan's case*<sup>2</sup> and looked at the reasonableness of the decisions of the parties involved in the Metherell affair.

The real benefit of the ICAC Report in this case, and indeed in all its other reports I have read, is that it gives a narrative of events. Prior to the ICAC Report, the participants via the media either gave different versions or none at all, but the Metherell diaries enabled us all to get the story not only straight but for all the participants to agree on it (Report, p.22).

(From some of the silly public comments made since the release of the Report on 19 June 1992, I wonder how many people have actually read it. ICAC told me about 3000 copies were distributed to the media, Parliament, those on its mailing list, the government bookstore and the public, so go get a copy of it and ICAC's other reports — they're free.)

The Metherell affair was characterised by lack of records and by the various participants keeping a lot of other people who perhaps should have been involved in the decision making process (who may have advised how stupid and/or wrong the decision was) totally in the dark about what was going on.

A former colleague who was part of the legal team acting for one of the parties before ICAC said that 'inept' was the only word to describe those involved.

One telling observation by ICAC about the decision of the head of the New South Wales Premier's Department to appoint Metherell:

Humphrey was being called upon to exercise a discretionary power in highly unusual circumstances, and it would have been most advantageous for him to prepare a note at the time as to what led him to decide as he did. He prepared no note, and when he gave evidence had no option but to reconstruct his thought processes as best he was able. [Report p.88]

As for diaries, there should be more of them: perhaps bureaucrats and politicians should be made to surrender them upon retirement on the condition that they will go into the State archives and they can get access once they start their memoirs.

The ICAC Terms of Reference required it to report on the specific aspects of the Metherell matter (which it has done) but more importantly to deal with the need for any changes to the laws, practices or procedures, etc. applicable in this area to ensure that such conduct does not occur again. This aspect is some months away according to the Report (pp.7-8).

### New South Wales history repeats itself

The New South Wales Premier in 1859, Charles Cowper (known as 'Slippery Charley') pulled a similar deal resulting in a Parliamentary Inquiry.

The *Sydney Morning Herald* of 9 October 1855 urged that merit should be the sole basis for public service appointments. One writer noted of New South Wales in the 1850s:

There were other factors which compelled ministers to exercise their patronage in a manner that was conducive to efficiency and economy rather than political advantage. One was the presence in the Assembly during the early years of responsible government of many independent members who prided themselves on being guardians of 'integrity and efficiency' in the administration of the colony's affairs. Ministers therefore had to exercise considerable care in making appointments or promotions if they were to avoid the charge of corruption or extravagance.<sup>3</sup>

I think community standards do not approve of appointments other than on the basis of merit and have not done so for some time, but politicians and bureaucrats have been able to get away with them, usually by confusing the issue.

The selection process for Dr Metherell has been contrasted with the purported proper and fairer alternative of the Selection Committee method of appointment but it is easy to appoint a mate and follow all the rules.

There are some myths about appointments to the public service. Under the *Public Sector Management Act 1988* (NSW) not all jobs must be advertised; there does not always have to be a Selection Committee; and if there is, there is no obligation to follow its recommendation.

I can feel considerable empathy with any committee that may have had to consider an application by Dr Metherell — damned if they picked him, damned if they did not.

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# DIGEST

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dence. The report (pp.18-19) speculated on what the jury might have speculated on about Pohl's behaviour. They obviously got it wrong.

There also needs to be a reassessment of what it really means to be a witness who is not shaken under cross-examination. The report made this observation regarding the original trial evidence of Margaret Pohl and that of the doctor about the time of death (pp.16 and 20). As things eventuated it meant nothing.

The report excellently assesses the significance of the original evidence both of the sister-in-law who went through the house at about 11.30 a.m. and of Pohl, in the light of Bawden's

evidence. It was noted that she was not shaken in cross-examination but added:

... human observation is notoriously unreliable and even a most careful and confident witness can, and has often proved to be in error, particularly when recalling observations of a happening. [p.55]

This was a case for jury debate akin to that of Henry Fonda and the other 11 just men.

After considering whether Bawden could have found out details of the murder by any other means or if there was collusion with Pohl the inquiry rejected these possibilities.

## The aftermath

At the time of writing Pohl had received the pardon recommended by

the inquiry and Bawden had been charged with the murder of Joyce Pohl. At Bawden's first appearance in court he pleaded guilty and the matter was adjourned for sentencing. At the time of writing sentencing was expected in mid-July.

*Peter Wilmhurst is a Sydney anthropologist and non-practising bureaucrat.*

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## References

1. Report of the Inquiry held under s.475 of the *Crimes Act* 1900 into the conviction of Johann Ernst Siegfried Pohl at Central Criminal Court Sydney on 2 November 1973, by the Hon. Mr Justice McInemey, May 1992.
2. Witrow, G.J., *The Nature of Time*, Pelican, 1975, p.38.

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Such an appointment route does not guarantee anything. Now for some anecdotes: the writer as a New South Wales bureaucrat has been a member of numerous selection committees: he has been told in a handful of these both who the committee should and should not pick. On the other side, most recently, he was the successful applicant for a job which turned it out one of the Committee members had promised to one of the other applicants.

If one really needs convincing about the inadequacy of the Selection Committee process, especially as to the behind-the-scenes activity, then two reported New South Wales cases are illustrative: *McDade v State Rail Authority* (1985) 10 IR 225 (where a committee after reporting its choice was told to go away, think again, and pick the person who came second) and the classic on the appointment of magistrates, *Macrae v Attorney-General* (1987) 9 NSWLR 268.

Looking at the role of ICAC, Commissioner Temby has discussed the proposition that it should spend more time on going after major matters. He has observed:

I do not decry the importance of major hearings and revelations, but if you

view it objectively there has been much done in the three years we have been there. But I, as Committee members know, reject the proposition that that is a sufficient approach. If you do not fix up systems you will get nowhere. All you do is reveal for the public titillation and guarantee a repeat, if not next year then the year after. It is absolutely absurd if you do not fix up the system.<sup>4</sup>

The other parts of the reference in the Metherell matter will enable him to do something to the system.

In the spirit of his observations I have a few quick suggestions:

- All public positions should be advertised and the selections made on merit: be it a tea-maker, judge, ambassador, member of the SES or whatever.
- Government office holders, in the interests of flexibility, should have a discretion to appoint anyone they want to any position on the public payroll as long as reasons are recorded.
- There should be an equally unfettered right of access by any member of the public to all paperwork relating to all such applications for or appointments to positions on the public payroll: be it for a tea-maker, judge, ambassador, member of the SES or whatever.

Writing of the New South Wales public service from 1786-1859 McMartin says:

The technique of discrediting a government by means of charges of corrupt appointments has a long history and 'jobs for the boys' is a cry that still rings along the corridors of power but the available evidence does not support the contention that efficiency and economy were incompatible with patronage. [p.278]

Governments or departments can face the flak if they want to appoint their mates but I just want to be able to find out about it.

**Peter Wilmhurst**

*Peter Wilmhurst is a Sydney anthropologist and non-practising bureaucrat.*

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## References

1. ICAC Report on Investigation into the Metherell Resignation and Appointment, June 1992 (the 'Report').
2. *Chan v Minister for Immigration and Ethnic Affairs* (1989) 63 ALJR 561.
3. McMartin, A., *Public Servants and Patronage*, Sydney University Press, 1983, p.277.
4. Parliament of New South Wales Committee on the ICAC, *Collation of Evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on General Aspects of the Commission's Operations*, 31.3.92, p.11.