THE ADMINISTRATION OF JUSTICE THE WATCHDOG ROLE OF THE BAR

by The Honourable Athol Moffitt, CMG, QC,
President of the Court of Appeal 1974-1984.

My Book, *A Quarter To Midnight*, makes some reference to the Bar and its independence. The fierce independence and the detachment of the majority of the NSW Bar to which it refers relates to individuals in the discharge of their duty to clients.

An important, but different matter not dealt with, is the independence of the organised Bar. Its function as an organised institutional body is different from that of its members as individuals. The role which Bars in Australia and elsewhere have accepted over the years is a public one, namely, in the public interest to exert their influence, e.g. by expressing opinions or offering criticisms, where necessary publicly, on matters of public importance concerning the administration of justice.

It is a role of the watchdog type in which the status, professional knowledge and independence of the Bar is directed to using its influence, including raising its corporate voice, when action is taken, practices are adopted or incidents occur, concerning the constitution, powers and operations of courts, tribunals, offices and institutions, which interfere with, put at risk or ignore the independence or quality of the administration of justice.

The Bar is better able than the Judiciary to offer public criticisms, for example where there is an intrusion into judicial independence or a breaking down of practices designed to preserve it. For this reason the Bar aids the Judiciary by filling the gap when the Judiciary has difficulty in doing so.

I believe all this is recognised, at least in theory, by the bars of Australia. For reasons I will mention, it is not always easy to match theory effectively with practice. The Bar, its representatives and its members, I suggest, need from time to time to pause in the pursuit of their individual professional duties to consider how effectively and independently this public role of the Bar is being pursued.

If the Bar is to fulfil this role with credibility and hence effectively, it is essential that it be done with independence, in particular with independence from any political party in government or opposition. This places a heavy onus on those who act and speak for the Bar, because it is not always easy to act independently in a way acceptable to the body of the Bar.

Individuals of the Bar, in particular in NSW, are close to politics. Over the last few decades leading Australian and State politicans, Labor and Liberal, have come in inordinate numbers from the NSW Bar. Friendships, party membership, membership of organisations such as the Labor Lawyers Society, patronage of individual members of the Bar by the exercise or the prospect of the exercise of Executive power, increasingly politically orientated, are powerful factors pressing against independence or demonstrations of it. It is difficult to reconcile an independent legal profession with membership of a professional lawyer association which has an allegiance, philosophic or otherwise, to a particular political party, Labor, Liberal or Communist.

A major section of my book dealt with the intrusion of political interests in various ways into "independent" institutions, but particularly into the many institutions and offices concerned with the administration of justice.

While the book is critical of all parties, it deals particularly with intrusions in recent years and hence during the terms of office of present governments into the

independent administration of justice and, in doing so, analyses examples, a number of which have occurred in recent times in NSW.

If the Bar finds what I have written on these matters to be substantially sound, its reaction should be more than just of approving readers. I suggest it should lead the Bar to ponder whether it has been as active, independent and effective as its public role demanded and what should be its reaction to any similar future intrusions into the independence of any of the many offices concerned with the administration of justice or the setting up of ineffective tribunals or commissions.

If the Bar thinks I am wrong, it is open to it to say so, but if it or any of its members does so, surely this must be by thoughtful analysis and discussion of matters on their merits.

What I have said leads me to refer to the review of my book (*Bar News*, Summer 1986) by Mr Finnane, QC.

In referring to or dealing with various matters appearing in the book, there was little discussion of subjects of substance on the merits and in particular the general thrust of the work. Several important subjects which were referred to at some length were disposed of by political type responses.

The reviewer is the one referred to in the book (p.176-7) as the inspector with 'ALP affiliations' appointed to conduct the inquiry into Mr Sinclair's involvement in a private family company. The explanation may be that his active party membership or interest has coloured the review of a book which has as a central theme the intrusion of party political interests, in particular recently in NSW into all manner of institutions and activities.

Thus, where responses to matters in the book apparently critical of present governments have a political rather than an analytic character, there will be some lack of confidence in the review. This is a central theme of the book, namely lack of public confidence in objectivity or independence when political factors appear to intrude.

One example of the reviewer's apparent political responses to an important part of the book was that relating to the NCA. In a substantial chapter there is a detailed analysis, largely based on the constituting Act, of the structure of the Authority, pointing out, with the support of detailed reasoning aided by the author's experience in this field, the deficient and cumbersome powers of the Authority and its absolute imposed secrecy and the absolute political control of it.

What was said was and is an appropriate subject for thoughtful review by lawyers and in particular the Bar in their concern for both public and individual interests in the pursuit of proper and effective justice. Of course, for the book to so criticise the NCA structure was to criticise the ALP which set it up and determined its structure and shut down the effective but embarrassing Costigan operations. This was more so as the book asserted that this was virtually the sole resonse of the ALP in Canberra to rising organised crime and corruption.

As the book points out, the effect of what has been now done is to hide from all including the Opposition, individual members of Parliament, including rank and file members of the ALP, and the public what is being done by a politically controlled and structurally weak body. The book asserts, and I repeat, this is a matter for grave public concern. I interpose that since writing the book, the pattern has spread and the State Crimes Commission has been structured on the same pattern and so has almost all of the same deficiencies.

The review of this part of the book so dealing with the NCA is of some length, but deals not at all with it on its merits. The reviewer says he found this chapter to be the "least satisfactory in the whole book," but does not say why. He only adds that it was repetitious and that the Authority is without precedent in Australia, so caution was understandable and that it will need time to operate effectively. Of course, it has been so structured that it is unlikely that outsiders can ever know how well or badly it is operating.

The approach of Mr Finnane QC in rubbishing this politically inconvenient demonstration of the unsatisfactory structure of the NCA without dealing with its merits is in accordance with the party political line of Mr Young, the Special Minister of State in the House of Representatives, and of Mr Evans in the Senate, already the subject of much press coverage. When asked about it in Parliament, each, by differing "side-swipes," likewise avoided dealing at all with the merits of what had been written of the structure of the NCA.

The Bar reviewer also had his own "side-swipe." He speculated (contrary to the fact, outside the scope of the book and not referred to in it) that I would favour police "verbals" and would be against any reform to prevent them.

Then the comment of the reviewer, in aid of disposing of criticisms of political appointments to politically sensitive but "independent" offices, was the usual political response to criticisms of governments for making such appointments. The critic of a government becomes the one criticised. His criticism, including criticisms that such appointments are made because of expectations that an appointee will not be independent, is twisted, so the critic is criticised for allegedly attacking the integrity of the appointee.

The example which the reviewer took from the book and used for this purpose was the criticism of the Government for its appointment of Mr Temby to the office of Australian Director of Public Prosecutions.

The criticism made in the book was entirely of the Government for making an appointment of a then recently active member of the appointing political party to an office, specially created so it would be seen to be independent and so give public confidence in the independent administration of the prosecution function, in particular in the cases where party political interests are involved. It was made clear that the criticism was only of the Government because it was expressly stated in the book that it was not aserted that in fact Mr Temby was not independent.

Mr Finnane used the same party line as used by Mr Evans to ignore the criticism of the appointing government to twist what was said to, as Mr Finnane put it, an "attack on Mr Temby," to which he was "entitled to take strong exception" (or as Mr Evans put it "extraordinary and disgraceful"). It is noticeable that sudden silence has descended on this line of criticism when a new event involving Mr Temby and Mr Wran intervened. What has occurred is consistent with my analysis

that the expectation in question existed but that it was not fulfilled.

In the end the reviewer did say that all practising barristers should read the book. They should do so to form their own opinion. Those who do will see from the preface that a purpose of the book "is to throw the subjects (dealt with) into the public arena, so they are open to mature thought and vigorous debate and criticism and hopefully action."

I return to where I commenced. If, as my book asserts, there is a serious decline in the independence and quality of the administration of justice in the ways pointed out, it must be a matter of serious concern for the Bar in its role of watchdog on this field. It is fair to say that the NSW Bar does recognise the public role earlier outlined and that in the past it has often spoken out on matters concerning the proper administration of justice.

The real question that the Bar must ask, and do so at intervals, is how effective and independent has it been able to be and in fact been in discharging this public role. The question is a serious one — and more so if it is accepted that I am substantially right in what I have said about intrusions into independence in the administration of justice and what I have said about some commissions on inquiry and various institutions such as the NCA set up by governments.

Having ceased to be an active member of the Bar over a quarter of a century ago, I do not profess in this article directly or indirectly to answer these questions. I do suggest that these are serious questions which serious members of the Bar should ask themselves.

Bar News *sought Finnane QC's comments on Mr Moffitt's article. His response is set out hereunder:*

I was somewhat surprised by the personal tone of this article. I certainly concede that my views are affected in part by my social and political beliefs. They are also affected by my religious beliefs, my family background, my friends, my interests, my work as a barrister, my experience of life and books I have read, including that of the author.

One part of my background which enabled me to review the validity of what he said was my experience as a barrister in the conduct of various types of Inquiries.

Although my review endorsed many of the points made in the book *A Quarter To Midnight*, I was not prepared to agree with his criticisms of the NCA, because such criticism, in my view was premature.

Other views I was unable to accept were:

- the particular vulnerability of the ALP to corruption
- Special Commissions of Inquiry were bad in principle
- the appointment of Mr Ian Temby, an appointment of a type which "is only made because the appointing government expects that on important occasions the party member office holder will not be independent and will not let the party down." I regarded his comments on Mr Temby as being "a most intemperate ill-considered attack."

I stand by the views I previously expressed as to the good and bad points of this book. No doubt those who read the book will be better able than I to judge the fairness of my review.

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