NSW Council for Civil Liberties Annual Dinner 2017

Westfield Plaza, Sydney, 24 November 2017

Return to the CCL: Advocacy and unthinkable challenges

The Hon Michael Kirby AC CMG*

Shared things in common

I am glad to be at this dinner. I insisted that I should pay my own way. This is the rule of this occasion. No freeloaders. We must dig into our pockets and give generously. As the president has pointed out, there are many projects for the CCL just now. I suspect that after Bret Walker SC has delivered his address, there will be still more. The needs for the defence of civil liberties are even greater today than they were in my time. They are greater than they have been for many years.

I am proud to be here with my brother David Kirby. He was secretary of the CCL in the 1960s-70s. As young solicitors we gave up a lot of time to appear *pro bono* in the interests of the CCL and its clients.

I am also glad that David's son, my nephew, Nicolas Kirby, a barrister, is also here.

David Kirby went on to serve as a judge of the Supreme Court of New South Wales. Most of the lawyers who served on the council, when it was established in the 1960s, were later appointed judges. It was here that they met CCL supporters who, as ministers, later had the power to appoint judges. Happy is the land that leavens its judiciary so that top corporate lawyers serve alongside those who have engaged with all types of people, problems and demonstrated a commitment to defending civil liberties for everyone.

Back in the 1960s I attended the monthly meetings of the CCL. These took place in an unpretentious meeting room in Castlereagh Street in the city. In my mind's eye, I can still see the table, the countless papers and the earnest conversations we had at those meetings. Swimming into my memory come the memories of the CCL notables of those days.

They included Robert Hope QC (later my colleague on the Court of Appeal and royal commissioner into espionage issues); Jim Staples (later advocate and judge); Dick Klugman (medical practitioner and later MHR); Bob St John QC (later a Federal Court judge); Marcel Pile QC (later a District Court judge); Tab Lynham (solicitor); Gordon ("Bunter") Johnson (barrister); Associate Professor Ken Buckley (economic historian and long-time CCL Secretary) and his wife Berenice Buckley (Applause); Neville Wran QC (later Premier); Lionel Murphy QC (later federal attorney-general and High Court Judge); and Carolyn Simpson (later Supreme Court judge). There were others. This list suffices to show the distinction of the CCL Committee in those early days.

The importance of advocates

This history also emphasises the central role that leading barristers performed in its work. Pauline Wright has told me that the number of barristers now participating in the CCL has declined. The CCL should start planning a recruitment drive. It could be based on a business plan that tells what happened to the early barrister participants. One is more likely to get appointed to the Bench (if that is desired) if you are seen by people of influence and good opinion. And especially seen doing pro bono work for others. This is actually a strength of our judicial appointments system. No barrister should forget it.

As Bret Walker SC demonstrates so clearly, the most able barristers are often engaged with civil liberties. This is not a political thing. It includes all sides of politics. The ideals of civil liberties and the rule of law are basically conservative notions about access to law and justice. The best advocates for civil liberties are those who have learned black letter legal skills in other fields. As I always told my associates in the Court of Appeal and the High Court of Australia, those lawyers who have a big heart but lack legal skills and techniques can be a menace. The CCL always went to the top in its test cases. Often it needs a top silk to see that there is a case, and one deserving of support preferably, with a prospect of winning. This is why it is vital to attract more barristers into the CCL. The effort should start at once.

Back in 1965, when I was 25, I persuaded the CCL to support a group of Sydney university students who had been arrested in Walgett. With Aboriginal colleagues, they challenged the discriminatory practice at the local cinema. Aboriginals were allowed in the stalls, where the floor was lino and the seats vinyl. But they were not allowed upstairs where the floor was carpet and the seats were velvet. The CCL went for the top. I briefed Gordon Samuels QC (later judge of the Court of Appeal and State Governor) with Malcolm Hardwick (later a QC). We went to Walgett. We had a partial victory. Within

weeks, the discriminatory policy was abandoned. This was not the deep south of the United States. It was not even Queensland. It was Walgett, NSW in 1965. And the CCL was there.

Breaking the silences

In my days at Sydney Law School, not long before the Walgett case, I never questioned the denial of Aboriginal land rights. I never questioned why women took their domicile (to found jurisdiction in a divorce case) from their husband. I never questioned White Australia. I certainly never questioned the brutal criminal laws against gay Australians, including me. No-one questioned these things. We were an unquestioning lot in those days.

The right to swing my arm finishes when my arm hurts another person.

But this was an advantage of the CCL in those days. It did ask the difficult questions. Moreover, it did something about them. It supported test cases. The CCL, including today, needs more test cases. It needs more pro bono lawyers, including barristers to bring those cases. It needs top silks to see the potential for such cases. I get a feeling that such cases are less frequent today. There should be a revival. This is urgent.

The CCL was slow to enter upon the issue of gay rights. All Australians were slow in this area, despite the Kinsey reports of the 1940s; the Wolfenden report of 1957; the English statutory repeal of 1967; and the South Australian repeal of 1974. But here too the CCL played an important role.

A recent book has described the important part the CCL played in finally getting politicians to the barrier over the repeal of criminal laws against gay men in New South Wales.[1] In the 1970s the CCL began appearing for men arrested by handsome young police officers, acting as *agents provocateurs*. Whereas NSW Police Commissioner Delaney said that this was one of Australia's greatest dangers, the CCL began to stand up against the prosecutions. When the New South Wales Parliament dragged the chain and refused to follow Don Dunstan's lead in South Australia of 1974, it was at the CCL dinner in Sydney in 1984 that the powerful and popular Labor Premier, Neville Wran QC, was booed and heckled for his inaction. According to Joseph Chetcuti in his new book on *Sydney's First Gay Mardi Gras*[2] it was the equivalent of this dinner tonight, in 1984, following the widespread arrests at the first LGBT public protest in Kings Cross, that finally strengthened Neville Wran's resolve. He did not want to lose face before his old friends in the CCL. He wanted no repetition of their calumny. Amendments to the Crimes Act of NSW were adopted in 1984.[3] Further reforms followed later.

Within the last month, the journey for equality for gay citizens has continued. On 15 November 2017, the outcome of the postal survey on the enactment of marriage equality for LGBTIQ people was announced. It revealed that 61.6% of the participants in the survey voted 'yes'. Only 38.4% voted 'no'.[4] The process of submitting the legal rights of one group in the Australian community to the votes of the public at large was objectionable. It was contrary to our constitutional tradition. It departs from our constitutional text establishing the Commonwealth of Australia as a representative democracy.

Even at this dinner I was told by a participant that her nephew, struggling to accept his sexuality, felt humiliated by the hostile statements being made against LGBTIQ citizens by churches and others during the postal survey. On a journey to Wollongong last month to give lectures, I saw a number of churches on the Princes Highway carrying the banner 'It's OK to vote "No"'. Well, from the point of view of human rights and equal civil liberties for all in a secular society, I do not believe that it was 'OK to vote No'.

I stick with the Anglicans; but it is not easy.

The fact that two-thirds of marriages in Australia take place in parks and vineyards, not churches, should have persuaded the 'religious' citizens to proper respect for their fellows. Would we tolerate today, in Australia, the claims of religious citizens to refuse basic legal equality to people on the grounds of their race, Aboriginality? Or gender? Or skin colour? Would we consider restoring laws against miscegenation or forbidding mixed race marriages?[5] Religious texts can be found to support a wide range of prejudices. Civil libertarians will resist these. They will uphold the secular principle of the Australian Constitution.[6] There is a right to freedom of religion. But where such beliefs purport to diminish the equal rights of other citizens, the religious freedom must adapt. The right to swing my arm finishes when my arm hurts another person.

It will take a very long time (if ever) for Australian religious institutions to win back the confidence and respect of many citizens, and most LGBT citizens and their families, for their ethical and moral judgments. All but two religious denominations (the Quakers and Uniting) banded together to urge a 'no vote'. The Anglicans found a million dollars to back their campaign, whilst devoting only a miserable five thousand dollars to the cause of domestic violence, in which notions of patriarchy probably contribute. The Roman Catholic Archbishop of Sydney devoted a critically timed Sunday homily to instructing the faithful effectively to vote 'No'. After the wrongs of recent decades a prudent respect for diversity might have been called for. Especially from churches with their central tenet to love one another. I stick with the Anglicans; but it is not easy.

I suspect there will be more work for civil libertarians to undertake in the days ahead, on this score and others. We can take encouragement from the leadership of the CCL on this issue under the presidency of the late John Marsden AM. He was a vigorous, early advocate of equality, for women and for gays.

Thinking the unthinkable

An important lesson of the last six decades in civil liberties in Australia should always be remembered. We are often blind to the departures from civil liberties of our own time. Initially we were blind and silent for those wrongs affecting Australian Aboriginals; for women; for non-white Australians; and for gays. We must ask ourselves what are the issues we do not see today that will seem so obvious thirty, forty, fifty and sixty years from now?

Amongst today's issues will probably be the treatment of refugees; the Australian response to climate change; the approach to global poverty and sustaining foreign aid; the reaction to animal slaughter and cruelty; and the existential dangers of the proliferation of nuclear weapons. We need to be braver and stronger in Australia than we have been of late.

Ironically, the vote in the postal survey suggests that our people are ready for courage and principle. The survey was meant to kill off same- sex marriage. It has done the opposite. The CCL must be more engaged with our country and with the world. The history of the CCL gives us a message of encouragement and strength. We need to think the unthinkable and take on the unwinnable and unpopular causes of liberty. The work of the CCL is not a popularity contest. It is a never ending challenge to engage our better angels.

END NOTES

* Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Honorary Life Member, NSW Council for Civil Liberties (1996).

1 Crimes Act 1900 (NSW), ss 79-81B ("Unnatural Offences").

2 J. Checuti, Sydney's First Gay Mardi Gras – What Brought it on and how it Changed Us (Sydney, February 2018).

3 Crimes Act Amendment Act 1984 (NSW).

4 https://marriagesurvey.abs.gov.au/results/

5 Loving v Virginia 388 US 1 (1967)

6 Australian Constitution, s116.