

## LORD ATKIN: IRISH ROOTS AND THE QUEENSLAND CONNECTION\*

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On 28 November 1867, Mrs Mary Atkin was delivered of a son in Tank Street on North Quay, Brisbane, on the site where the Commonwealth Law Courts now stand. In the register recording the child's birth he is named "James Richard", but he became famous as Dick Atkin, more formally, Lord Atkin of Aberdovey.

As this lecture is the second Atkin Oration, it is appropriate to say something about Lord Atkin to explain why we Queenslanders, who go about our lives 12,000 miles away from where Lord Atkin made his name, find his life a subject for celebration on an annual basis.

Dick Atkin travelled to Wales from Queensland when he was only three years old. He was raised there by his mother and grandmother. He won scholarships that enabled him to study at Oxford University. After graduating from Oxford, he became a barrister. As a junior barrister, he lacked connections in the law and briefs were slow to come. However, Atkin's brilliance and capacity for hard work were eventually recognised. He became a successful barrister and then a great judge; indeed, he was arguably the most influential English judge of the 20th Century.

Young Dick Atkin had returned to Wales because his younger brother, the third boy born to Robert and Mary, was sickly, and it was thought that he would have better prospects in the old country than in the new frontier of Queensland. His father, Robert, had stayed on in Queensland. These were the kind of harsh separations that were typical of attempts to make a life at the edges of the Empire in the 19th Century.

Robert Atkin died in 1872, and so young Dick Atkin never saw his father again after his return to Wales. But the judgments Dick rendered as Lord Atkin of Aberdovey are suffused with the liberal outlook of his parents and a lasting adherence to the cause of the people as opposed to the interests and privileges of the rich and powerful.

The very existence of this lecture series shows that Queensland's lawyers are inordinately proud of Dick Atkin's Queensland origins. It might be thought that, given Atkin's brief time as a Queensland resident, it is unreasonable – even churlish of us – to claim Dick Atkin as one of our own; but we Queenslanders acknowledge no equal when it comes to churlishness. In fairness, the Queensland connection was not all that exiguous; it helped establish Atkin's career at the Bar. By an extraordinary co-incidence, the child who would become Dick Atkin's wife, Lucy Hemmant, was also born in Brisbane – within 12 days and 100 yards of where Dick had been born. Her father, William Hemmant, had been very successful as a merchant in Queensland and returned to England where he built a grand house near Sevenoaks, that he called "Bulimba". Dick Atkin met Lizzie Hemmant while he was at Oxford. It was at "Bulimba" that William Hemmant introduced his son-in-law to Norman Herbert Smith, the eponymous founder

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of Herbert Smith Freehills. It was Smith who sent Atkin his first briefs and put him on the road to success with a steady flow of work<sup>1</sup>.

More broadly, our geographical and historical links with Dick Atkin are but superficial aspects of the deeper, more important, cultural and intellectual connections of the common law tradition. Lord Atkin's judgments remain an inspiration for all who share a commitment to the more humane aspects of the common law inheritance, suffused as those judgments are with an intellectual adherence to the great humanitarian principle of fraternity.

Lord Atkin's famous judgment in *Liversidge v Anderson*<sup>2</sup> was a ringing blow for liberty and equality under the rule of law. And just as importantly for those of us who speak the language Shakespeare spoke, for the integrity of the English language itself.

But it is for his decision in *Donoghue v Stevenson*<sup>3</sup>, delivered in 1932, that Dick Atkin is most celebrated. This great decision, in its proclamation of the neighbour principle, was a masterpiece of the synthesising technique of the common law in the service of notions of compassion and fellow feeling which, though imminent in the common law, have sometimes struggled to be heard.

The post-modernist school of critical legal studies advance the view that the common law has developed only by decisions which deliberately break with the past. They claim Atkin as a hero, in particular because of his observation in another case that when "ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred"<sup>4</sup>.

But, in truth, the genius of Dick Atkin, and indeed the genius of the common law, is to reconcile the doing of justice today and legal continuity with the justice done yesterday. Because if the decisions of today are no more than the erasing of yesterday's errors, like cases will not be decided alike, the idea of equality before the law would be betrayed, and the common law would not be worth much. It certainly would not be worth fighting for.

To the extent that there was something new in the decision in *Donoghue v Stevenson*, it was its articulation of the neighbour principle that unified the cases in which an obligation to exercise reasonable care for others had been held to exist. This principle has its inspiration in the deepest values of the Judeo-Christian ethic that, in many ways, each of us is indeed our brother's keeper. The articulation of the neighbour principle is, it is fair to say, the most eloquent statement by the common law, so vigilant and successful in the protection of liberty and equality, of its commitment to fraternity as an ideal.

Some Australian lawyers are uncomfortable with our ongoing reliance upon English decisions to elucidate the common law as it develops here, but even the most nationalist of them would not be so churlish as to deny the legitimacy of ongoing reference to *Donoghue v Stevenson* as an

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<sup>1</sup> Geoffrey Lewis, *Lord Atkin*, London, Butterworths (1983) at 8-9.

<sup>2</sup> [1942] AC 206.

<sup>3</sup> [1932] AC 562.

<sup>4</sup> *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29.

important legal landmark, or to decline to celebrate the continuity of the legal tradition of all the English speaking peoples. Within that tradition, even though we may not be neighbours, we do remain brothers and sisters. That is certainly something worth celebrating.

With that introduction may I turn to the subject of this evening's lecture.

### **Dr O'Doherty**

The register recording Dick Atkin's birth notes that his father's name was Robert Travers Atkin, and that Robert's birthplace was County Cork, Ireland. The register also records that young Dick Atkin had been delivered by a Dr O'Doherty, who happened to be one of the most eminent surgeons then in practice in Queensland. Dr Kevin Izod O'Doherty had been born in Dublin in 1824. And so Robert Atkin and Dr O'Doherty were both Irishmen, but, as we will see, they were very different kinds of Irishmen. O'Doherty became a close personal friend and political ally of Robert Atkin in the Queensland Parliament where they sat as liberals of the Gladstonian variety. That they were friends was remarkable, to say the least, not only because Robert Atkin was a Protestant and Dr O'Doherty a Catholic at a time when that mattered a lot, but also because Dr O'Doherty was a convicted criminal.

Nineteen years before he delivered young Dick Atkin, Kevin O'Doherty had been convicted by a Dublin jury of "compassing to levy war against Her Majesty, the Queen"<sup>5</sup>. At the time of his conviction, Kevin O'Doherty was a medical student about to sit for his final examinations. He had become involved in the Young Ireland movement, and was arrested because of his co-editorship of the "Irish Tribune". It was for articles published in the "Irish Tribune" that he was charged and convicted.

In passing sentence upon O'Doherty, Mr Justice Crampton observed:

"I have never read any publications more dangerous, more wicked, more clearly designed to invite insurrection, rebellion and revolution than those publications which emanated from your press and of which you have been ascertained by the verdict of your jury to be the guilty publisher."

His Lordship went on to conclude: "Under these circumstances, the Court feels called on to pronounce upon you the sentence that you be transported for ten years."

As was the practice, his Lordship permitted O'Doherty to say a few words. O'Doherty said that:

"he was influenced by but one feeling, and had but one object in view. He felt deeply for the suffering and privations endured by his fellow countrymen and desired by every means consistent with a manly and honourable resistance to put an end to those sufferings."

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<sup>5</sup> For the biographical details of Kevin and Eva O'Doherty, I am indebted to Dr Ross Patrick, "From Convict to Doctor - The Life of Kevin O'Doherty", The Clem Lack Memorial Oration 1981. Delivered at the AMA Hall, Kelvin Grove, Brisbane, 27 March 1981, and to Ross and Heather Patrick, *Exiles Undaunted* (1989, University of Queensland Press).

O'Doherty was convicted only at his third trial. Twice before, juries of his fellow Dubliners had refused to convict him. Significantly, O'Doherty went on to say that, on this third occasion, "out of twelve jurors permitted to be sworn there was not one Roman Catholic". That was history's curse: the fundamental division that made fellow-feeling between the two kinds of Irishmen virtually impossible.

O'Doherty was transported to Van Diemen's Land with other members of the Young Ireland movement. He was granted a Ticket of Leave in 1850 when he began work as a pharmacist in Hobart. In May 1856 he received a pardon, and resumed his medical studies and qualified as a Fellow of the Royal College of Surgeons in Ireland in 1857.

Until the work of Daniel O'Connell bore fruit in 1829, Irish Catholics had suffered from legal disabilities, including their exclusion from parliamentary office, the judiciary, and the executive government. Indeed, they were excluded from holding commissioned rank in the armed forces of the United Kingdom, to which they supplied about a quarter of the personnel who were required to do the anonymous dying on behalf of the Empire. And even where Irish Catholics were not under direct legal disability, they were actively discriminated against in all walks of life except the operation of public houses and horse racing, the legacy of which remains with us today in Australia. Only after O'Connell's successes did the legal profession become open again to the Catholic Irish.

Some Irish Catholics, whether out of genuine admiration for English success in the arts of government or some more base motive, tended to admire the British to craven excess. In the late 19th Century, Mr Justice William Kenny, who tried the famous Childs murder case which attracted the attention of James Joyce in *Ulysses*, was generally regarded as an impartial judge, but he was famously desperate for acceptance among the Protestant Ascendancy. Timothy Healy, the leader of the Dublin Bar at the turn of the Century, said of Justice Kenny: "He would have given anything except his immortal soul to be a Protestant."<sup>6</sup> Kevin O'Doherty was definitely not that sort of Irishman.

O'Doherty was convicted in November 1848. The date itself indicates that his reference, at his sentence, to the sufferings of his fellow countrymen were not to a general grievance over seven hundred years of foreign rule, but to the circumstance that in the years from 1845 a population of approximately eight million people had been reduced to about five million through starvation and emigration to avoid that fate.

The British government at Westminster was pleased to call this event "The Famine". But as George Bernard Shaw later pointed out, one cannot have a famine if there is actually plenty of food to eat, but the government allows it all to be exported.

At this time in Victorian Britain, inspired by the likes of Lord Macaulay, people were congratulating themselves on the British genius for government limited by law. That genius had been given a particularly rigid expression in the checks and balances of the US Constitution which had been so well-designed to prevent bad government that they were apt to prevent

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<sup>6</sup> Cited in A Hardimann, *Joyce in Court: James Joyce and the Law*, Head of Zeus Ltd (2017) at 117-118.

government altogether. The enthusiasm for limited government may readily degenerate into "laissez-faire" and the exclusion of compassion from government. Experience, and not only the experience of the distant past, shows that the ideal of fraternity struggles for practical effect under the US Constitution.

At the time when Kevin O'Doherty came to manhood, the genius of the English speaking peoples for limited government was of no help to the millions of Irish who starved during the famine. It can, I think, be said without fear of contradiction that not one of these wretched folk ever paused, in his or her dying moments, to express their satisfaction that the government at Westminster, by which they were governed, was a government limited by law.

It must be rare, if not indeed unique, in human history that the laws and governance of a country have so catastrophically failed to secure the peace and welfare of a people. It is hardly surprising that many of these people reacted in anger and despair against the very idea of government. In the United States, Patrick Joseph Lee, an Irish immigrant arriving at the Boston Docks, spoke for these people when, as he looked around, he exclaimed: "If there's a government here, I'm agin it."<sup>7</sup> In this country, that burning rage against governmental authority found expression in the myths surrounding the Eureka Stockade and Ned Kelly. In stark contrast, Kevin O'Doherty chose to seek better government than to damn the very idea of government.

It is hardly surprising that many of the Irish came, like Kevin O'Doherty, to the view that only Home Rule could ensure that this sort of cataclysm did not happen again. In pressing the cause of Irish rule for Ireland which gave rise to the offence of which O'Doherty was convicted, he was giving voice to the opinion that skill in the arts of government is of much less importance than identification with the governed, and that identification with the governed can only be guaranteed by ensuring that the government is of and by the people.

### **Coming to Queensland**

Dr O'Doherty married Eva Kelly, who was famous in her own right as the poet, "Eva of the Nation". He was encouraged to come to Queensland by Bishop O'Quinn, with whom he was associated at St Vincent's Hospital in Dublin. O'Quinn enthused Dr O'Doherty with his vision for settling large numbers of struggling Irish families in Queensland where, he hoped, they would become successful farmers. Dr O'Doherty arrived in the Colony about a year after O'Quinn. For four years, O'Doherty lived and practised medicine in Ipswich, then regarded, according to *The Queenslander*<sup>8</sup>, as "the intellectual and industrial capital of the colony". O'Doherty came to Brisbane in 1865 with the "flowing tide of progress".

O'Doherty was elected to the Legislative Assembly in 1867. By then he was one of Brisbane's leading surgeons. He was an early president of the Queensland Medical Society. He was an inspiring exemplar of the ethics of Hippocrates. He gave generously of his time and talent, carrying out extensive work on an honorary basis at Catholic hospitals in Brisbane.

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<sup>7</sup> As we know from his grandson, Emmett Lee. See R E Lee, "In the Public Interest: The Life of Robert Emmett Lee from the FBI to the FCC", (1996) University Press of America at 3.

<sup>8</sup> Saturday, 4 January 1896 at 21.

O'Doherty was no narrow sectarian. He was one of the founding trustees of the Brisbane Grammar School. When the school was opened in 1868 by Governor Blackall, O'Doherty made a speech in which he was critical of the failure to invite both the Catholic and Anglican Bishops of Brisbane. That contretemps didn't stop him serving as a trustee and sending his sons to BGS<sup>9</sup>.

And so, while O'Doherty was in no way a Catholic bigot, he was a staunch defender of the dignity of those who had for centuries been denied that dignity as a matter of State policy. He evidently thought that religion at its best should be a unifying force within the community and a well-spring of generosity and compassion.

While he was in the Legislative Assembly, Dr O'Doherty maintained a very busy private medical practice. Nevertheless, he obviously gave great satisfaction to his constituents as their representative for the seat of North Brisbane because he was not challenged during the period of the great struggle against the "Black Soil Squatters". After that bitter struggle subsided, and when Samuel Griffith emerged as the dominant force in Queensland politics, O'Doherty sat for twelve years in the Legislative Council. In addition, he actively campaigned against the avowedly sectarian attempt by a French priest, Fr Paul Tissot, to solicit the votes of Catholics for a Catholic candidate for Parliament<sup>10</sup>.

I should, perhaps, explain here that when one speaks of the squattocracy in Queensland in the mid-19th century, one is speaking of a very different political grouping than the graziers and farmers who later came to be responsible for producing the agricultural wealth of the State. This latter group tended to be politically conservative, but they were decent honest people.

At the time of separation from New South Wales, the squattocracy who dominated Queensland's politics were speculators who had strong associations with shady moneyed interests in Sydney from whom the taint of the Rum Corps had not entirely lifted. These "Black Soil" squatters, as they were known, were said by Professor Jenks to have "laid claim to some enormous areas which they did not attempt to cultivate."<sup>11</sup> Sir Stephen Roberts says that they "sat down and raided the properties of respectable settlers. [They] may even have been drink-seller[s] with no [live]stock at all; the distinguishing feature of the genus [was] dishonesty and locating [themselves] on ground to which [they] had no title."<sup>12</sup>

### **An unlikely friendship**

As to the possibility, and indeed the necessity, of better government, responsive to the needs of the governed, Robert Atkin was of a like mind with Dr O'Doherty. But there was a division that had to be bridged before these different kinds of Irishmen could work together to build a better government for a better society than they had known in the old country. From his earliest time in the colony, O'Doherty had taken a strong stand against the kind of sectarian division that blighted his homeland. Speaking at a St Patrick's Day Dinner in 1863, he said of the religious strife in Ireland that "no blight more emasculating ever fell upon my country." This speech led

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<sup>9</sup> R&H Patrick, *Exiles Undaunted* at 163.

<sup>10</sup> R&H Patrick, *Exiles Undaunted* at 179.

<sup>11</sup> Jenks, *The History of the Australian Colonies* (Cambridge 1986) at 61.

<sup>12</sup> Roberts, *The Squatting Age in Australia 1835-1847* (Melbourne 1975 reprint) at 61.

to a letter to the *Brisbane Courier* which asserted that O'Doherty had "proved by his own argument that the best use to put an Irishman to was to expatriate him for his country's good."<sup>13</sup>

Robert Atkin was, as I have said, a Protestant from County Cork. I should pause here to say that, ordinarily, this circumstance could have been expected to make for a level of bitterness between Catholic and Protestant that would have made the friendship between Robert Atkin and Kevin O'Doherty impossible. Cork is, of course, the southern-most of the Irish counties. Because of its strategic value by reason of its proximity to France and Spain, the English in the time of Elizabeth I decided to plant a colony in Cork – it was the only county outside Ulster where they did so in such a comprehensive way. As a result, relations between Protestant planters and the dispossessed Catholics were particularly fraught. They were to remain that way well into the 20th Century when Cork was a particular hotbed of Republican sentiment. During the war, the Black and Tans burned Cork city. Michael Collins, the leader of the armed struggle during the war of independence, was a Cork man, as were many other leaders of the rebellion. We can be quite confident that Robert Atkin had been brought up within a most virulent strain of sectarianism. As we will see, his blinkered background did not define him.

Robert Atkin had met Mary Ruck, who was Welsh, in Dublin. They were married in London in 1864. They came to Australia, partly for Robert's health and partly to seek their fortune. After some misadventures in business in Central Queensland, Robert came to Brisbane where he worked as a journalist. The register recording his son's birth describes his occupation as "Editor".

In 1868 Robert Atkin was elected to the Queensland Legislative Assembly as a member for Clermont. He was, like O'Doherty, a liberal of the Gladstonian variety who stood against the Black Soil squattocracy. And in this, he stood four-square with Kevin O'Doherty.

In 1872, when a smallpox epidemic threatened the Colony, O'Doherty introduced the first Public Health Act passed by the Queensland Parliament. The Act established a Central Board of Health with authority over quarantine, vaccination, drainage, sanitation, and food purity. He and the other medical men on the Board campaigned, with little success it must be said, for the powers conferred on the colonial government by the Health Act to be deployed to clean up Brisbane's drains to prevent the recurrence of infectious disease<sup>14</sup>. And so, despite his lack of initial success, O'Doherty initiated in the Parliament the first steps of progressive development as a project of the Parliament of Queensland of the idea that the health of the citizenry was a fundamental responsibility of government.

That idea would, in the next century, see Queensland become the first Australian State, and the first province in the British Empire, to introduce a system of free public hospitals. Dr O'Doherty's idea that the health of the community is a responsibility of the Parliament continued to grow in Queensland with a special zest. A completely free hospital service for in-patients and outpatients without the application of any means test was introduced in Queensland in 1944. In this, Queensland was again a leader.

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<sup>13</sup> R&H Patrick, *Exiles Undaunted* at 134.

<sup>14</sup> R&H Patrick, *Exiles Undaunted* at 183.

While other States followed with the assistance of the Chifley government, with the return of the Menzies government in 1949 all the States except Queensland reinstated public ward charges to increase revenues. Queensland maintained its free hospital system. Even when a conservative government came to power in Queensland, the State retained its free hospital system despite its enormous cost because the new government believed that politically it could not afford to change it<sup>15</sup>.

The legislature in which O'Doherty and Atkin served passed laws for the building and operation of railways. In America, the railways essential for the economic progress and prosperity of the nation were built on the initiative of wealthy individuals like Vanderbilt and Jay Gould. In the Australian colonies, the very different economic circumstances meant that these great works of nation-building could only be undertaken by governments, and active governments at that.

The Queensland legislature in which they served was also active in promoting public education. When O'Doherty's advocacy of State aid for denominational schools was rejected, he refused, in protest, to serve on the Board of Education to which he had been appointed. And in 1873, O'Doherty declined to nominate again for Parliament.

In the longer term, the popular causes for which Robert Atkin and Kevin O'Doherty were advocates together would, when harnessed to the strength of organised labour in the early decades of the 20th century, establish a social democracy that would be the marvel of the English-speaking world, with free public hospitals, free public education, universal adult suffrage, workers' compensation protection, and a system of industrial conciliation and arbitration. And in 1922, near the end of a decade of radical reform, Queensland became the first province in the English-speaking world to abolish the death penalty<sup>16</sup>.

Dr O'Doherty campaigned, without immediate success, for the establishment of a University for Queensland which would include from the outset a preliminary medical school<sup>17</sup>.

Robert Atkin, whose health had never been robust, suffered severe injuries in a fall from a horse. It seems that he never properly recovered. His ill-health forced him to resign from Parliament in March 1872 on the basis that he would be succeeded by the rising barrister Samuel Griffith. Robert Atkin died two months later. He was thirty-two years old.

### **The sectarian problem in the Australian colonies**

It is probably fair to say that, in the mid-19th Century, the divisions between convict and free-settler and Protestant and Catholic were the two principal sources of social tension between the white colonists in Australia. The friendship between Kevin O'Doherty and Robert Atkin rose above these social and sectarian differences. Their friendship, and the achievements that flowed from it, serves as an ongoing reminder that social and cultural differences, that may seem eternal and unbridgeable, can be bridged by education, good will and mutual respect.

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<sup>15</sup> J Bell, "Queensland's Public Hospital System", (1968) vol XXVII, *Public Administration* 39 at 49.

<sup>16</sup> *Criminal Code Amendment Act 1922* (Qld).

<sup>17</sup> R&H Patrick, *Exiles Undaunted* at 186.



That it was possible to be a faithful member of one's Church and to respect the views of those of a different faith, or indeed the views of those of no faith at all, was demonstrated by the very fact of their personal friendship as well as by their public utterances. This was not an easy point to make at that time. Indeed, so far as the sectarian divide was concerned, it was a real force for bad until after the Second World War.

Robert Atkin and Kevin O'Doherty co-founded the avowedly anti-sectarian Hibernian Society of Queensland on 7 September 1871. When O'Doherty stood down as President, he was succeeded by Robert Atkin. The assumption on which the Society was founded was that decent people of goodwill could advance the common good while at the same time remaining faithful to the faith of their fathers.

Shortly after Robert Atkin's death, the Hibernian Society erected a public memorial to his life which still stands at Sandgate. The inscription on the monument describes how Robert Atkin was distinguished in his journalism, and in his work in the legislature, by "large and elevated views, remarkable powers of organisation, and unswerving advocacy of the popular cause, his rare abilities were especially devoted to the promotion of a patriotic union among his countrymen, irrespective of class or creed, combined with a loyal allegiance to the land of their adoption."

It is difficult to imagine that these words were written by anyone other than Kevin O'Doherty in honour of his friend. And one suspects that O'Doherty's unwillingness to continue in the colonial legislature in 1873 was, at least in part, an emotional response to the death of his friend and political ally.

If I might be permitted to pause here for a moment to say that the preservation of that monument to Robert Atkin should be a matter of public interest as a manifestation of our abiding regard for the values of inclusiveness in our community.

On the occasion of the founding of the Hibernian Society, Dr O'Doherty stated that its first aim was to "destroy the most serious of all barriers to a complete solidarity among his countrymen - religious prejudice and party antipathy"<sup>18</sup>. O'Doherty explained that the Society was open to Irishmen of all religions. He expressed his agreement with the basis on which Queensland was governed and his hope that a similar government would be granted to Ireland. "We are here" he said, "thank God, completely independent of that discord among our countrymen at home. Here the British Constitution is not an empty name."

Now it has to be said that he was overly optimistic in stating that Queensland was completely free of sectarian discord. And although it would be well into the next century before O'Doherty's optimism was truly justified, Queensland did break down the sectarian barriers more quickly than some other States. When Murray Gleeson was sworn in as Chief Justice of New South Wales in 1987, Gough Whitlam said to him that "twenty years ago someone with your name couldn't have been appointed to this position." It is significant that by 1967, Queensland had already had three Catholic Chief Justices, Thomas McCawley, Hugh Macrossan and Neil Macrossan.

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<sup>18</sup> R&H Patrick, *Exiles Undaunted* at 19.

Notwithstanding friendships and alliances like those between Robert Atkin and Kevin O'Doherty, Dr O'Doherty's people were, for a long time, a highly visible, and frequently uncomfortable, minority in this country. The Catholic Irish encountered difficulties in finding employment in business and the professions. Difficulties in obtaining employment as solicitors in private law firms led to the over-representation of the children of the Irish in the Crown Law Office and at the Bar. This early over-representation of the Irish at the Bar would reach its ultimate expression in the late 1980s and 1990s when Anthony Mason, Gerard Brennan, Bill Deane, Mary Gaudron, Michael McHugh and John Toohey served together on the High Court.

My generation is the last to have experienced the ugly reality of the sectarian divide between Catholics and Protestants. When I attended St Columba's Convent at Wilston in the late 1950s, we used to engage in taunts with the children from the Wilston State School on the way home. On occasions, when mutual taunts did not seem to be enough, we actually threw stones at each other.

In the 1960s, there were still law firms in Queensland who employed only Catholics or only Protestants. But, almost as if by a miracle, when I began my time as an articled clerk in 1974, the last vestiges of sectarianism had gone. I suppose that they simply couldn't survive the comradeship of the Second World War and the general prosperity that ensued. For more than a hundred and fifty years, however, the possibility of the peaceful integration of the Catholic Irish into the mainstream of Australian society seemed to be distinctly problematic. The process of integration took generations. That is not surprising. The Irish were a difficult people to integrate.

Over the medieval walls of the city of Galway on the west coast of Ireland was a sign: "From the fury of the O'Flaherties, Lord Protect Us." We had O'Flaherties at my school. They were very wild. With the benefit of hindsight, I can understand what the good burghers of Galway were worried about. Apart from being very wild, the O'Flaherties were also tall and attractive to women. I resented them on each of these grounds. But once you got to know them, you realised that Wilston was a better place for having them.

The problems of Irish integration were much greater than the eccentricities of particular families. The Catholic Irish in Australia, a quarter of the population at the outbreak of the First World War, were, at best, ambivalent in their support for England in that war. Under the leadership of Archbishop Daniel Mannix, they were implacably opposed to the two referenda on conscription which the Commonwealth government proposed to support it. The Irish were sullen participants in Empire Day celebrations – if they participated at all. And they were often slow to stand for "God Save The Queen" when that was our National Anthem.

But after a few generations of awkwardness, this once abject people thrived in Australia as they have thrived nowhere else. Today we can look back and see that the contribution of the Irish to the public life of this country is something worth celebrating. Some people in this room may remember their excitement when John Kennedy became the first Irish-Catholic President of the United States in 1960. By that time, Australia had had four Irish-Catholic Prime Ministers:

Scullin, Lyons, Curtin and Chifley. And in the United States, Kennedy remains unique while, in Australia, we have added Keating to the tally. And so, in a socio-cultural sense, O'Doherty's people have been so conspicuously successful that they are now an entirely indistinguishable part of the Australian people.

In the four generations since the passing of Kevin O'Doherty, his people have become so successfully assimilated into the Australian community that it was, for some decades, before the success of multiculturalism, commonplace to describe Australia as an Anglo-Celtic country. I acknowledge that this description was also a nod to our Scots and Welsh immigrants. While we might not now describe our characteristic cultural mix in this way, the fact remains that we are a better place for the migration of these people. Just as we are a better place for each successive wave of immigrants who have enriched our cultural life.

### **O'Doherty's later years**

In 1885, Dr O'Doherty returned to Ireland where for a time he served as MP for North Meath in the House of Commons. In the Imperial Parliament he sat, it has been said, as the representative of "The Irish National Party of Australia"<sup>19</sup>. He sat with Charles Stuart Parnell and supported Gladstone's bill for Home Rule for Ireland. He returned to Australia briefly to get his affairs in order. A banquet was organised in his honour in Brisbane, but it was boycotted by the local establishment.

The boycott is a salutary reminder that an advocate for the cause of the people was not necessarily popular with the people who mattered. The *Brisbane Courier* was strongly anti-Parnell and anti-Home Rule in its editorial policy; it exulted at the snub administered to O'Doherty by the great and the good of Brisbane. And so, even at that early stage, the *Courier* was astute to stake out its honoured place firmly on the wrong side of history.

After the defeat of the Home Rule Bill in Westminster, and Gladstone's resignation as Prime Minister, O'Doherty returned to Australia in 1889. He had been invited to run for a further term in the House of Commons, but declined the honour because, it would seem, of his straitened financial circumstances.

After returning to Australia, O'Doherty served for a time as Secretary to the Board of Health, but he became blind. He eventually died, in penury, at Milton in July 1905. He was eighty years old.

Kevin and Eva O'Doherty lived extraordinary lives, full of endeavour and energy pitted against extraordinary adversity. In the end, their lives were concluded in personal tragedy, even more sad than the untimely death of Robert Atkin. The O'Doherties had four sons and one daughter. Each of their sons died, one by one, in the 1890s. There was no male grandchild to carry on the O'Doherty line, but happily Kevin and Eva are survived today by two great-great-granddaughters who live in the United States<sup>20</sup>.

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<sup>19</sup> *The Queenslander*, 4 January 1896 at 21-22.

<sup>20</sup> R&H Patrick, *Exiles Undaunted* at (ix).

Eva O'Doherty lived until 1910. Her only surviving child, a daughter, and her only grandson lived with her. Her death in 1910 meant that, at least, she was spared the knowledge that this grandson would be killed fighting in the Australian forces in France during the Great War.

### **The lessons**

It might now be said that the story of Australia's Irish is a story of a different time and of a people that no longer exist. And that would be true, in that Irish Australians are no longer a visibly distinct social grouping. That this is so speaks to Australia's success as a melting pot, the world's most successful multi-cultural nation. But there is also no doubt that some of us in this room are who we are because of the courage, the ambitions and the achievements of Kevin O'Doherty's people.

The American historian, Henry Adams, himself the grandson and great-grandson of men who had been President of the United States, writing at the beginning of the 20th century, described politics as "the systematic organisation of hatred"<sup>21</sup>. The history of Queensland, and indeed Australia, from the late 19th century to the early 20th century showed that Adams was unduly cynical about democratic politics. In the context of the politics of the British Empire in the 19th and early 20th century, no hatreds had been as thoroughly organised as the sectarian divide between the Irish of the Orange and those of the Green.

British Imperial policy promoting the policies of plantation and division since the 16th century was, as Conor Cruise O'Brien said, "one of the worst things one gentle people has ever done to another". To this day the sectarian division of the Irish blights the lives of those who live in the six counties. But even the most well organised of hatreds can be disrupted, and the example of Robert Atkin and Kevin O'Doherty shows that the most powerful disruptive agent is friendship – and, in its more abstract sense, fraternity – or as Robert Atkin's son Dick would put it, "neighbourliness".

The contribution made by Robert Atkin's kind of Irishmen, the decent, thoughtful Protestants, who saw the oppression of the majority of their countrymen in their own land as an injustice that had to be righted at home and not exported abroad, has been somewhat overshadowed by the numbers and the noise of Kevin O'Doherty's Irish. But the alliance of these decent men claimed this country for ordinary people from the twin evils of the British Imperial policy of divide and rule, and the grasping land jobbery of the Bunyip aristocracy in their new home.

Dr Samuel Johnson said that "the Irish are an honest race, for they seldom speak well of one another." It will be obvious that I have enjoyed very much this evening's opportunity to speak well of the Irish. But, in doing so, I have also spoken honestly. Under the leadership of the O'Doherties and the Atkins, both kinds of Irish embraced the practice of the value of fraternity that make us one people dedicated to doing justice to each other within our new nation.

The truly revolutionary value of fraternity has flourished in Australia as a powerful antidote to the individualism which, in its coldest version, sees society as nothing more than a chaos of

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<sup>21</sup> James Traub, *John Quincy Adams: Militant Spirit*, Basic Books (2016) at 536.

social atoms, free and equal to be sure, but bound only by prudent bargains between individuals made ever more anxious by the stresses of living in a stressful environment.

In only a couple of generations the alliance of Protestant liberals like Robert Atkin and the Catholic Irish like Kevin O'Doherty would, without bloodshed, create governments of and by ordinary working men and women that, in turn, promoted the growth of a society that became the envy of the world.

The parliamentary achievements of these early Queenslanders are of abiding importance to us for two reasons. First, they show that even the most virulent cultural divisions can be defeated in this most lucky country. And secondly, those achievements are strong evidence to counter the fashionable cynicism about politics and the democratic process.

Disillusionment with the political process among our younger people is a special concern, as I know from my own experience. Each year the brilliant young lawyers who act as associates to the judges, almost without exception, express their ambition to work in the field of human rights. That usually means working within the judicial process to improve the lives of the less fortunate of our fellow citizens. In this regard, none of my associates has ever expressed an ambition to enter politics.

Given the brutality of the political process, the polarisation of views that forecloses reasonable debate and respectful disagreement, and the eye-crossing banality of so much of what passes for political debate under the pressure of the 24-hour news cycle, one can understand the attractions of arguing for one's rights in the open, polite and reasonable atmosphere of a court where decisions must be justified in public by comprehensive and coherent reasons. But the attractions of openness, fairness and rationality offered by the judicial process cannot alter the reality that the grant of the positive rights that make life worthwhile is necessarily the consequence of the exercise of the sovereign prerogative of choice.

One cannot escape the truth that the positive rights that are the concrete expression of the great human and political principle of fraternity are possible only if taxpayers are willing to pay for them. Even the very greatest of judges, even a Lord Atkin, cannot hope to give full justice to the expression of the value of fraternity in our public life. Judges can't impose or spend the taxes that raise the money to educate our children, to care for our sick and aged or the veterans of our nation's wars, or to build the infrastructure necessary to our prosperity, or to conserve our environment. Within our constitutional tradition it is Parliament that provides the process whereby that willingness is expressed. As E G Whitlam said<sup>22</sup>:

"Parliament has been our great liberating force ... There is no freedom without equality. To redistribute and equalise liberty has been one of the principal functions of Parliament. Parliament alone can give equality of opportunity and thereby increase liberty for all. If we are to have economic equality of opportunity, which is the next stage in the advance of liberty, we must have effective parliamentary government and, accordingly, dispense with fetters on

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<sup>22</sup> Cited in Andrew Moore, "A mace to swat two blowflies: interpreting the *Fitzpatrick and Browne* privilege case", (2009) 55 *Australian Journal of Politics and History* at 32, 33.

Parliament rather than contrive them."

### **Conclusion**

In the end, cynicism about politics is an expression of a lack of faith in our fellow citizens. It comes readily to those who have no idea of history. If we know nothing of the heroes of the past, we can be forgiven for believing that the mediocrity of the present is our destiny.

Those familiar with Australian history, with the story of Robert Atkin and Kevin O'Doherty, for example, know that cynicism about the human capacity for fraternity and what our parliaments can achieve to give effect to that ideal is an unjustifiable form of misanthropy that we do not need and cannot afford.

Thank you for your attention.