

high court changes

ceremonial sitting. On 5 February 1987 the Right Honourable Sir Harry Gibbs retired as Chief Justice of Australia at a ceremonial sitting of the High Court. The Attorney-General, Mr Lionel Bowen, speaking at the ceremony, drew attention to Sir Harry's contributions to successive Australian Legal Conventions.

One of the features of your period as Chief Justice has been the biennial address you have given to the Australian Legal Conventions on the state of the Australian judiciary. These have generated considerable interest and debate. The subjects have ranged from purely legal subjects to those which are or should be in the mainstream of political debate. While many people may not have agreed with all Your Honour had had to say, I think it is useful to have had these issues ventilated.

He also pointed to the pressures placed on the court during the 'Murphy affair'.

During the last years of Your Honour's term as Chief Justice the Court was placed under considerable strain as a result of accusations concerning the conduct of a Judge of the Court. These accusations were such that it was inappropriate for the Court itself to deal with them, a point acknowledged by the Court itself at the time. It is equally inappropriate for Parliament acting unilaterally to deal with such accusations other than in accordance with the procedures established by the Constitution. It is central to a system of justice that where accused of criminal behaviour, judges of any court receive the same equal treatment as anybody else before the law.

criminal law contribution. Mr Roger Gyles, QC, President of the Australian Bar Association and the New South Wales Bar Association drew special attention to Sir Harry's contribution to the development of the criminal law.

It will be presumptuous of me and, in any event premature, to endeavour to assess Your Honour's lasting contribution to the development of the law in this country. However, I venture the view that Your Honour's contribution to the criminal law has been outstanding, both in the substance of Your Honour's decisions and in your willingness that the Court should play its proper role in that great field of law.

Mr I Callinan, QC, President of the Queensland Bar Association, also echoed this theme.

The first Chief Justice of this Court was justly famous as an expert on the criminal law and on penal statutes in particular. It has not always been appreciated that Your Honour, in that great tradition, has maintained a similar interest and owns a similar knowledge. Those who care to look will find in the law reports many illuminating and penetrating dissertations on the criminal law.

interpretation. He also drew attention to problems of statutory interpretation, a matter that has excited much interest over the years Sir Harry has been on the Court.

One of your special strengths has always been as an interpreter of statutes. If there has been one great certainty in the law in this country from the beginning of the last war it is that we will have more legislation, that it will be more complex and correspondingly, less intelligible but Your Honour seems to have had a unique ability to find meaning in and give sense to the most difficult and obdurate problems of statutory construction.

reply. Sir Harry Gibbs replied, in part:

During the time of my membership of this Court there have been great changes, not only in society generally,

but also affecting the Court. Most recent and, perhaps most important, have been the abolition of all appeals to the Court as of right, and the removal of the right of appeal from Australian courts to the Privy Council.

Besides that, the Court has moved to this fine building in Canberra and so no longer sits regularly in all the capital cities of the States. The Court now has the power to control its own finances and administer its own affairs. A compulsory retiring age has been introduced and after Sir Anthony Mason has been sworn in as Chief Justice tomorrow, all the members of the Court will be obliged to retire at the age of 70.

Some of these measures have, in theory, enhanced the status of the Court. I say in theory, because its status was already high before they were taken. There can, however, be no doubt that in fact as well as in theory the jurisdiction and organisation of the Court have undergone changes more significant than at any time since Federation. It is impossible to predict the effect which all these changes in combination will have on the working of the Court for reforms, beneficial in themselves, not infrequently have consequences which those who initiated them could not foresee. I hope that none of the changes will reduce the importance of the role of the Court as the final appellate tribunal in all matters of general law.

He noted that, while the High Court's constitutional judgments are of very great importance, they form a comparatively small part of the Court's work.

The standing which the Court has acquired has been very much due to its achievements in the field of the general law. There has recently been a considerable increase in the volume of cases involving administrative law and the interpretation of statutes.

Finally, on the age-old question of 'strict construction', Sir Harry said:

No one seriously suggests that there should be a rigid adherence to the very words of previous judgments or that statutes should be construed with unthinking literalism and everyone recognises that the law must and does develop to meet the needs of the changing times. But in that development, principle and logic and precedent have their proper place and a Judge would fail to perform a judicial function if he or she deserted all three and gave a decision based simply on individual notions of right and wrong. Stability and certainty in the law are virtues, particularly in unsettled times.

new chief justice. The following day the Honourable Sir Anthony Mason was sworn in as Chief Justice and Justices Toohey and Gaudron were also sworn in. Sir Anthony, in his address from the Bench, provided some thoughts on the question of 'strict construction':

Our courts have an obligation to shape principles of law that are suited to the conditions and circumstances of Australian society and lead to decisions that are just and fair. In discharging that obligation judges do not exercise unlimited freedom of choice or the freedom of choice that is inherent in the legislative and the political process. For the most part in this Court we are engaged in the activity of interpreting the Constitution and, more commonly, statutes. Although interpretation involves creative elements, judicial creativity designed to promote the interests of justice is exercised within a general framework that takes account of the express provisions, the purpose and the policy of the statute. And even in those cases where the rules in question are common law or judge-made rules, judicial freedom of choice is restrained by our efforts to ensure that judicial development of the law, though responding dynamically to the needs of society, is principled, orderly and evolutionary in character. There is an expectation

that the rules by which conduct is to be judged should be reasonably ascertainable or predicable, as well as yielding just and fair results.

review of commonwealth criminal law

review. Sir Harry Gibbs has agreed to head an expanded body to review the Commonwealth criminal law. The review body will consist of Sir Harry, Mr Justice Ray Watson and Mr Andrew Menzies, a former Deputy Secretary of the Attorney-General's Department.

background. On 24 June 1984 Senator Gareth Evans, then Attorney-General, appointed Mr Justice Watson to conduct a review examining the possibility of consolidating and rationalising the criminal laws of the Commonwealth. In July 1986, Mr Justice Watson presented an initial report to the Attorney-General and since that date has been examining the provisions of Commonwealth Acts which may need to be amended or repealed if the Commonwealth criminal law is consolidated.

criminal law ad hoc. The present Attorney-General, Mr Bowen, said when appointing Sir Harry Gibbs

The work done by Mr Justice Watson has been of great value and has raised substantial legal policy issues which must be resolved. These policy issues are attributable to the fact that at Federation the Commonwealth was not given a general criminal law power. The Commonwealth criminal law has accordingly grown on an ad hoc basis incidental to the exercise of other Commonwealth heads of power, and is therefore scattered throughout Acts of the Commonwealth Parliament.

Included in the issues raised by Mr Justice Watson's report are questions related to the scope of the Commonwealth criminal laws and the extent to which, if at all,

there is a need to deal with procedural and evidentiary matters.

In the light of those and other issues, the Attorney-General decided that the review of the Commonwealth criminal law should be expanded by adding to it other persons with a wide range of experience on different aspects of the criminal law. The Attorney-General said he was particularly pleased that Sir Harry Gibbs had agreed to join the Review. He would bring to the Review unparalleled legal skill and experience relevant not only to the criminal laws of the Commonwealth but also to those of the States and Territories.

interview. In an interview reported in *The Age*, Sir Harry said that he was starting out with an open mind, and no preconceived ideas of what the review should do, or particular reforms it might recommend.

Sir Harry also said that the inquiry would examine the procedure of conducting federal trials according to State laws where they were tried, and look at the allied question whether there ought to be a uniform Commonwealth evidence law, rather than the variations between the States on the admissibility of evidence and procedures that exist now.

overlap with alrc's references. Some of the Committee's work will coincide with the ALRC's work on evidence and the law of sentencing, both due to be completed soon. In the area of criminal procedure, there are several anomalies that will be reviewed, notably in regard to charges that can be laid, and sentences that are available, particularly when crimes cross State boundaries. If people receive the same sentence in different States, the effective jail sentence can vary enormously, depending on remissions. Consultations between the ALRC and the Gibbs group have already started.