

Concluding Remarks

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

I hope that you will agree that we have had a stimulating conference. We have discussed a number of important issues that relate to the possible improvement of the working of our constitutional system. All of these issues warrant close and continuing consideration.

The questions raised by Mr Justice Callinan are perhaps more appropriate to be considered by judges than by the general community. He discussed some problems created by the law of precedent, and in particular the paradox that the conservative view that precedent should be followed entrenches the activist decisions of those judges who, sometimes by a majority, have already disregarded existing precedent. That is a serious matter for judicial consideration.

Three constitutional reforms were, in particular, suggested. Professor Walker and Mr Peter Reith advanced a strong and persuasive case for the introduction of citizen initiated referenda. The Honourable Len King put forward arguments to the contrary, some of which were demolished by Professor Walker as élitist and undemocratic. The nagging fear of the opponents of CIR is that vested interests may throw their weight and their money behind proposals which are superficially attractive, but which would infringe the legitimate interests of a section of the public or would be deleterious to the public interest. These fears may be groundless. It is hard to oppose a CIR limited to the repeal of existing legislation, and it is attractive to think that CIR would provide a useful balance to the power of the Executive in any State which had a unicameral legislature. The debate on this subject generally could usefully be pursued.

Professor Walker, however, went a bridge too far when he acceded to the suggestion that High Court Justices could be subject to recall. Nothing would be more destructive of judicial independence than the possibility that a judge might be hounded out of office by a media campaign based, for example, on the judge's alleged leniency in dealing with criminal appeals.

The question whether it would be desirable to retain an upper House was examined in relation to South Australia, but it is a general issue. The Honourable Len King favoured a unicameral legislature, but the Honourable Trevor Griffin saw no reason to make a change of that kind. Mr King suggested that Queensland and New Zealand had not suffered from the abolition of an upper House. I am not sure that I agree. The harmful effects of undesirable constitutional change can be slow and imperceptible. There have been instances in Queensland when a government has rushed legislation through the Legislative Assembly overnight, allowing no opportunity for the public to voice its legitimate objections. In New Zealand, as I understand it, it was a wish to curb the power which the Executive often has to dominate a unicameral Parliament that led to the adoption of an electoral system which makes it virtually impossible for any party to obtain a majority.

I understand the frustration of governments when an upper House fails to pass perfectly sound legislation, and does so purely for political reasons, but an upper House, besides providing an opportunity to revise and amend legislation, usually also operates as a useful check on the growing power of the Executive.

Senator Minchin put forward an unanswerable case in favour of voluntary voting. We are so used to the fact that voting in Australia is compulsory, that we tend to forget that Australia is one of the very few countries whose laws make it obligatory to vote. Unfortunately, Senator Minchin was not optimistic that this unnecessary infringement of our liberties will be removed.

In a lively address, Julian Leeser brought us up to date on the republican debate, showing that the

republicans remain in a state of muddled division. No one has yet devised, nor is anyone likely to devise, a republican Constitution for Australia that would work as well as our present Constitution.

Dr Partington told us the sorry story of the Hindmarsh Island bridge. One can hardly doubt that a blatant and unconvincing fabrication of Aboriginal tradition was accepted as true, or possibly true, by persons whom we would have expected to be more perceptive, or less ideologically committed, than proved to be the case.

Mr Windschuttle, in the course of a thoughtful discussion of indigenous land rights, gave examples of other cases in which authors have, in many instances, fallen into error, or resorted to fabrication, in an attempt to advance the Aboriginal cause – to place the best possible interpretation on the motives of those involved.

One serious problem that I see with the *Mabo* judgment is that it should never have dealt with the question of Aboriginal lands, since the land in question in that case was on the Island of Mer, whose inhabitants have a culture quite different from that of the Aboriginal peoples of mainland Australia. Further, the Court brushed aside, as discriminatory, the principle that some indigenous notions of land rights are too unlike those recognised by the common law to be able to be given effect by the common law. That of course does not mean that indigenous land rights cannot be recognised by statute, but the existing native lands legislation can hardly be regarded as desirable or appropriate.

The nation has wasted a great deal of money, and unnecessary social division has been caused, by mistaken policies which governments have been led to adopt by erroneous theories and misleading propaganda. Some Aborigines are in great need of help, and the Government has the difficult task of meeting their needs more rationally, less wastefully and with less rancour than has so far been the case.

Finally, we had an interesting historical retrospect. Professor Howell and Professor Ayres gave us accounts, in the one case, of South Australia's early unhappy experience of Federation – an unhappiness that perhaps persists – and in the other case of a time when the High Court was unfortunately divided by the mutual antipathies of some of the judges.

I am very grateful to the Board of the Society for the gifts which they gave me, and which I value greatly. I have enjoyed my association with the Society and its members, and hope that we have done something of value. I am, however, unworthy of the gifts, when the credit should go to John and Nancy Stone, without whose efforts the Society could not have continued to function successfully for over a decade. I thank them for their efforts, and the members of the Board for their cooperation, and you all for your support of the Society.