I INTRODUCTION

On 7 November 2016 the Australian Senate, by 33 votes to 29, defeated a motion that the Plebiscite (Same-Sex Marriage) Bill 2016 (Cth) be given a second reading. Prime Minister Malcolm Turnbull declared that the Government had no intention to take other measures on the issue. In this article, delivered as an address to mark the centenary of the birth in 1917 of the Right Honourable Sir Harry Gibbs (Chief Justice of the High Court of Australia 1981-87 and Justice 1970-81) the author outlines the career of Gibbs CJ, including various personal interactions. He suggests some of the chief legal values that Sir Harry Gibbs revealed during his service. He states that these included a deep commitment to proceeding properly in matters involving ‘constitutional issues’. He then analyses some of the problems perceived in the Government’s proposed plebiscite on same-sex marriage. On the basis of Sir Harry Gibbs’s commitment to proper procedures in constitutional matters, illustrated by his methodology and decisions in the Territorial Senators Cases (1975 and 1978) and elsewhere, the author suggests that he would have resisted the constitutionally unnecessary conduct of a plebiscite. It was not required following the decision of the High Court in 2013 upholding federal legislative power in the matter. He raises the question whether, given such clear legislative power, a plebiscite would fall within any of the incidental powers belonging to the Parliament or be inconsistent with representative democracy. Defeat in the Senate has obviated consideration of such questions. However the matter illustrates again that the way constitutional issues are approached will sometimes be as important as the substance of the issues involved. Just as Sir Harry Gibbs taught.

II COMMON LAW VALUES AND PROCEDURES

Sir Harry Gibbs was an alumnus of the University of Queensland. His was a life of duty and service. After 11 years as a Justice of the High Court of Australia (1970-81), he was elevated in 1981 to be the eighth person and second Queenslander to serve as Chief Justice of Australia (1981-87).1 He brought to the office erudition in the law, much experience as a barrister and judge, and a sharpness of mind and gifts of clear

---

1 The Sir Harry Gibbs Memorial Lecture, TC Beirne School of Law, University of Queensland, 12 September 2016. The lecture has been updated to the time of publication.


expression\textsuperscript{2} that ensure that his opinions are still read to enlighten contemporary Australians on the law, especially constitutional law.

Gibbs knew the criticism often voiced about legal systems of the common law, namely that they are so concerned about procedural fairness that they sometimes gave insufficient attention to the substance of the law which they insist should be administered fairly, with natural justice and due process. He also knew the answer that the common law typically gives to those who criticise it on this ground. This is that, if legal steps are taken with care for procedural justice, it is much more likely that substantive justice will emerge.

Gibbs had a well-developed sense of fairness and justice.\textsuperscript{3} His judicial reasons reflect an old fashioned concern to demonstrate to the losing party that relevant arguments have been considered. On several issues he and I had different viewpoints. Because of our respective life experiences, he was probably less exercised by the law’s burdens on minorities. Nevertheless, I am proud to say that we enjoyed what was ultimately a firm friendship, based on a number of shared values. Our views on at least one cause (whether Australia should become a republic) was deeply affected, for each of us, by what we saw as the constitutionally illegitimate way in which the issue had been promoted before the Australian people by its principal protagonists. At the time, those protagonists were chiefly the Hon Paul Keating MP, Prime Minister of Australia, and a young, gifted lawyer Malcolm Turnbull, Chairman of the Republic Advisory Committee, later himself to rise to the office of Prime Minister.

In this memorial lecture, I seek to demonstrate the well-springs from which Gibbs derived his deep commitment to proceeding fairly in all things, but particularly in matters that could be described, in a general sense, as constitutional. I intend to lay the ground for these propositions by revisiting\textsuperscript{4} Gibbs’s impressive legal career.\textsuperscript{5} That career shows how natural it was that his values should be prudent and cautious; but also how those values would often reflect the wisdom of the common law: including its strong attachment to following the path of fair procedures. It was this latter feature of his character that I wish to emphasise. I shall seek to derive from it some conclusions about how, today, Sir Harry Gibbs might have approached an issue that, in a broad sense, would be classified as constitutional: I refer to whether a plebiscite of the Australian electors could or should be conducted before the Federal Parliament proceeded to consider amendments to the \textit{Marriage Act} 1961 (Cth), to open up the legal status of marriage to two competent adults of the same sex on a basis equal to the present provisions that confine that status to opposite sex couples.\textsuperscript{6}

\section*{III A CELEBRATED CAREER}

Harry Talbot Gibbs was born on 7 February 1917 in Ipswich. This article is therefore offered on the eve of the centenary of his birth. His birth took place at a time when the First World War was reaching its climax, with no certainty as to its outcome. On a per capita basis, the new Australian Commonwealth was making a huge

\begin{thebibliography}{9}
\bibitem{2} The qualities emphasised by D F Jackson and Joan Priest, ‘Gibbs, Harry Talbott’, in A R Blackshield, G Williams and M Coper (eds), \textit{Oxford Companion to the High Court of Australia} (OUP, Melbourne, 2001) 300.
\bibitem{3} Ibid.
\bibitem{4} The author previously described the career of Sir Harry Gibbs in M D Kirby, ‘Recollections of Sir Harry Gibbs’, \textit{Quadrant}, September 2005.
\bibitem{5} Although named ‘Harry’, Gibbs CJ was universally known to his friends as ‘Bill’.
\bibitem{6} \textit{Marriage Act} 1961 (Cth) s 5.
\end{thebibliography}
contribution to the British cause: tested near Gallipoli, Turkey and continued with enormous losses in Flanders and the Somme in France. So great were the Australian losses that a measure of disillusionment, compounded with grief, began to affect the attitudes of the Australian population.

In 1916 and 1917, with an aim to overcome the effects of this disillusionment on recruitment, the federal government of W M Hughes decided to hold a plebiscite of the electors, believing that patriotism would cause the country to rally to the flag and express approval for the imposition of compulsory military service overseas. The plebiscite was constitutionally unnecessary. It was not binding on the Federal Parliament which authorised it. Constitutional power for federal legislation with respect to defence, certainly in wartime, extended to measures necessary for the defence of the Commonwealth, both at home and abroad. Each of the two plebiscites that occurred, first in 1916 and then in 1917, were unexpectedly defeated. The electors of Australia withheld their approval of compulsory overseas foreign military service.

Some of the opposition to the plebiscites was voiced by sections of the Irish Australian community and by church leaders. The result undoubtedly shocked the government. So much so that, when the first plebiscite was rejected, the second attempt was made, presumably in the belief that the first vote had been a momentary aberration. However, the repetition of the same outcome with an even greater negative vote fed deep divisions in the Australian community over the suggested disloyalty of sections of the population towards the imperial British cause that the government saw as central to Australia’s safety and survival. Because of the role of church leaders in opposing the plebiscite, a sectarian division arose. This was to survive well into the 1950s, as the young Bill Gibbs would have known, growing up in Ipswich in the immediate aftermath of the plebiscite, further losses in the War and the disillusionment that accompanied Australia’s economic downturn during the post-war decade.

Gibbs was educated at Ipswich Grammar School. He was the son of Harry Victor Gibbs, a prominent solicitor. From his mother, Flora Talbot, he derived his middle name. Matriculating in the early 1930s, he joined Emmanuel College at the University of Queensland where he was elected vice-president of the student body. His outstanding intellectual gifts and personal qualities also won him the presidencies of the Law Students’ Society and the University Students’ Union. Mischievously, he noticed that there was no express requirement that the president of the Women’s Union for female students of the University had to be a woman. He was duly elected to that office also. He resigned it soon after the poll was declared, possibly under the pressure of his future wife, Muriel Dunn, whom he met at law school. In 1937 he was graduated Bachelor of Arts with First Class Honours in English literature. In 1939 he was one of the first students to be graduated Bachelor of Laws, also with First Class Honours.

The same sharp eye for legal rules led Gibbs to win an order from the Full Court of the Supreme Court of Queensland remitting fees otherwise payable by him on his admission to the Queensland Bar by reason of his outstanding undergraduate

---

7  *Australian Constitution* s 51(vi).
8  The two plebiscites on compulsory military service overseas occurred on 28 October 1916 and 20 December 1917. Both failed. As with voting in elections at the time, voting was optional. It did not become compulsory until 1924.
9  The life history recorded here derives from Joan Priest, *Sir Harry Gibbs. Without Fear or Favour* (Scribblers, 1995).
He was never to lose this talent in, and fascination with, the detail of the law. He knew that in the law’s detail lay the answers to many contested problems.

Gibbs’s graduation at University coincided with the outbreak of the Second World War. He enlisted immediately and served the entire duration of the War in the Second Australian Imperial Force. His talents were mobilised after his service in Papua New Guinea to help plan the post-war administration of that territory. He married Muriel Dunn in November 1944. They produced three daughters and a son. At his memorial service one of his daughters, Margaret, spoke for the family about Gibbs as a loving husband, father and grandfather and a man who was always true to his word.

After demobilisation, Gibbs resumed his practice as a barrister. In 1951 he joined the Queensland Barristers’ Board. He served on the Faculty of Law of the University of Queensland as a part-time lecturer from 1948 to 1967, principally teaching the law of evidence. He took silk in 1957. He argued _Dennis Hotels v Victoria_, a challenge that extended to Queensland’s liquor licensing laws on the ground that they constituted ‘duties of excise’ under s 90 of the _Australian Constitution_. His practice at the Bar was flourishing when, in 1961, at the age of 44, he was appointed a judge of the Supreme Court of Queensland.

Gibbs’s ability in both trial and appellate work suggested the likelihood of further judicial advancement. However, he was passed over in 1966 when the office of Chief Justice of Queensland fell vacant. Queensland’s loss of his talent in this respect was to prove the Commonwealth’s gain. In 1967 he was appointed a judge of the Federal Court of Bankruptcy and concurrently a judge of the Supreme Court of the Australian Capital Territory. For some, this move appeared to be a judicial siding. However, his manifest talent and positioning soon won him promotion to the High Court of Australia in 1970, filling the vacancy that followed the retirement of another fine jurist, Sir Frank Kitto.

In moving to federal judicial office, Gibbs was not relying only on promotion to the High Court. Although the bankruptcy jurisdiction was a narrow and specialised one, successive governments had begun to talk of the creation (as the Constitution contemplated) of a federal superior court below the High Court. Gibbs moved his residence from Brisbane to Sydney. The Commonwealth Industrial Court (later the Australian Industrial Court) became the nucleus that was to give rise to the Federal Court of Australia in 1976. However, by that time Gibbs was well and truly established as a Justice of the High Court of Australia under Barwick CJ, a man of huge talent as a legal advocate and with great determination to push the law and the Court in directions that Gibbs would sometimes find challenging.

Although Gibbs would probably have shared many of Barwick’s attitudes about the Whitlam Government that held office (1972-75) soon after his own arrival at the Court, his personal correctness and the highly traditional attitudes he took towards political neutrality held him back from the provision of legal advice to the Governor-General, Sir John Kerr, during the crisis over the vote of Supply in November 1975. Gibbs might have had his inclinations and values. However, those predilections would not have extended to providing oral or written advice on political questions,

---


11 _Dennis Hotels Ltd v Victoria_ (1960) 104 CLR 529; (1961) 104 CLR 621 (PC).

12 _Australian Constitution_ s 71. See also s 73(ii) and s 77(i) and (ii).
particularly as these might subsequently have come before the High Court as justiciable issues.13

When Barwick retired as Chief Justice in 1981, Gibbs was the senior Justice in office. He moved seamlessly into the position of Chief Justice. This meant that he inherited the painful crisis that soon engulfed the Court following criminal charges brought against a serving Justice, Lionel Murphy. By this time, I had myself been appointed to federal office, as a Deputy President of the Australian Conciliation and Arbitration Commission. I was quickly seconded to chair the new Australian Law Reform Commission (ALRC). When I took up that post in 1975, Gibbs sought me out to offer me lunch, friendship and advice about the modalities of institutional law reform.

Gibbs proved much more enthusiastic for law reform than I had expected. His enthusiasms were specific. Like most Queenslanders, he was an avid admirer of the Griffith Criminal Code of 1897. He sought to persuade me of the merits of a federal criminal code, based on the Queensland model. When eventually I arrived at the High Court, many years later, I voiced a doubt which he had expressed to me, concerning the ability of lawyers from non Code states to interpret the Code in a proper way.14 On a number of occasions during my service on the ALRC, and his in the High Court, we met and talked of law reform. As the years went on, our conversations were sometimes strained by my well-known friendship with Justice Murphy, whose ordeal was a great burden for himself and for those who admired him.

When, subsequently, that painful time was consigned to history and Gibbs had retired from the High Court, the Justices, including myself, welcomed him to a dinner in Sydney in 1997 to celebrate his 80th birthday. He made a particular point, at that function, to speak with sincerity of the pain that Lionel Murphy had felt as he faced accusations, two criminal trials and a parliamentary inquiry, stood over at the time of his death. Gibbs explained that he saw his duty as Chief Justice as doing what he could, consistent with Murphy’s holding the office of a Justice, to preserve the reputation and integrity of the Court. Murphy’s friends, and certainly Lionel Murphy himself, felt that Gibbs and his colleagues could have been more insistent at the time on his entitlement to the presumption of innocence: which Murphy always protested. However, at his 80th birthday function, Gibbs emphasised that he had done all in his power to procure the judicial reasons of his colleagues, in the opinions that were pending in the Court, so that the outstanding judgments could be delivered before Murphy’s death. This is what happened. The last judgments were pronounced and Lionel Murphy died hours later.

According to Gibbs, at this dinner, throughout that dark time all the Justices of the High Court observed the principle of civility when dealing with each other. It was an unrelenting moment for the main actors and a specially painful time for Murphy and Gibbs. In his tribute as Chief Justice at the memorial sitting of the Court marking Lionel Murphy’s death, Gibbs expressed gracefully an appreciation of Murphy’s own view of his approach as a Justice. And the fact that history judges the performance of all. Particularly those who hold high public office.

---

13 Justiciability was asserted in *Cormack v Cope* (1974) 131 CLR 432, in which the author appeared as one of the counsel. See also *R v Winneke; Ex parte Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25. See also (1982) 152 CLR 211.

Gibbs performed many important functions after his retirement as Chief Justice in 1987. He became President of the Court of Appeal of Kiribati in 1989. He was also chairman of the committee reviewing federal criminal laws from 1988-1999. Occasionally, during the important years of the Mason High Court that followed the conclusion of his tenure in 1995, he ventured forth in his ever-courteous way to criticise what he saw as excessive ‘activism’ on the part of the Court. In 1992 he became President of the Samuel Griffith Society, a conservative body that was extremely critical of many decisions of the Mason High Court. It was especially hostile to the landmark decision in *Mabo v Queensland* [No 2].\(^{15}\) Not only did this uphold the survival of indigenous native title to land in Australia. It also invoked principles of international human rights law in arriving at that conclusion.\(^{16}\) This was not a conclusion or an approach that Gibbs favoured.

Upon subjects such as this, the attitudes of Gibbs and of myself were diametrically opposed. I was not at the time a member of the High Court. I lamented (as I was later to do more forcefully) the fact that I had no part in that short but critical interval of Australian judicial legal renewal. For Gibbs, such ‘activism’ was alien to his views as to the proper exercise of judicial power. Yet as David F Jackson was to say, in the memorial service after Gibbs’s death in 2005, the changes in the decisions of the High Court of Australia that were to follow the Mason Court would have the effect of bringing the pendulum back, to some extent – at least up to the current time – to a point more congenial to Gibbs’s viewpoint.

Nevertheless, apart from ordinary social occasions when Gibbs and I would meet because of our respective engagements in senior judicial posts, there were three particular activities that brought us together regularly. One of them was important for the substantive point I wish to make in this article.

The first activity was in the Order of St Michael and St George. When he became Chief Justice of Australia, Gibbs was elevated in the orders of knighthood to one of the highest ranks available in the British Imperial system: Knight Grand Cross of the Order of St Michael and St George (GCMG). For decades, this rare and prestigious rank was substantially reserved, in Australia, to those who, during non-Australian Labor Party governments, achieved the Great Offices of State (Governor-General, Prime Minister and Chief Justice of the High Court). Effectively, appointment went with the office, sometimes after completion of the service. That is how Gibbs acquired it. It involved magnificent robes and a golden chain of decoration. He would wear these insignia to the annual church service of the Order held, often in the presence of the Queen, at St Paul’s Cathedral, London and for the surviving Australian members of the Order at St James’s Church, in the legal precinct in Sydney. On the evening before the church service in Sydney, a dinner would traditionally be held at the Australian Club in Sydney. As I had been appointed to the Order as a Companion (CMG) in the last New Year’s Honours list of Malcolm Fraser’s Government in January 1983, I attended the dinner and service after that time.

I was to be the last Australian appointed to the Order on the recommendation of an Australian Government. Six weeks before his death, Gibbs telephoned me to

\(^{15}\) (1992) 175 CLR 1.

\(^{16}\) (1992) 175 CLR 1, 42-44 (Brennan J) (Mason CJ and McHugh J concurring).
arrange the details of the occasions in September 2005 when the members of the Order would meet. He was very dutiful about such matters: punctilious in remembering and observing them. He told me that, in due course, the duty would pass to me to ‘turn off the lights’. In the event, soon after Gibbs’s death, the occasions ceased to happen, in Sydney at least. When in April 2005 he telephoned me and I asked after his health, he said it was ‘not so good’. This was typical of him. There was no lamenting his predicament or speaking of things existential or personal.

Coinciding with our meetings in the Order, were engagements with the Australian Academy of Forensic Sciences. This was a body of medical experts, forensic scientists, judges and lawyers who convened regularly, at that time in Sydney, to examine puzzling questions of medico-legal interest. The occasions were unremarkable except for a somewhat eccentric Sydney psychiatrist, Dr Oscar Schmalzbach, who designated himself ‘secretary-general’ of the Academy and was given to addressing its members in Latin. Gibbs was diligent in participating in the meetings. Whilst bemused, as many of us were, by the often challenging behaviour of the organiser, he was invariably gracious to the cross-disciplinary group who gathered on these occasions. He revealed his personality in a shy, somewhat old fashioned and even courtly manner. But he was never quaint. And he never dropped his guard. He was always conscious that he had held the highest judicial office in the land: a position that he knew was more important than the parade of temporary officeholders, many of whom he had known and observed over the decades. Gibbs never did or said anything that would occasion embarrassment. His manners and personal conduct were always impeccable.

The third interaction brought us into a still closer relationship than either of us had earlier expected. It happened soon after, in December 1991, Mr Keating became Prime Minister of Australia. He announced that the country was going to become a republic and would shed its remaining constitutional links with the Crown of the United Kingdom. This decision was made, if not entirely unexpectedly, then certainly suddenly. There was no plan for prior consultation with the Australian people concerning whether, in principle, they wished to follow their Prime Minister down this path.

A few years earlier, a constitutional commission established by the Hawke Government in 1985 (which had included quite ‘progressive’ members including the Hon Gough Whitlam, past Prime Minister, and Hon Sir Rupert Hamer, past Premier of Victoria) concluded that no change in the constitutional relationship of Australia to the Crown should be proposed. So the announcement by Mr Keating and the revelation soon after that he had informed the Queen of his determination, came as something of

---

17 Kirby, above n 4.


a shock. Especially was this so for those who were inclined to view the constitutional monarchy as a benign and generally beneficial system of government, arguably preferable to the others (which had not been explored but which were now suddenly on offer).

Gibbs and I, separately, were both concerned about the way in which Mr Keating had gone about his proposal. As informed observers of the Australian Constitution, we were well aware that some aspects of constitutional monarchy appear unsuitable to a highly egalitarian and democratic country like Australia that reserved no other constitutional office to hereditary succession. The functions of the monarch in Australia’s constitutional arrangements by the 1990s had receded to an antipodean variation on Walter Bagehot’s description: ‘To be consulted, to encourage and to warn’.20

For me, the advantage of preserving the role of the Crown in the Constitution was the very fact that the Queen lived half a world away and came to Australia only when invited. Not too often and not too rarely. This was arguably a good arrangement. Before it should be changed, there should be a serious (possibly extended) discussion amongst the Australian people (to whom the decision belonged) leading to a clear decision that the system should be altered. This procedure, a kind of constitutional due process, had been denied to the Australian people not by long discussion or even a legislative act but by the peremptory decision of the Prime Minister who rekindled at least memories of sectarianism by immediately proceeding to the Republic of Ireland to visit the home of his ancestors and to address the Irish Dáil, a citadel of republicanism some of it hostile to the monarch and the United Kingdom. The fundamental character of Australia’s constitutional system of government was not a detail of a particular law made by the Parliament. It was a question about the basic nature of the Constitution and indeed the constitution of the Parliament itself.

Mr Keating’s announcement was promptly followed by the establishment of an inquiry to be headed by a talented young lawyer, Malcolm Turnbull. Like the Prime Minister, he was a committed republican. He devoted his energies, and not a little of his personal fortune, to advancing the cause. Clearly, it was one in which he passionately believed. For a while, nothing was done to question this constitutional fait accompli.

It was at that stage that I discussed the issue with a respected Sydney barrister, (later Judge) Lloyd Waddy QC. We formed a group of diverse citizens who named themselves Australians for Constitutional Monarchy (ACM). We formed this body together to afford a vehicle to promote the debate which had so far been denied: and to encourage discussion among the electors of Australia as to whether, at this time, they wished to proceed down the Prime Minister’s chosen path. Only this, we felt, would enliven the democratic process and allow the people to determine a fundamental aspect of their form of government and whether it should be altered.

I did not doubt that Sir Harry Gibbs would have the same view as I concerning the change to the Australian Constitution, and also the same objections to the manner in which the change was being imposed upon us. The urgency of doing something to initiate a debate was emphasised when the report of the Turnbull committee was made public.21 It proposed steps that it said should be taken to achieve the objective identified by the Prime Minister. For Paul Keating’s sincerity and determination, one might have admiration and respect. Certainly, he was a man of political integrity and leadership. However, in foreclosing an important decision that constitutionally belonged to the people, different voices were needed.

---

This is not the occasion to revisit the debates led by ACM and its opposing organisation, the Australian Republican Movement (ARM), headed by Malcolm Turnbull. ACM recruited a young former parliamentary staff member, Tony Abbott, to be its executive officer. He also was later to become Prime Minister of Australia. Sir Harry Gibbs agreed to become Chairman of the ACM National Council. I served on that Council. We met often and agreeably. In consequence, the conflicting views were more than thoroughly aired for the Australian public.

When I was appointed by the Keating Government in December 1995 to be a Justice of the High Court of Australia, I immediately resigned my involvement in ACM. Mr Keating and his government lost office in March 1996. The new Prime Minister, Mr John Howard, had undertaken to put the issue to the electors of Australia in a referendum, based on a republican model chosen by its supporters. That model was duly put. It was acknowledged by all that any such alteration would at least require an affirmative constitutional referendum under s 128 of the Australian Constitution. In the result, a referendum conducted on 6 November 1999 failed to pass in every State and in the Northern Territory. It secured a majority vote of electors only in the Australian Capital Territory.

From many conversations with Sir Harry Gibbs during the time that we were both engaged in ACM, I know that he shared views on this topic, similar to my own. Neither of us were dyed in the wool sentimentalists or Women’s Weekly monarchists.

22 Constitutional Alteration (Republic) 1999. The voting details were set out in A R Blackshield and G Williams, Australian Constitution – Law and Theory (Federation Press, Sydney, 2002, 3rd ed) 1308. See also ibid 1328-1331.


values are concerned: including the way in which the constitutional order is deployed to reach a conclusion. The view that the *end* justifies the *means* is not one that is immediately congenial to those raised in the constitutional and legal traditions of Australia and Britain.

V GIBBS AND THE TERRITORIAL SENATORS’ CASES

I was not surprised that Sir Harry Gibbs held to such views in the contested matter of the republic and reacted adversely to the constitutional *fait accompli* with which we had been presented. Anyone who had been watching his decisions in the High Court of Australia, as I had, knew how important to him was the observance of due constitutional process and the proper evaluation of argumentation on both sides. There are many illustrations of Gibbs’s commitment to that course. However, none of the illustrations was as clear, or as pointed, as the decisions known as the Territorial Senators Cases. Because, in the end, the constitutional validity of the creation of Senators of the Commonwealth, so designated, for the mainland self-governing Territories, was accepted by the High Court of Australia (and not later abused) the controversy that attended the original proposal of the Whitlam Government to do so faded over time. Nowadays, virtually no one hears the story of the controversies that surrounded the change in the law to permit the election of territorial senators. I doubt that the hard fought cases that led to the acceptance of the office of territory senators are now taught in Australian law schools. This was a constitutional controversy that had its day and passed into accepted constitutional doctrine. Yet at the time, it was a contest of strong and heated disagreement. And in that disagreement, Gibbs expressed some of the strongest and most cogently argued opinions of the minority viewpoint.

Amongst the many policies that the Whitlam Government accepted, on its election in 1972, was the enlargement and modernisation of the Australian electorate. It moved quickly to reduce the minimum voting age from 21 to 18 years. It also took immediate initiatives to provide for the representation in the Federal Parliament of the electors of the Commonwealth living in the mainland territories of Australia, including the right to elect senators. To this end, in 1973, three Bills were introduced into the Parliament, namely the Senate (Representation of Territories) Bill 1973 (Cth), the Commonwealth Electoral Bill 1973 (Cth) and the Representation Bill 1973 (Cth). Because the Government did not enjoy a majority in the Senate, the Bills (although passing twice through all stages in the House of Representatives) were twice rejected by the Senate. In consequence, the Bills joined a number of others that were assembled to support Mr Whitlam’s request of the Governor-General in 1974 that both Houses of the Federal Parliament should be dissolved with a view to a double dissolution so as potentially to activate the Joint Sittings mechanism provided for in the *Australian Constitution* s 57.

As a consequence of the election that followed the double dissolution, the Whitlam Government was returned to office but with a reduced majority in the House of Representatives. However, a combination of its majority votes in the House of Representatives and its continuing minority votes in the Senate was such that, at a Joint Sittings of the two Houses, there was a prospect that the accumulated Bills would be passed by the majority of members and senators voting together in the Senate chamber.

On 30 July 1974, the Governor-General convened a Joint Sitting. It took place on 6 and 7 August 1974. Six Bills were affirmed by the majority of the members of the

25 *Commonwealth Electoral Act* 1918 (Cth) s 163(1)(a).
two Houses then assembled. Those Bills subsequently received the Royal Assent. There were various challenges to a number of the consequent Acts in proceedings before the High Court of Australia. Many aspects of the litigation do not need to be noticed for the point I wish to make. That point concerns the arguable contention as to whether a particular provision in the Australian Constitution, permitting a law to allow ‘the representation of [a] territory in either House of the Parliament to the extent and on the terms which it thinks fit’ extended so far as to permit a law to be enacted by the Federal Parliament that such ‘representation’ should be by way of a full senatorial officeholder, as distinct from some lesser form of representation.

The primary argument for a lesser form of representation was a constitutional contention that the Senate was intended to be the States’ House in the Parliament. As well, the specific statement in the Constitution that the Senate should be ‘comprised’ of senators ‘for each State’, directly chosen by the people of the State, was said to contain a negative implication that the Senate could not include ‘senators’ from the Territories or anywhere else. In the close and fraught political circumstances of 1973-4 there was also a practical concern that, unless restrained, the Federal Parliament and Government might use the s 57 mechanism and a joint sitting to crowd the Senate with Territorial senators and thereby disturb the delicate balance assured by confining the senators to those representing the States.

The majority of the High Court in the first Territorial Senators Case rejected the negative implication contended by the States which then had Coalition governments, namely Western Australia, Queensland, New South Wales and Victoria. In *The State of Western Australia v The Commonwealth and Ors* (First Territory Senators Case) the majority comprised of Justices McTiernan, Mason, Jacobs and Murphy. However, strong dissents were published by Chief Justice Barwick and by Justices Gibbs and Stephen.

In his reasons, Justice Gibbs swept aside technical objections to the validity of the decision of the Governor-General to convene a Joint Sitting, at least in the circumstances that had occurred. Instead, he proceeded straight to the point of substance that, in his view, made it unthinkable that the subordinate power to provide ‘representation’ of the Territories in the Senate could extend to the election of a fully-fledged senator. For Justice Gibbs, that was not compatible with the meaning that was evident in the Constitution s 7. This, he concluded, made an exhaustive provision for the composition for the Senate as a House of the Parliament. Any special ‘representation’ under s 122 could not extend to full membership, with the powers, rank and title of a senator.

On the outcome of the majority’s reasoning, the Act providing (relevantly) for Territory Senators was given effect. Provision was duly made for two senators for each Territory. To some extent, this small number allayed the concern about the risk of swamping the Senate with intruders undeserving of the same powers, rank and title as a Senator elected from the States.

Chief Justice Barwick, a man used to achieving his objectives in law and life, was not satisfied with this outcome. After the first Territory Senators Case, one of the Justices in the majority (McTiernan J) fell in Melbourne and broke his hip. Reportedly, Barwick CJ declined to install a ramp to permit the elderly judge to continue his service. In the result, in September 1976 at the age of 84, Justice McTiernan retired. He was replaced by Justice Keith Aickin. It was widely speculated

26 Australian Constitution s 122.
27 Australian Constitution s 7. See also s 24.
28 (1975) 134 CLR 301.
that Justice Aickin would probably have voted with the dissenting judges on the point of difference in the Territory representation case. But at the time that appeared to be one of those counterfactual debates that sometimes arises in respect of decisions of the High Court of Australia.

The Whitlam Government was dismissed from office in November 1975. The Fraser Government was appointed and then returned at the election that followed. Chief Justice Barwick wished to remove what he saw as an intolerable departure from the federal character of the Australian Constitution. In his reasons in Attorney-General (NSW); Ex rel McKellar v The Commonwealth, he referred to the fact that two States, during argument of that matter, had questioned the ‘propriety of the Court’s decision’ in the first Territory Senators Case. Whilst expressing ‘due respect to the opinion of others’, he declared that the earlier decision should be reconsidered ‘[before it] becomes entrenched in constitutional practice by the mere passage of time’.

The result of this judicial hint was the commencement of the Second Territory Senators Case: Queensland v The Commonwealth. The matter was re-argued before the High Court in May 1977. By this stage, some of the State governments had changed political complexion. Victoria dropped out as an objector whilst New South Wales intervened to support the earlier decision of the Court. However, Queensland and Western Australia returned to the fray to urge the reversal of the earlier decision. The Commonwealth, now represented by the Fraser Government, was content to support the status quo. In the result, as expected, Justice Aickin agreed with Chief Justice Barwick. The other remaining Justices who had been in the majority in the First Territory Senators Case (Mason, Jacobs and Murphy JJ) adhered to their stated positions. The outcome of the case therefore depended on the orders proposed by Justices Stephen and Gibbs. If they concluded that their respective earlier reasoning had been constitutionally correct (which would not have been unusual) and joined with Chief Justice Barwick, they would have afforded him his desired majority. However, neither of them did so.

Justice Gibbs analysed the problem anew. Whilst expressing respect ‘to those who take a different view’, he repeated his opinion ‘that the decision in that case was erroneous’. Notwithstanding the presence of the words in s 122 of the Australian Constitution permitting some form of representation, he could not accept that those words were intended ‘to prevail over ss 7 and 24 which deal with so important a matter as the composition of the Houses of Parliament’.

Justice Gibbs then addressed the resulting question which was: ‘Whether I ought to follow the decision of the majority in Western Australia v The Commonwealth, notwithstanding that I believe it to be wrong’.

He went through the arguments that the High Court was not bound by its past precedents; that constitutional decisions were especially important; that the earlier case was still quite recent so that it could now be readily reversed; and that the matter was significant for the balance of federal powers in the Federal Parliament. He then came to his conclusion:

29 Blackshield and Williams, above n 22, 698 [15.89].
30 (1977) 139 CLR 527.
31 Ibid 601.
32 (1977) 139 CLR 585; 52 ALJR 100.
33 Ibid 590, 104.
34 Ibid 590, 104.
I have had much difficulty in deciding what course my duty requires… But when it is asked what has occurred to justify the reconsideration of a judgment given not two years ago, the only possible answer is that one member of the Court has retired and another has succeeded him. It cannot be suggested that the majority in [the first case] failed to advert to any relevant consideration or overlooked any apposite decision or principle. The arguments presented in the present case were in their essence the same as those presented in the earlier case. No larger related decision has been given that conflicts with [it]. Moreover, the decision has been acted on; senators for the Territories have been elected under the legislation there held valid. To reverse the decision now would be to defeat the expectations of the people of the Territories that they would be represented, as many of them believed that they ought to be represented, by senators entitled to vote – expectations and beliefs that were no less understandable because, in my view, they were constitutionally erroneous, and that were encouraged by the decision of this Court.

… Having considered all the circumstances that I have mentioned, I have reached the conclusion that it is my duty to follow Western Australia v The Commonwealth, although in my view it was wrongly decided.

In a very practical way, Justice Gibbs expressed a qualification to his conclusion. That qualification would arise if, in the future, the ruling needed to be reconsidered because provisions for the representation of the electors in the Territories had the consequence of disturbing the federal balance so as to justify a reconsideration of the question.

Not mentioned, of course, was the fact that the Fraser Government then in office, had a large majority in the Parliament and would not be likely to distort the federal balance. This closing hint of Realpolitik in the reasons of Justice Gibbs was not inappropriate in a constitutional context. He was disclosing candidly a factor that was important in a decision which was painful, and by no means inevitable, for him.

The outcome was that the Territory senators survived. Justice Gibbs bowed to the force of the recent precedent. He obviously felt distaste for the attempt of Chief Justice Barwick to seize the opportunity of a change in personnel to achieve the outcome that he wanted.  

For Justice Gibbs, the path of getting to a correct judicial decision was itself important, indeed vital. The end did not justify any judicial means. Following well established paths was a way of wisdom. Doing things in a regular way was sometimes as important as doing what the heart might desire.

At work in the reasoning of Justice Gibbs in the Second Territory Senators Case is the mind of a judge striving to follow a path of integrity in reaching his conclusion. It is not open to any Justice of the High Court of Australia simply to give effect to the outcome he or she favours emotionally. The path to an outcome must be taken carefully and analytically because sometimes taking that path will forbid the judge reaching a conclusion which, left to intuition or naked instinct, might otherwise be arrived at. In the two Territorial Senators Cases we see at work in Gibbs a judge of integrity and wisdom. Another fine justice of the High Court of Australia, Justice

---


Stephen, reached a similar conclusion. So Barwick, a man for whom ends and outcomes were sometimes more important than means, found himself in a minority of two: himself and Justice Aickin. The legislation enacted at the Joint Sitting for Territorial senators was reaffirmed by a judicial vote of 5-2. It has never been questioned since. Nor has its provision been abused, a prospect that Justice Mason in the first Territory Senators Case had in any case dismissed as politically fanciful.38

VI THE MARRIAGE PLEBSICITE: THE GIBBS APPROACH?

By reason of a disclosed policy of the government led by Malcolm Turnbull to address the contentious issue of same-sex marriage in the unusual way of first testing the waters of the opinions of the electors of the Commonwealth by the conduct of a plebiscite, the return of that Government led to the assertion that the Government had a ‘mandate’ to proceed in this way. The Australian people were therefore faced with a proposal for the conduct of a national non-binding plebiscite, as a precondition for the consideration by the Federal Parliament, under its constitutional powers, of a possible amendment to the Marriage Act 1961(Cth) to open up marriage to same-sex couples.39

Although my own long-term relationship with my partner Johan van Vloten has survived these past 47 years, I believe I can address this matter without relevant personal bias. We are by no means convinced that we would take advantage of any such amendment if it were enacted. After so long a domestic partnership together, embracing marriage under an amended federal law might appear to cast doubt on the legitimacy of our relationship which we would not admit. Nevertheless, we each believe that, as a civil right, afforded by a secular parliament that has no constitutional power to enact a sacramental marriage, an amendment could and arguably should be adopted in Australia, to provide for same-sex marriage as has already been done in the United Kingdom, New Zealand, Canada and many other countries of like legal traditions.

A decision by the Federal Parliament in Australia in favour of the amendment would determine the matter in the institution in which the Australian Constitution envisages it should be decided, namely in the Federal Parliament. It would not subject the matter to be determined, or influenced, by a direct vote of the public. The Australian Constitution provides for a form of representative democracy. It does not provide, certainly expressly, for plebiscites on controversial issues. This is a wise system of government and in any case it is the only system for which the Constitution provides. The propinquity of members of the Parliament, operating together in the same physical space, tends to diminish the extremes of emotion and feelings that can sometimes arise on the streets. Bill Gibbs and his generation would have known this because of the still existing memories that existed when they were young as a consequence of the last occasion on which Australia had indulged in substantive and contested national plebiscites, namely the military conscription plebiscites of 1916 and 1917, mentioned earlier.

The original proposal for a plebiscite, as a precondition (but not a determinant) of an amendment to the Marriage Act to allow same-sex marriages was first advanced in August 2015 when the actors in the Federal Parliament were the familiar earlier antagonists in the constitutional republic debate of the 1990s. Tony Abbott, as Prime

38 Western Australia v The Commonwealth (First Territorial Senators Case) (1978) 134 CLR 201, 271 (Mason J).
39 Plebiscite (Same-Sex Marriage) Bill 2016 (Cth). Introduced into the House of Representatives on 14 September 2016.
Minister, was an opponent of same-sex marriage. Malcolm Turnbull, awaiting his call to that office, was a supporter. To resolve differences of this kind that had arisen amongst the members of the Coalition Parties in the Federal Parliament, Mr Abbott proposed the unusual precondition of a plebiscite. This was intended to obviate, or at least delay, a free vote of the members of the Parliament which was the way that earlier controversies of a similar kind had been resolved, as for example in the passage of the Family Law Act 1975 (Cth).

The proposal for a plebiscite, as a precondition for the vote in the Federal Parliament, was not suggested by its advocates because they wished to share with same-sex couples and their families the exuberance and joy of a public celebration and eventual participation in the vote. This was made clear by the emphasis that the vote would be compulsory but not binding, assuming that the outcome of such a vote could be made binding on the Parliament. Nor was a public vote by referendum constitutionally allowed or required. The High Court of Australia, in an earlier unanimous decision in December 2013 in The Commonwealth v Australian Capital Territory, had made it plain that the entire power to enact a law for same-sex marriage rested with, and only with, the Federal Parliament. Such a law would fall within the Federal Parliament’s grant of legislative power with respect to ‘marriage’. All that was required to enact the law was the will to introduce a Bill for that effect or to permit such a Bill to be considered under the Standing Orders and a Parliamentary vote. There was no obligation to consult the people by constitutional referendum, still less by a plebiscite.

Some supporters of the plebiscite idea, overlooking or forgetting the record of appeals to public participation in referendums in Australia, urged that successive opinion polls in Australia had made it clear that the vote in the plebiscite would succeed. Yet it would not be binding. And if it was bound to succeed, why should such an exceptional step be taken which diminished the centrality and role of parliamentary procedures set out in Australia’s constitutional form of parliamentary democracy? Why proceed outside Parliament when there was no constitutional need to do so?

Whilst the Federal Government might assert the power of the Federal Parliament to provide by its proposed legislation for the conduct of a national plebiscite as within the express constitutional incidental power (s 51(xxix)) or within the ‘implied’ incidental power, this is by no means certain. If the view is taken that the design and language of the Australian Constitution envisaged a system of representative and not direct popular democracy, a question could be presented as to validity by interposing exceptionally a non-parliamentary vote with no express warrant to the Constitution. This is especially so where emphatically, unanimously and recently the High Court of Australia had upheld the power of the Federal Parliament to enact the law, if it wished to do so. Given that the resolution of the issue thus lay in the chambers of the Federal Parliament, how could it be incidental to that power to consult the people further in a

---

40 See M Grattan, ‘Abbott delivers to the conservatives on same-sex marriage, but at what cost?’; The Conversation, 12 August 2015. This reportedly followed a debate of 5½ hours in the Party Room.
41 (2013) 250 CLR 441.
42 Australian Constitution s 51(xxi).
43 In the 116 years operation of the Australian Constitution there have been 44 referendum proposals. Only 8 have succeeded to secure the double majority requirement of s 128 of the Constitution.
plebiscite? Is not the very system of representative parliamentary decision-making the way the Constitution expressly provides for decisions in such matters?

Some of the supporters of the plebiscite, who also claimed to support same-sex marriage in principle, urged that this was the easiest and quickest way to resolve the current political difficulty standing in the way of the legislative process in Australia. In short, they urged that a plebiscite was the quickest means to the political end that they claimed to ardently desire.

This contention ran into the confusion between means and ends. It is on the risks of that confusion that Sir Harry Gibbs gave many warnings during his lifetime, judicial and otherwise. The way one goes about things is important. Especially in matters that are broadly constitutional in character. Particularly in matters that involve consideration of the basic rights of citizens. Particularly where the impediment to the normal procedure of a parliamentary vote is self-created by those who wish to take advantage of it to achieve their desired political outcome.

I never discussed plebiscites with Bill Gibbs. The idea of a marriage plebiscite had not arisen whilst he was alive. I never discussed with him matters of sexuality, either mine or anyone else’s. He was not a friend of intimate discourse, at least with me. Queensland was one of the last States of Australia to amend the provisions of the Queensland Criminal Code, providing for the sodomy offence. In that provision, the Code was sanctified by the pen of Sir Samuel Griffith. It had been shared with other countries. The belated attempt to remove the criminal penalties imposed on consenting, adult, private sexual conduct under the Code was made in 1990. It was adopted. However a preamble was adopted, reminding anybody who might read its words that ‘Parliament neither condones nor condemns the behaviour which is the subject of this legislation’. In all probability, Bill Gibbs had quite conservative views about the subject of homosexual offences. On substantive legal, and criminal, matters he was not adventurous. Nor was he embarrassed in the slightest by that fact.

For all this, I consider that it is likely that once again, he would have regarded the conduct of a plebiscite, requiring it as a precondition to a vote in the Parliament, as a most unwise measure differing from the constitutional design and even possibly inconsistent with that design. He would have seen it as antithetical to the representative form of democracy for which the Australian Constitution provides. He would have been disturbed by the exceptional and ahistorical character of it. He would have been suspicious of the exceptional appeal, outside the parliamentarian chamber, to populist opinion. He would have been anxious that it might become a precedent for further questions regarded as politically difficult that could result in diminishing the standing and authority of Parliament itself. He would have been hostile to a step that removed lawmaking from the chamber of Parliament where issues were debated and records kept. I believe that he would have rejected the notion that the means of an exceptional plebiscite were justified by the end of getting to an outcome that could be achieved more simply and by orthodox means, through a vote in the Parliament itself.

In years to come, when the proposal for the plebiscite in Australia on the issue of same-sex marriage has passed into a footnote to history and is lost to memory in the same way as the discussions of the High Court on the two Territory Senators Cases

44 The Criminal Code of Sir Samuel Griffith was one of the three Codes utilised in the British Empire. The others were the Macaulay Code and the James Fitzjames Stephen Code.
45 Criminal Code Act 1897 (Qld).
46 Criminal Code and Another Act Amendment Act 1990 (Qld), preamble.
47 Some political conservatives have supported the principle of same-sex marriage as a basically conservative development. See Paul Ritchie, Faith, Love & Australia the Conservative Case for Same Sex Marriage (Connor Court, Sydney, 2016).
have done, the importance of adhering to our constitutional institutions and their settled representative machinery for law-making will remain true. When judges and other public office-holders are tested in their adherence to those institutions and procedures, they should be held to the high standards exhibited by Sir Harry Gibbs.

In *De Amicitia*, Cicero wrote about the importance of human friendship. At a time when love, sex and exclusive family relations are given so much emphasis, friendship has sometimes been under-valued. Yet Cicero’s warning should be remembered:48

> And this is what we mean by friends: even when they are absent, they are with us; even when they lack some things, they have an abundance of others; even when they are weak, they are strong; and, harder still to say, even when they are dead, they are still alive.

The legacy of the Right Honourable Sir Harry Gibbs GCMG, KBE, QC lives on. I am proud that, in later years, despite various differences, he was my friend. The subjects that we differed about were less important than the subjects we agreed upon. This is quite often the way of friendships in the judiciary and the law. The way one does important things – including those bearing what might be called a constitutional character – is often as important, or even sometimes more important, than the end the respective actors have in mind. Our differences of substance will be tempered if we can agree to observe faithfully the methodology of settled ways. They tend to help us to reach correct decisions about the substance. They make accepting unwelcome decisions easier to bear.49

In his centenary year, all Australians, but particularly judges and lawyers, should remember Gibbs CJ: a fine citizen and principled servant of the law.

---

48 Cicero, *De Amicitia* (On Friendship).
49 G Lindell, ‘Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia’ (2008) 30 Sydney Law Review 27. Cf. Centre for Justice v Attorney-General (Bermuda) [2016] 5 LRC 312; [2016] SC (Bda) 72 Civ. Where the Supreme Court of Bermuda rejected a challenge to the constitutional validity of a non-binding referendum on same-sex marriage. The majority voted against but as the turnout was below the 50% requirement, it failed.