

**Opening of Rare Books Room
Friday 11 February 2000 5.30pm**

**Welcoming Remarks
Chief Justice Paul de Jersey**

Your Excellency the Governor and Mrs Arnison
The Right Honourable Sir Harry Gibbs and Lady Gibbs
Mr Attorney-General the Honourable Matt Foley, MLA
The Honourable Justice White, Chair of the Supreme Court Library Committee
Your Honours
Ladies and Gentlemen

In its unadorned state, the corridor along which you approached this grand Banco Court this evening, is pathetically bland. And so would be our lives without inspiration. Through the generosity last year of the Queensland Art Gallery, we added to that corridor Anne Graham's beautiful contemporary visions of Australia. Subsequently walking that corridor, saying "hello" from time to time to lawyers, occasional witnesses - once the family of an alleged murderer - I sensed an uplifting of spirit: amazing, they said, that the fabric of a courthouse might so readily be made interesting. Blandness, but with an added touch of beauty – thereby inspirational! What else might we achieve?

Well, you say, a courthouse is expected to exude tradition. It is evident here in this courtroom, but how many people, we Judges asked, come in here? Many more these days than a few years ago of course, but for all that? Our exceptional, significant, rare books, the grand robes of the Honourable Jack Lawrence Kelly – those sorts of things exude tradition, we Judges felt, but how to remind the people that tradition is truly not barren: it can be beneficial? And so we are presenting hallowed tradition to a contemporary public in a captivating modern setting.

We regard these books as evidencing the roots of our current legal wisdom, the robes as an important signification to the people of the dignity of their courts. We have rendered them accessible. They can be scrutinised, assessed, evaluated at close quarters – indeed like almost every aspect of today's judicial role. We have facilitated that assessment by placing these beautiful treasures in a modern context; and likewise we Judges today strive to render justice more accessible, we strive to render justice according to law, more currently comprehensible.

The striking module outside, irreverently recently termed by some a Dr Who Tardis, a Maxwell Smart cone of silence, is full of rare books. This court room, ladies and gentlemen, is full of rare individuals: interesting, distinctive, memorable people, and on behalf of the judiciary, I warmly welcome you all. This evening's court room is indeed a cauldron of creativity – our vice regal representative, current judges including a Justice of the High Court of Australia; the Hon the Attorney-General; former Chief Justices including a former Chief Justice and charismatic State Governor in Sir Walter Campbell, and Sir Harry Gibbs, one of only three Queenslanders who have reached the eminent rank of Chief Justice of Australia, he together with the legendary Sir Samuel Griffith, who gazes down upon us, and Sir Gerard Brennan; former Judges; Consuls; Mr Cedric Hampson QC, the stylish long term leader of the Queensland Bar; Law School Deans, Presidents of the professional associations; our Librarian Mr Aladin Rahemtula, himself a treasure, indeed a gem ... Doyens as are you all, of many varied sections of our broad Queensland community, I regret I cannot offer individual biographies, but I respectfully suggest that like our rare books, you should all be taken from the shelves and savoured, as may indeed occur following the oration!

I warmly welcome you all to this event of such significance in the life of the courts, and thereby the people of Queensland. It is significant particularly for drawing back into the public domain a very important part of Queensland's legal heritage: these wonderful treasures which have languished too long behind then necessarily closed doors. The courts are deeply indebted to the Supreme Court Library Committee for co-operating in this course, and of course to those generous benefactors who have facilitated it: The Incorporated Council of

Law Reporting for the State of Queensland, and the Grants Committee of the Queensland Law Society. I welcome their representatives, including Mr Cedric Hampson QC as Chairman of the Incorporated Council, and Mr Brian Kilmartin as Chair of the Grants Committee.

I also note with pleasure the presence of the architect Mr Leigh Shutter, whose innovative style progressively revealed last year, increased my excitement level, as my colleagues may confirm, to the point of irrepressibility; and of the builders, E. Chapman and Son, whose craftsmanship is self evidently beyond measure.

The public significance of this event is further signified by the presence of leaders of the other arms of Queensland government: the Honourable the Attorney-General, whom, as always, I welcome to the Court; and ultimately His Excellency the Governor, who also does great honour to the Court. We are indeed privileged and delighted, Your Excellency, that you have kindly agreed to be present this evening, to speak about the development of the project, and formally to open our splendid new public facility.

Your Honours, ladies and gentlemen, will you join me in welcoming His Excellency the Governor...

**Official Opening Speech delivered by His Excellency the Governor of Queensland,
Major General Peter Arnison AO**

It is a great pleasure to be here this evening, and to have been invited, by the Chief Justice, to officially open the Rare Books Room of the Supreme Court of Queensland

The Chief Justice and I share a mutual interest in libraries, possibly because we both had the good sense and judgment to marry librarians

At the outset, may I say that it is helpful to consider, as we are this evening, that the legacy of the past continues to set markers for our future endeavours. And so it is pleasing that within this Rare Books Room Project, there is a strong sense of cherishing and learning from the best of what we have inherited from the past

The Library has been functioning for 138 years and, I am informed, continues to be regarded as the best Law Library in Australia. The establishment of the extensive rare books collection can be attributed largely to the enthusiasm and dedication of Judge Harding, a noted bibliophile, who was Chairman of the Supreme Court Library Committee from 1887 until his death in 1895. Judge Harding was an Acting Chief Justice, and his portrait can be seen on the walls of this Court. After his death, Harding's private book collection of 4,500 volumes was acquired by the Government to form the nucleus of the Queensland State Library

Today, the Supreme Court Library holds over 140,000 volumes and has 11 regional Courthouse Libraries

The nationally significant rare books in the collection comprise more than 950 volumes dating back to the early 16th century, including some of the most important legal texts of the common law system. Many are original first editions belonging to prominent judges and practitioners, and amongst the collection are items which are not held anywhere else in Australia. They include works by Bracton, Littleton, Coke, Bacon, Selden, Hale, Plowden, Justinian and Blackstone.

In addition to rare books, the Library has a large collection of historically significant documents including biographical files on Queensland's legal personalities dating back to 1860. In recent times, the Library has attracted donations of legal material such as unpublished memoirs, manuscripts of published works and conference papers by judges and other members of the legal profession. It is particularly pleasing that these special items can now be brought into the public domain, in order to foster community awareness and appreciation of our legal heritage.

Supplementing this project is a free standing cabinet housing the judicial robes and wig of the late Honourable Justice Kelly, formerly Senior Puisne Judge of the Supreme Court. These items have been generously donated by the Late Judge's family. Special occasions in the court, such as valedictories and appointment ceremonies, will be accompanied by appropriate displays and a regular program of exhibitions focussing on legal and non-legal topics will also be mounted for the benefit of the general public and visiting school students.

The Rare Books Room should not be mistaken as a sort of splendid retirement home for a selection of antiquities, rather it is a demonstration of pride in our history, and a recognition of the part that heritage plays in the way we conduct our affairs as a society.

Against this background I am sure we all sense the importance of these rare works as tools in helping us to enlarge our awareness, and to enrich our experiences. To that end, I am very pleased to hear that a Supreme Court Historical Society is to be formed. The Society will host seminars and lectures, publish booklets and papers, liaise with schools to provide educational displays, and preserve material significant to Queensland's legal history, complementing the Library and, consistent with the Chief Justice's desire to best utilise information technology

and to "open up" the courts, I note that a Judicial Virtual Library is planned. This fits well within the scope of the Court's internet homepage and the web-based judgement service which publishes the text of Supreme and Court of Appeal judgements.

These contemporary developments are to be applauded, and so I commend the Chief Justice, and the successive Chairs of the Library Committee, their Colleagues, and the staff of the Library, for having the vision and the energy to move forward these projects.

May I also acknowledge that these developments would not have been possible without the generous support of the Incorporated Council of Law Reporting for the State of Queensland and the Grants Committee of the Queensland Law Society.

The Rare Books Room offers a splendid illustration of the notions of preservation and education, and thus I wish this project the enduring success it deserves. Chief Justice, may I again thank you for the privilege of visiting your Court, and for inviting me to participate in this ceremony. On your behalf, it is my great pleasure to declare the Rare Books Room of the Supreme Court of Queensland, officially open.

**Oration Delivered at the Opening of the Supreme Court Library's Rare Books Room
at the Supreme Court of Queensland
on 11 February 2000**

I am grateful to be here today in the Supreme Court which has happy memories for me, although the old building which I knew has gone and so, unfortunately, have many of my old friends and colleagues.

The rare books now on display, published in England centuries ago, are not merely relics of another place and age. They are some of the foundation stones of the legal system which we have inherited from England and have made our own. It has been said that a young society has shallow roots, but the roots of our common law go deep into medieval England. Of course the doctrine stated in those books has not remained static. The common law has developed in response to the changes in society which have been caused by the revolutions in thought and in the manner of living which have occurred over the centuries since they were written. It has also been transformed by statute law which is increasingly voluminous. Although the details of the law have greatly changed in the process some basic principles remain just as the authors represented in this collection stated. In particular, two principles are paramount - that judges must be completely independent in the exercise of their offices and that no-one, however powerful, is above the law. Those principles were not easily established, and no-one did more to establish them than one of the authors of the works in this collection, Sir Edward Coke. I may be excused for taking a few minutes to remind you how he set an example which judges follow to this day.

England was at that time an absolute monarchy and it was the power of the Crown that particularly needed to be rendered subject to the common law; today there are other powerful interests, as well as Governments, that would challenge, if they could, the rule of law. As a barrister, Coke had not been a shining exemplar; even his contemporaries (1) thought that the bias and rancour which he showed as prosecutor of such people as Walter Raleigh and Guy Fawkes went beyond proper bounds. As a judge, however, he showed uncommon courage. Not long after he became Chief Justice of the Common Pleas, the King (James I) sought to withdraw proceedings pending before the judges in a particular case and when they demurred claimed that it was treason to affirm that the king should be under the law. Coke replied in words which Bracton (whose work is also represented here) had written in the 13th century: "The king ought not be under any man but under God and the law" (2). In a later case (3) the king sought to alter the law by proclamation; that of course was a basic challenge to the rule of law, but Coke rejected the challenge. The king transferred Coke to the Kings Bench, as Chief Justice, mistakenly thinking that he would be less trouble there. It was not long before the king ordered that proceedings in a case touching his interests should be stayed until the judges had consulted with him (4); obviously he wished to influence the decision. Coke refused to agree and in consequence was dismissed from his position as Chief Justice. The principles for which he fought were not finally recognised until the Act of Settlement in 1701, but since then they have remained at the heart of the common law. In the 18th century another of these authors, William Blackstone, wrote that the distinct separation of the judicial power from the legislative and executive powers is "one of the main preservatives of the nation's liberty" (5). His work influenced the framers of the American Constitution, and thus indirectly the framers of ours. The principle which he stated is of course firmly incorporated in the Commonwealth Constitution and is substantially observed in the States; it, too, is fundamental.

In the 18th century England became the only free country in the world, at least until the United States of America were established. It owed its freedom in part at least to the fact that the judges were independent and that no-one was above the law. Similarly, the freedom which Australians enjoy today, but which so many other countries lack, depends, in large part, on the strength and independence of the judiciary. If we need to be reminded of the consequences that ensue when the independence of the judiciary is eroded, we have not far to look. There are countries in South East Asia where judges on benches formerly respected have more recently not always been able to resist the influences or deny the wishes of government, particularly since the abolition of appeals to the Privy Council from those

countries. The result, obvious to all, is that those countries have been gradually sliding down the path towards totalitarianism.

Although everyone would pay lip service to the notion that judges should be independent, it is not unnatural for some members of government, like most people, to prefer to hear what they want to hear rather than what they ought to hear. The independence of the judiciary depends as much on the sort of persons who are appointed to the bench, as on the safeguards which protect the holder of the office once it is attained. Similarly, nowadays everybody would pay lip service to the notion that appointments to the bench should be made on merit, which of course includes character and temperament as well as ability and experience. In practice, inappropriate motives do sometimes influence judicial selection in many if not most countries. Personal patronage has been exercised ever since Queen Elizabeth I appointed as her Chancellor Sir Christopher Hatton, who had never been admitted to the bar, but was "chiefly famed for his handsome person, his taste in dress and his skill in dancing" (6). Political affiliation was once almost universally regarded as a reason for judicial appointment. It is claimed that in Great Britain political appointments have not been made since Lord Chancellor Jowitt put an end to the practice in the 1940's, but in the United States and Canada there is barely any attempt to disguise the fact that appointments are made on political grounds. Political appointments have not been unknown in Australia, but they are never acknowledged as such. At one time in Queensland religion seemed to be a determinative factor but those days fortunately have long since gone. A more recent heresy is that the bench should be representative and that the sex of the aspirant or perhaps his or her ethnic origin should be a more important consideration than merit. The bench can never be representative, for there are many sections of society which it would be impossible to represent; what is more important, the bench should never be representative, for the duty of a judge is not to represent the views or values of any section of society but to do justice to all. I do not of course suggest by this litany that bad appointments make up a large proportion of the bench. Further, of course, a good appointment may sometimes be made for a bad reason. However, one insufficiently qualified judge is capable of inadvertently doing substantial injustice and an unmeritorious appointment disturbs the morale of the bench and the faith of the legal profession in the system.

In the Commonwealth, and in the States, the power of appointment to the bench is vested in the Government and often that means in practice in the Attorney-General. There are no checks on its exercise. A belief that this system does not always work satisfactorily has led some lawyers to suggest alternatives. Sir Garfield Barwick suggested that the power of appointment should be given to a judicial commission. There are objections to that course; the members of a commission can be chosen to secure the desired result, and a commission may adopt a bureaucratic approach to selection. A commission might think itself bound to conduct inquiries of the prospective candidates, emulating, even if weakly, the United States Senate. It is difficult to suggest any workable alternative to appointments by the government. However, society would benefit if the process of making judicial appointments were required to be more transparent. One way in which that could be done would be for the law to provide that the Attorney-General should consult, say, the Chief Justice, the President of the Bar Association, and the President of the Law Society, and that the Attorney-General should, at the time of making an appointment, reveal the recommendations that had been made. The Attorney-General would not be obliged to appoint any of the candidates who were recommended but if he or she departed from the recommendations, it would be necessary to account to the public for the departure. There may be other ways of ensuring that judicial appointments are made openly, in a way that reveals that they are made on merit, and not as a result of patronage, ideology or idiosyncrasy.

The question how judges might best be appointed is not only a local issue and it is a question whose solution is by no means easy. This is shown by a rather remarkable series of decisions of the Supreme Court of India. The Constitution of India provides that appointments are to be made by the President after consultation with the Chief Justice of India and such other judges as the President determines. This system seems to have worked well enough in India until the 1970's when, at a time of political crisis, the Government of India began to appoint judges who would agree with its views, particularly on important constitutional issues then the subject of debate. Dissatisfaction with the fact that the bench appeared to be losing its independence

led in 1981 to what became known as the First Judges Case (7) where it was held, although only by a narrow majority, that the Constitution meant what it said and that although the Government was obliged to consult with the Chief Justice, it was not bound by the Chief Justice's opinion. Later, after a strong Chief Justice had taken office, there was frequent disagreement between the Chief Justice and the Government and this led in 1993 to the Second Judges Case (8). The Court then held that the constitutional provision meant that in the event of conflicting opinions as to the making of judicial appointments, the opinion of the Chief Justice was entitled to primacy and that no appointment should be made unless it was in conformity with the opinion of the Chief Justice. It was further held that as a matter of practice the Chief Justice should take into account the views of the two senior Justices of the Supreme Court. The hope that three Justices would regularly agree on the appointments to be made proved to be in vain. In 1998 when the Chief Justice, with the concurrence of only two of his senior colleagues, recommended appointments that were widely regarded as unsuitable, and the Government would not agree to them, the President of India referred the question for reconsideration by the Supreme Court. In the Third Judges Case (9) the Court confirmed that the opinion of the Chief Justice was entitled to primacy over that of the Government, but held that this did not mean that primacy was enjoyed by the Chief Justice alone; for his opinion to prevail, it had to be founded on consultation by the Chief Justice with a plurality of his colleagues, which was defined to consist of the Chief Justice and four senior puisne judges. It is too soon to say whether this latest expedient will prove successful, but already in India since that decision was pronounced consideration has been given to the question whether appointments should be made by a judicial commission.

The ability of the Supreme Court of India to transmute the simple words "after consultation with the Chief Justice" so that they meant, first, "if the Chief Justice and two other judges agree", and then "if the Chief Justice and four other judges agree", provides an example of an interpretation which liberates the meaning of the Constitution from the words which it uses, and seems to proceed on the view that words should mean whatever a pragmatic court thinks it desirable that they should mean. In some cases, Australian courts seem to have taken the same approach to constitutional interpretation, and in cases where it was necessary to declare the common law; judges have similarly departed from established principles, either because the earlier decisions were thought to be out of tune with contemporary social standards, or simply because they were thought to be wrong. Another reason that has been given for departing from law thought to be long settled is that it rested on historical assumptions now shown to have been false (10) - this bold approach seems to accept the correctness of the dictum of Oscar Wilde that the one duty we owe to history is to rewrite it. Activist judges reject the notion that the common law should be developed only by recourse to legal principles. They regard the statement that judges - appellate judges at least - should apply the law as it is, rather than as they think it ought to be, as out of date, even naive.

In support of the view that judges should consciously assume a law-making function, and should make new law by reference to social, economic or even political values, there is sometimes cited a well known passage by Lord Reid (11) who, speaking extra-judicially, said in effect that it was a fairy tale to suggest that judges declare law and do not make it. Lord Reid was saying what is obvious enough, that when a legal decision overrules an earlier authority, or develops a principle so that it has a new application, new law is made. It is a mistake to think that Lord Reid was suggesting to judges that they should disregard existing authority and principle and should invent new rules that reflect their own ideas of social policy or that they should give to legislation an effect which ignores its words but which they think meets the needs of changing times. Lord Reid's judicial utterances clearly show that he did not intend this. In one case (12) he said, "where parliament fears to tread it is not for the courts to rush in", and in another case (13) he said, "If we are to expand the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations, that must be left to legislation". It is paradoxical that judges who strenuously support the doctrine of the separation of powers in relation to the judiciary nevertheless believe that the judiciary should consciously assume a legislative function, and that judges who believe in democracy should espouse an undemocratic method of changing the law. There are a number of reasons why judges should curb their desire consciously to alter the law in accordance with extra-legal values, rather than develop existing legal principles. Any alteration by the judiciary is necessarily retrospective, and a retrospective

change which is not predictable on legal grounds is likely to lead to injustice. An activist approach leads to uncertainty and certainty is an important element of justice. A judge who attempts to re-make the law in the light of contemporary standards is faced with the difficulty that there are deep divisions in society as to what are or should be the standards of the time. It is easy to mistake the attitudes which are regarded as acceptable by some of the more vocal sections of society as the attitudes of society as a whole. Judges have not the same facilities as have Members of Parliament to enable them to assess whether change is necessary and what the consequences of change are likely to be. The line between developing the law and altering it may sometimes be narrow, but it is usually clear.

It has been suggested that there are limitations of method or procedure that will confine judicial activism within proper grounds. One example given is that the courts cannot choose the matter for decision, but must rely on the parties to raise it; another that judges must give reasons that show the principles on which a decision is based. However, limitations of this kind are only as effective as the judges allow them to be. A striking example is provided by Mabo (No 2) (14) where in a case concerning Murray Island the court determined the rights of Aboriginal people whose culture and history are quite different from those of the Murray Islanders.

The primary aim of any court should be to do justice between the parties. The proper development of legal principles usually enables this to be done, unless there are statutory provisions which bring about an inappropriate result. Lord Reid himself showed how with imagination legal principles could be found which would do justice in a particular case. On the other hand, to alter the law, retrospectively, for extraneous reasons, is likely to cause injustice. Contemporary values can of course be given effect when a judge exercises a discretion which the law allows.

The question which I have been discussing does not so much concern trial judges, for their task clearly is to ascertain what the law is and to apply it to the facts as they find them to be. The determination of the facts often depends more on a meticulous examination of the evidence than on an intuitive conclusion as to where the truth lies. Fact-finding is not always an easy task, but it is trite to say that it is of vital importance. A brilliant exposition of the law will be futile if the facts to which it is applied are wrongly found. It can be difficult on appeal to correct an erroneous finding of fact, particularly when appellate courts take a restrictive approach to their jurisdiction. Some commentators, including some who have held judicial office and should know better, insist that the adversarial procedure is not concerned with finding the truth. The fact that rules of evidence in some cases limit the scope of the enquiry, mostly for good reason, does not mean that a judge making findings of fact is not endeavouring to discover where the truth lies. Obviously it is the duty of every judge to make that endeavour, and experience shows that the adversarial method is well adapted to the task.

One respect in which the ingenuity of lawyers desirous of change is welcome is in devising rules of procedure to meet the changing circumstances of litigation at this time. Cost and delay have been intractable problems of litigation for centuries but they appear to have become more serious at the present time, perhaps because of the changing nature of litigation and the classes of persons engaged in it. It is far too expensive for many sections of society to embark on litigation unless they either have a high probability of success or are legally aided. Unfortunately, legal aid is unavailable in very many cases where it is needed. It is not altogether easy to explain why trials have tended to take so much longer than was usually the case in earlier times and this is a situation which the judges have been endeavouring to amend, I hope with success. The provision of legal aid depends on the Governments, not on the judges.

I have spoken mainly about the judiciary but it goes without saying that our legal system depends heavily on the integrity and ability of the barristers and solicitors. The professional bodies have striven, with success, to maintain and if necessary raise the standards of both branches of the profession. Lawyers as a class have never been particularly popular, and in past times their standards of behaviour were often low; thus it was that Dr Johnson observed

of a gentleman who had just quitted his company that "he did not care to speak ill of any man behind his back, but he believed the gentleman was an attorney" (15). That has changed, but it is unfortunate that the authorities, apparently believing that the good of the nation is measured only by the success of the economy, and that competition is vital if the economy is to be successful, have interfered with traditional rules and practices of the profession which experience has shown to be valuable and necessary. For more than a century attempts have been made to obliterate the distinction between barristers and solicitors, but the bar continues to survive, because experience shows that the specialised skills and particular ethical rules of the bar mean that a separate bar is essential to the proper conduct of litigation. So far as solicitors are concerned, the most obviously harmful effect of competition policy is caused by the relaxation of the rules regarding advertising, which has meant that the humble practice formerly known as ambulance chasing has been elevated to a formidable new dimension.

As Mr Justice Philp used to say, long ago, judges have lost their singularity. The increased numbers on the bench, and the egalitarian temper of the times, have combined to deprive judges of the elevated status they once enjoyed. Their burdens have become more heavy, and they are more exposed to public criticism. The role of judges is a limited one; they cannot contribute to the growth of knowledge, the enhancement of culture or the prosperity of the nation, as scientists, artists and statesmen may do. Notwithstanding these things, judges can and do play a part, an indispensable part, in maintaining in our society that fortunate balance between liberty and stability which comparatively few nations enjoy. The old books now on display, may serve to remind those who see them of the ancient and honourable traditions of the law, and of the fact that the independence and integrity of the judges is a necessary condition of a free society.

The Right Honourable Sir Harry Gibbs, GCMG, AC, KBE

FOOTNOTES

- (1) See Aubrey's Brief Lives (Penguin ed.) p 226
- (2) Prohibitions De Roy (1608) 12 Rep. 63, 65
- (3) Case of Proclamations (1610) 12 Rep. 74
- (4) Commerdams Case (1616) Hobart 140
- (5) Blackstone, Commentaries, Vol 1
- (6) Campbell, Lives of the Chancellors, Vol 2, p.137
- (7) SP Gupta's Case, A.I.R 1982 SC 149
- (8) Gupta v Union of India A.I.R 1994 SC 268
- (9) Re Presidential Reference A.I.R. 1999 SC 1
- (10) See Wik Peoples v Queensland (1996) 187 CLR 1, at 180
- (11) The Judge as Law-Maker (1972) 12 JS PTL 22
- (12) Shaw v D.P.P. [1962] A.C. 220, 275
- (13) Myers v D.P.P. [1965] A.C. 1001, 1021-2

(14) (1992) 175 CLR 1

(15) Boswell, Life of Johnson (World's Classics) at 443