

SIR ROBERT GARRAN

By Professor Leslie Zines

When Sir Robert Garran died on 11 January 1957, a month before his ninetieth birthday, there were many tributes from a wide variety of people; the Governor-General, the Prime Minister, government ministers and opposition leaders, judges and lawyers, heads and former heads of the public service departments, academics and university administrators, teachers, clergymen, artists, actors and musicians.

Before his death a chair of law, now in the ANU, was named after him. (A chair which I had the honour of holding for 15 years.) Later his name was given to a university hall of residence, a government office building, an annual oration and a Canberra suburb. He had knighthoods bestowed on him on three occasions; knight bachelor in 1917, KCMG in 1920 and GCMG in 1937.

How could all this happen in relation to a man who had spent nearly all his professional life – 31 years – as secretary of the Commonwealth Attorney-General's Department and constitutional adviser to the Government? This is not seen as a position with a high public profile. The duties involved do not usually attract the excitement, or even the interest, of most groups in our society. The answer is that Robert Garran was not just any old departmental head or just any old constitutional lawyer. He left his mark on the nation, its institutions, its evolution and its law, and also on the educational, cultural and social life of this city.

Garran was born in Sydney in 1867, and he has left us a vivid description of growing up in the Sydney of the 1870s and early 1880s. The family lived for a while in a terrace house on the western side of Phillip Street where Martin Place now joins it. They had a house cow which was milked in their backyard because Mother was (justifiably in those days) suspicious of what she called "milkman's milk". The cow would then, on its own, walk down Phillip Street to Hunter Street, turn right and go up to the Domain to graze. As a young schoolboy Robert would make his way left down Hunter Street to the office of the Sydney Morning Herald where his father Andrew worked as editor until ill health forced him to retire in 1885. It stood on the corner of Hunter, Pitt and O'Connell Streets and the Herald remained there until the late 1950s.

Andrew Garran was one of the first in New South Wales to publicly support the cause of federal union of the colonies. He used the editorial pages of the Sydney Morning Herald to that end and throughout the rest of his life delivered speeches and wrote articles emphasising the benefits of federation. It was, however, a cause which had many opponents and, more importantly, had to struggle with inertia and with suspicion in Sydney of the other colonies, particularly Victoria. In his memoirs, *Prosper the Commonwealth*, published a year after his death, Robert Garran described this provincialism when he was a boy. He wrote:

From what a small boy in Sydney saw and heard and read, his interests and prospects lay pretty well within the borders of New South Wales. Victorians, inhabiting a “cabbage-garden” to the south, were, to the Sydneysiders, people to be mistrusted. They were guilty of the treason of seceding from New South Wales, they were addicted to the damnable heresy of protection, and seemed to be unaccountably and selfishly prospering by it; and they set covetous eyes on our Riverina. As to the other colonies, to the Sydneyite they hardly counted: distant wildernesses of sand, or saltbush, or banana groves, as remote as coral islands – romantic to read about, but outside the range of experience. That at least was how it struck a schoolboy; and perhaps to many grownups it did not look much different.

There was not much intercolonial travel and most of it was by sea. The separateness and provincialism of the colonies is perhaps evidenced by the fact that when a conference was assembled at Sydney in 1883 to discuss the possibility of union (it was decided as usual that the time was not ripe) the Premier of Victoria saw Sydney Harbour for the first time in his life.

It is likely that Robert’s later interest in federalism had its genesis in his father’s journalistic activity and political aims. He was a pupil at Sydney Grammar School for eight years to 1884, finishing as Captain, and then went on to Sydney University where, gaining scholarships in classics and mathematics, and general proficiency, he graduated with a Master of Arts degree with first-class honours and the University Medal in the School of Philosophy. He then studied for the law examinations conducted by the Barristers Admissions Board, there being no established law course at the University. After a year in a solicitor’s office he became associate to Mr Justice Windeyer. In 1890 he was admitted to the Bar, mainly practising in Equity. The future he saw ahead of him at the age of 23 he described as follows:

My expectation then was that I would lead a quiet and blameless life as an Equity barrister in a world which according to Victorian belief had finished with convulsions and was slowly but steadily progressing from good to better. But the Fates had other plans in store for the world, and for me.

The year after Garran was admitted to the Bar, 1891, saw the convening of a conference of politicians of all the Australian colonies and New Zealand for the purpose of drafting a federal constitution. The convention was held in Macquarie Street, around the corner from Garran’s chambers, in the NSW Parliament building. It was this assembly that sparked Garran’s enthusiasm for the federal movement. As a young new barrister with time on his hands he frequently attended the Parliamentary public gallery to observe the proceedings. He was fascinated.

That convention of 1891 was the first serious attempt to bring the ideal of a federal union down from the clouds and into the political arena and the everyday world. To most of the delegates it was a foreign system, but they learnt fast, debated, compromised, threatened to pack their bags and go home, and so on. Union seemed to them more and more a

reality the longer they were together, broadening their understanding and knowledge of the problems, fears and aspirations of other colonies while pressing the claims of their own. Free trade versus protection, large colonies versus small colonies, arguments over the use of rivers for conservation versus navigation, the division of the proceeds of customs and excise duties among the colonies, imperial ties versus national aspirations, all went into the whirlpool of political debate and diplomatic negotiation. Committees were set up to deal with different aspects. Finally a drafting committee completed a draft constitution. Much of it was drafted on the Queensland Government yacht *Lucinda*, on which the Premier, Samuel Griffith, had come to Sydney. Many of the drafting sessions took place while they sailed on the *Hawkesbury*. Most of the draft was approved by the convention. Within a few months, to use the words of Garran, federation . . . “from a vague aspiration was crystallized into a precise plan setting out the terms of a federal compact”.

The new constitution went to the various Parliaments for further action. Most colonial governments waited for New South Wales, the colony with the most anti-federal feeling. But years passed and nothing happened. Federation was stalled by a series of circumstances including matters of provincial political concern, opposition to the constitution by the NSW opposition leader, George Reid, a staunch free trader who believed the new central government would be protectionist, and opposition by the new Labor Party, who believed it would be conservative because of the strong upper house dominated by small States. Some of them feared it was a document intended to oppress the working class.

Further, Victoria by reason of the ending of the land boom and the collapse, due to corruption, of its comparatively unregulated banking and financial institutions entered an economic depression that spread to the other colonies. All this was exacerbated by a drought throughout the continent that continued for many years and had a devastating effect on exports and therefore on all the colonial economies. Governments had difficulty meeting interest payments to London investors and commodity prices were falling.

As a result of all this, and more, federation was not uppermost in politics or in people's minds. There were a few, however, who continued to carry on the fight by endeavouring to arouse public interest. Edmund Barton resigned from government to devote himself to the federal movement, speaking at hundreds of meetings, planning campaigns, writing letters and pamphlets. Garran became one of the disciples who gathered about him to assist the cause. Among other things, he wrote for the “Bulletin” amusing verse attacking the anti-federalists in general and Barton's opponents in particular. For example, when Sir John Robertson, a leading anti-federalist, declared that federation was as dead as Julius Caesar, Garran penned some verse to the effect the “antis” had forgotten Great Caesar's Ghost from whom the traitors' armies had fled at Philippi.

Federation Leagues were set up all over NSW, while the Australian Natives Association was doing similar work in Victoria. Garran was present in 1893 as a representative of the Sydney League at the historic conference of these bodies at Corowa which discussed how

the movement could be got out of the doldrums. As Sir Ninian Stephen explained in a Senate Lecture last year, it was Dr John Quick of Bendigo who moved a portentous resolution which was to capture public imagination and eventually to receive public support in four of the colonies including NSW and Victoria. This was that each colonial Parliament should pass an Act providing for the election of representatives to attend a convention to consider and adopt a bill to establish a federal Constitution and upon the adoption of such a bill it be submitted by some process of referendum to the verdict of each colony. The process would thus begin with the electorate directly voting for delegates and end with the electorate approving or otherwise their handiwork. The Parliaments, and more particularly the conservative upper houses, would be bypassed.

By 1896 New South Wales, Victoria, Tasmania and South Australia agreed more or less to that procedure. Delegates, largely pro-federal, were elected to attend a constitutional convention. Western Australia preferred to have its delegates appointed by Parliament and Queensland did not attend, being embroiled in a political and constitutional crisis of its own, as people in north and central Queensland pushed for the secession of those areas from southern Queensland.

During the years between the conventions Robert Garran took an active part, mostly behind the scenes at various conferences and gatherings pushing the federal cause, It was during this period that the University Extension Board at Sydney University had asked him to choose a subject and prepare a course of lectures. He prepared a course on federal government. No student applied to do it. He then used the lectures to produce a handbook with the prescient title of *The Coming Commonwealth*, published in 1897, just in time for the elections to the Convention. Nearly all politicians felt the need for such instruction and the book soon sold out. Garran found himself regarded as an authority (if a junior one) on federation.

It was at the Convention of 1897 that Garran's public career can be said to have taken off. The Convention met on 22 March 1897 in Adelaide. Barton was elected its leader. The Premier of NSW, George Reid, took Garran with him as his secretary. Garran discovered to his pleasure that everyone had read *The Coming Commonwealth* and complimented him on it. At the request of Barton, Garran was appointed secretary of the major committee of the Convention, the drafting committee. So he had a front row view of the inner workings of the Convention as well as helping it along. The last weeks of the Convention in Melbourne saw Garran working with Barton, O'Connor and Downer endeavouring to incorporate amendments approved by the Convention into the draft Constitution. They often worked at the Grand Hotel (now the Windsor) until 4 or 5 in the morning.

During the two referendum campaigns to approve the Constitution Garran became an active member of a New South Wales committee pushing for a yes vote. The "antis", as they were called, were very strong in Sydney and their medium was the *Daily Telegraph*. The committee deluged the country press with pro-federalist literature, replied point by point to the antis in the metropolitan press and went around the State to make their points at meetings addressed by leading antis. Two of the leaders were Jack Want QC, who

formally resigned as State AG for the campaign, and Dr MacLaurin, elder statesman and Chancellor of the University of Sydney. Garran summed up his activities at the time in this way ;

It was a great joy to us young graduates to trounce our revered Chancellor – who I fear agreed with Want that we were no gentlemen – and an equal joy to us young barristers to trounce our attorney-general. Altogether we found life very good.

Their efforts were of course ultimately crowned with success. Four colonies produced strong affirmative votes at the referendum of 1899. Western Australia for a while stood out but was forced to a referendum under threat of secession by the people in the goldfields of Kalgoorlie and Coolgardie, who were nearly all easterners. Queensland, although not present at the Convention, got its act together and by a rather narrow vote agreed to enter the Commonwealth.

When delegates of the colonies were invited to London to discuss the enactment of the Constitution Bill, Barton asked Garran to go with the delegation. But in the meantime Garran had agreed with Dr John Quick that they would produce a joint work on the Constitution to be published at the establishment of the Commonwealth. It was produced in 1901 and it is a most remarkable work of over 1000 closely printed pages. Although its formal title is *The Annotated Constitution of the Australian Commonwealth*, it is a classic study, invariably called simply “Quick and Garran”, and referred to as an authority by counsel and judges to this day. It covers the history of ancient and modern colonisation and the government of all the Australian colonies and New Zealand. It contains one of the best descriptions of the history of the Australian federal movement. It then comments on every section and sub-section and paragraph of the Constitution Act and the Constitution in the light of constitutional practice and legal decisions of Britain and the colonies, decisions of the Supreme Courts of the United States and Canada and Canadian decisions of the Privy Council. What it does not contain are any Australian High Court decisions on the Constitution because there weren’t any, as the High Court did not come into existence for another three years. A number of people, including Law Lords of the Privy Council, expressed regret that Garran never revised the work or attempted to update it. Garran rejected this idea on the ground that it was a contemporary exposition of the Constitution at the time of its enactment. To include its later evolution would have altered its basic character.

The Commonwealth came into being on 1 January 1901. After a ceremony in Centennial Park, Sydney where the Governor-General Lord Hopetoun, was sworn in and then Prime Minister Edmund Barton and his fellow Ministers, there was in the afternoon a meeting of the Executive Council. It created seven departments and allocated portfolios. But of course there were no Acts to administer because there was no Parliament. Garran was appointed Secretary of the Attorney-General’s Department, the first appointed public servant, and was for several days its only member.

Garran’s first duty was to draft in his own hand the first number of the Commonwealth Gazette announcing the coming into existence of the Commonwealth of Australia and the appointment of the first Government. He then sent himself to the State Government Printer, who graciously printed it. When Barton, with Garran and others, went by train to

Melbourne – the temporary capital – he carried with him all the files of the Commonwealth of Australia.

For the first several months Garran's tasks and opportunities were unique. Never again would the head of the Department experience the same circumstances. There was no Parliament for over four months, no High Court for nearly three years and during that period few expositions of the Constitution by State Courts.

He had to advise on the holding of federal elections where there was no Electoral Act and sparse help from the Constitution, which merely provided that the State electoral laws should be applied "as nearly as practicable". The Ministers had all rushed to their electorates and Garran was instructed to answer all queries from State electoral officers in the Minister's name. He seems to have largely made it up as he went along. He said that "if the defeated candidates had known of all our difficulties in trying to apply the inapplicable, there might have been quite a crop of disputed elections." By 9 May 1901, however, there was a Parliament and Garran had the interesting and somewhat heady experience of opening a new statute book unencumbered by the heavy weight of past practice and precedent. He and his drafting officer, Gordon Castle, aimed at a lucid direct style, free of long clauses, qualifications and technical jargon. Existing Acts of other jurisdictions which might have been models were stripped bare of superfluity and honed down to the clear essentials. Such was the theory, and in fact the Commonwealth Acts were recognisable by their crisp appearance. Alas, those Acts can no longer be described in quite that way, not because the draftsmen are inferior to those who began the statute book, but because of the demands of a more complex society. Garran said that when the Commonwealth levied direct taxation for the first time in World War I their Income Tax Assessment Act was "a thing of beauty and simplicity that would not have shamed Wordsworth or T S Eliot". He then referred to the constant battle between big taxpayers and the Tax Office as having produced "the literary monstrosity of today [i.e. the 1950s]." Today the Act of the 1950s seems almost innocent and naïve, and rather short.

The creation of the High Court in October 1903 may have cramped Garran's style somewhat. I recall coming across an opinion of Garran's which in reply to a question said something like this: "As a result of the decision of the High Court in X v Y the answer to your question is 'No'. That decision is quite wrong, but until it is overruled we can do nothing but abide by it."

Garran worked under eleven attorneys-general during his 31 years as head of the Department, from Alfred Deakin in the Barton government to Frank Brennan in the Scullin government. The Attorney he served for the longest time was William Morris Hughes, who held the office for terms aggregating eleven years. Hughes had a very high regard for Garran and seemed to want him by his side wherever he went. But in size, appearance and character they were as different as could be. Hughes was about five feet five inches in height with a fiery temperament, pugnacious personality and authoritarian manner, a born political street fighter. Garran was six feet four inches tall, calm,

cultivated, charming and a loyal public servant. A former Crown Solicitor, Fred Whitlam, father of Gough Whitlam, said that there was about him “a serene wholeness”.

Yet get on they did. Whenever a crisis or great difficulty occurred Hughes could be heard yelling “Where’s Garran?” From 1915 to 1921, while Hughes was Attorney-General he was also Prime Minister. The problems that engulfed him as a result of World War I caused him to look to Garran more and more for help, particularly in his Attorney role. The War Precautions Act had given broad powers to Government to make regulations on any matters related to the war. The High Court had accepted that many domestic matters, such as the price of food, had a relevant connection with the defence of the Commonwealth during wartime. The Act became a great legislative sausage machine as Ministers gave instructions for a steady stream of regulations on every conceivable topic. A famous cartoon shows Garran in overalls standing by a large War Precautions Machine and Hughes expostulating with him because two days had passed without the issue of new regulations.

The War Precautions Regulations gave many new powers to the Attorney-General over many aspects of life. In order to deal with this Hughes got Parliament to pass an Act to create the office of solicitor-general and appointed Garran to it. Under the Act Hughes delegated to Garran practically all his statutory powers as Attorney-General. As Garran put it, “To all intents and purposes Magna Carta was suspended and he and I had full and unquestionable power over the liberties of every subject.”

As he was a public servant there is no way one can accurately determine what contribution Garran made to the formulation of government policy. One clue was however, provided by the Governor-General. At the end of 1916 after the defeat of the first conscription referendum there were moves at a caucus meeting to obtain a resolution expressing no confidence in Hughes. In the middle of the meeting Hughes and 23 of his followers left and formed a new party, the National Labor party. The Opposition Liberal leaders said unofficially that they would support Hughes so long as the new government confined itself to war measures. Hughes went to Government House, resigned his commission and asked for and received a commission to form a new government. In his report to King George V the Governor-General, Sir Ronald Munro-Ferguson, expressed the view that the new team was at least as strong as its predecessor, the real strength of which “was limited to the hurricane force of the Prime Minister, the good character of Senator Pearce [the Defence Minister] and the trained mind of Mr Garran,” all of which were still available. That Garran should be put with the Prime Minister and a senior minister as one of three who provided the “real strength” of the government is a most unusual tribute to a permanent public servant. It was made by a man who was very aware of the operations of government and the political scene.

In April 1918 Hughes was invited by the British Government to attend an Imperial Conference, and he took Garran with him. They did not return to Australia for about 17 months. That was partly due to the relatively sudden end to the war and Hughes’s anxiety to be at the peace conference to influence British policy, retain for Australia German

New Guinea and seek reparations. The result was that Garran played a considerable role at the Paris Peace Conference, where he became well known. Given the status of technical adviser to his Minister he had right of entry to the plenary conference and to the several councils when required by the Minister. He was placed on a number of committees of the British Empire Delegation and took part in discussions relating to the proposed covenant of the League of Nations. It was Garran who was chosen to convey the views of the British Empire Delegation to the Council of “the Big Five”. He and Hughes did not arrive back in Australia until 24 August 1919.

Just as Garran had contributed greatly to the establishment of a new nation on sound constitutional and legal foundations, so in the 1920s and 1930s he took a notable part in the development of Australia and the other British Dominions towards full sovereignty. He attended, with Bruce, the Imperial Conference of 1923 and went with Scullin and Attorney-General Brennan to the Conference of 1930 after attending an assembly of the League of Nations. The 1930 Conference brought into effect the final settlement of the proposed Statute of Westminster based on the Balfour Declaration of 1926 affirming the equal status of the United Kingdom and the Dominions. Garran was attached to the Imperial Relations Committee which put the finishing touches to the Statute. At the same time he was chairman of a drafting committee which was concerned to ensure that despite the grant of full power to each Dominion to override Imperial Acts, the laws relating to merchant shipping would remain uniform. This position as chairman recognised, as he himself put it, that he was the “doyen of legal advisers at the conference”.

During his spare time Garran had over the years engaged in translating the “Book of Songs” by the German poet Heinrich Heine and other songs of Schubert and Schumann. Singers loved the translations and they became well known as a result of broadcasting. They were published by Melbourne University Press as a book in 1946. He is generally recognised as having captured not only the meaning of the songs but, to a high degree, the spirit and rhythms of the German originals. On his death the secretary of the Sydney Schubert Society stated that those translations ranked among the finest existing and that it was gratifying that they achieved world-wide recognition in Garran’s lifetime.

For many people, however, the respect and affection they had for Garran related not to his roles in national, British Commonwealth or international affairs, but to his aim to make the young city of Canberra a cultured and civilised place in which to live.

When the first public servants were moved unwillingly from Melbourne to Canberra about the time of the opening of the old Parliament House in 1927 there was much complaining. Most of them had no desire to be pioneers. They missed the conveniences of urban life in a metropolis and some missed parents or other relatives to act as baby-sitters. The bus transport system was primitive and many people in those days did not have cars. Many more grizzled and bemoaned their lot. Garran and his wife were not among them. They built their house and remained there for the rest of their respective lives.

When Garran retired in 1932 some people said that they were the only people in Canberra who were not forced to live there. Both of them went to great efforts to assist newcomers to settle in and to become part of the community. They took leadership roles in arranging events and organising amenities. Lady Garran's death in 1937 was generally regarded as a great loss to the people of Canberra.

Garran's longer lasting efforts were directed to the educational and cultural growth of Canberra, the breaking down of what Sir Kenneth Bailey, one of Garran's successors, called "its provincial Babbitry". He inspired some with the thought that Canberra should not be merely a city of government, but of culture, learning and research. Almost immediately he took a leading part in establishing the Society of Arts and Literature, of which he was the President. It later broke up into specialised parts. The first was the Musical Society, which provided an orchestra in which Garran was second clarinet. He also sang in the choir. Another off-shoot, the Drama Society, evolved into the Canberra Repertory Society.

Garran was head of a movement which resulted in the establishment in 1929 of Canberra University College, under the auspices of Melbourne University. He remained chairman of its governing body from its creation until about three years before his death. While the College was sufficient to provide classes to public servants (some of whom had begun them in Melbourne) and their offspring, Garran from an early date advocated a high-grade research university in the capital, which he saw as principally concerned with subjects that could be nurtured in a national capital and which were of direct concern to government. They included international relations, economics, Pacific relations, political science and public administration. The creation of the Australian National University fulfilled this aspiration and went further than he envisaged in coverage and expenditure, with research schools in physical and biological sciences and medical research, as well as the social sciences. He was a member of the interim council of the ANU from the beginning. In recognition of his long and persistent advocacy of such a university he was honoured with the degree of Doctor of Laws and was thus the first on the roll of ANU graduates. Later he was appointed the first honorary fellow of University House.

During the 25 years between his retirement and death Garran performed many public services. He was appointed by the British and Indian governments in 1933 to be chairman of the Indian Defence Expenditure Tribunal to report on the apportionment between the two governments of the cost of British and Indian armies in India. In 1934 he was appointed to a committee to prepare a reply to the case for the secession of Western Australia from the federation. The reply was called the Case for Union, which apparently convinced the Joint Committee of the Westminster Parliament not to receive the petition of the Western Australian Government to take that State out of the Commonwealth.

Garran was also briefed by the Commonwealth to argue before the High Court an important case on section 92 of the Constitution, which provides that "trade, commerce and intercourse among the States shall be absolutely free". Garran strongly believed, with much justification, that the High Court had made a complete mess of this provision. It takes up several parts of his memoirs.

For about eighty years from the creation of the High Court there were many twists and turns in the interpretation of section 92. By the mid-twentieth century the predominant interpretation was that of Owen Dixon, who held that it gave an individual right to engage in interstate trade, subject only to such regulations as were necessary for an orderly society, such as rules of safety and public health. Commonwealth nationalisation of banks and airlines were held to be in breach of the section, as were State Acts controlling interstate road hauliers and providing for statutory marketing schemes for agricultural products.

In his memoirs Garran said that he was musing over the judgments on section 92 “and frankly I want to burn the lot.” He suggested that all the judges and professors of constitutional law should go to a psychoanalyst and get their brains washed and then look with fresh eyes and virgin minds at the section itself as it was meant to be. He envisaged a law student making a summary of leading cases on the section. The student then “closes his notebook, sells his law books and resolves to take up some easy study like nuclear physics or higher mathematics”.

It was not until 1988 that the Court, by and large, accepted what Garran had always said was the intention of the framers, namely that section 92 was directed to the prevention of discrimination against interstate trade, and the prohibition of the protection of the local trade and industry of a State against that of other States.

Garran’s experience at the Peace Conference led to his interest in furthering the cause of international peace and international service. He was president first of the League of Nations Union and then of the Australian Association of the United Nations, the aims of which were to spread knowledge and understanding of the work of those organizations. But his chief devotion in the cause of international work and service was to the Rotary movement. He was responsible for the foundation of the Canberra Rotary Club and was enthusiastic in advancing the cause of Rotary International. In 1940 he embarked on a three-month Rotary visit to the United States, explaining Australia to American Rotarians during a time when Britain and Australia were at war, but America was neutral.

His constant delight and interest in new experiences and in learning new things is well illustrated by a story Professor Geoffrey Sawyer told. A little while before his death Garran asked Sawyer to come to see him. He was ill in bed, but he had come across some articles in the journal “The Listener” about a school of legal theory known as American Legal Realism and he wanted to discuss its ramifications. It is referred to in the last section of “Prosper the Commonwealth”.

On his death Garran was given the honour of a State funeral, the first ever given to a former public servant. The Prime Minister, Robert Menzies, sent a message which said: “What a man he was, and how grateful we all are for his life and his kind.”