OPENING ADDRESS F-LAW 2001, PRAXIS AND POLITICS – MOVING FORWARD IN DIFFICULT TIMES
QUT FACULTY OF LAW, 15 FEBRUARY 2001, 9.30AM

I am delighted to have been invited to open the F-LAW 2001 Conference which promises to be a delicious feast of legal feminism. Dr Helen Stacy and her team from QUT's Research Concentration in Women, Children and the Law have arranged a magnificent banquet to stimulate and nourish the intellect. I hope my few words will provide a delicate hors d'oeuvre to tease the palate in preparation for the delights to come.

A recurring theme throughout the conference is one in which I have a particular interest: the appointment of women to the judiciary. In 1990, there were no women judges in Queensland. Now women fill the positions of Chief Magistrate, Deputy President of the Industrial Relations Commission, Chief Judge of the District Court and President of the Court of Appeal. Seven, or 28%, of the 24 Queensland Supreme Court Judges are women. This is a number significant enough to allow the women judges to be themselves rather than honorary gentlemen, an issue to be more fully explored later today by Jean McKenzie-Leiper from Ontario.

This dramatic change has not occurred without debate, usually centred around the truism that judges must be appointed on merit.

This time last year, the Right Honourable Sir Harry Gibbs, GCMC, AC, KBE delivered the Inaugural Oration on the opening of the Supreme Court Library Rare Books Room. Sir Harry is a highly respected former Chief Justice of Australia and eminent jurist, admired by the Queensland legal profession, for he is one of ours, born in Ipswich, educated at the University of Queensland, a former member of the Queensland Bar and a former member of the Supreme Court of Queensland. Sir Harry turned 84 last week and during his lifetime there have been enormous social changes, including changes in the role of women. When Sir Harry practised as a barrister and worked as a judge, there were very few women in the legal profession and even fewer women judges. Interestingly, Sir Harry married one of the then few Queensland women lawyers, solicitor Muriel Dunn, but as was the custom at that time Lady Gibbs gave up her paid career upon marriage. Sir Harry never served on a Bench which included women. When he retired as Chief Justice of Australia in 1987, his vacancy was filled by Australia's first and still only woman High Court Judge, Mary Gaudron.

In his lengthy Oration which raised a number of noteworthy issues, Sir Harry also expounded his views on judicial appointment: although "everybody would pay lip service to the notion that appointments to the Bench should be made on merit … In practice, inappropriate motives do sometimes influence judicial selection in many if not most countries." He touched on personal patronage and political and religious appointments and then stated, "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."

Sir Harry's comments created a controversy, but on analysis are not exceptional. Of course, judges should not be representative; for example, one group regularly using the courts are criminals, but no sensible person would wish criminals to be represented in the judiciary! Every judge on appointment takes an oath of office to do equal justice to the poor and rich and to discharge their duties of office according to law to the best of the judge's knowledge and ability, without fear, favour or affection. The judicial oath does not allow judges to represent in a partisan way any section or sections of society. But many thoughtful people, whilst understanding and respecting the need for well qualified independent and non-partisan judicial officers, nevertheless expect the judiciary and other public institutions of power and influence, including academia, to more equitably reflect the diversity of those properly qualified to be appointed to them.

For some years now, sections of the community, including women, have complained about the lack of access to positions of power and influence in society, including judicial positions. In an effort to remedy this imbalance and its consequences, social commentators have understandably queried: "If a candidate has all the qualities, attributes and merit for a particular judicial position and the Bench to which the candidate is to be appointed has a gender or cultural imbalance which can be partially remedied by the candidate's appointment, then why should not the candidate be appointed to that Bench."

Nor would any sensible person dispute that appointments to the judiciary should be on merit. An independent judiciary as the third arm of government plays a crucial role in Australia's working democracy and is an institution which must be preciously guarded. Judges are appointed generally until age 70 and can only be removed in exceptional circumstances: they must be merit appointments or the community will suffer. Australia's egalitarian society and future hopes demand a meritocracy in all fields of public life. But difficulties may arise in the definition of the concept "merit" which invariably includes subjective elements and, like beauty, may be, at least partially, in the eye of the beholder. Chief Justice Gleeson, in his speech to the Australian Bar Association on judicial legitimacy in New York last year describes the "capacity of an individual to make an impartial determination of the facts and to understand and conscientiously apply the law" as the primary requirements for fitness for judicial office.[1]

In Australia, appointments to the judiciary are the gift of the Attorney-General, who almost invariably consults widely with senior judges and senior members of the profession before making the appointment but is not bound by the consultation. Some have criticised this system. Sir Harry suggested that the Attorneys-General should consult with the Chief Justice, the Presidents of the Bar Association and the Law Society and should, at the time of making an appointment, reveal the recommendations that were made. Such a course would almost certainly be offensive to the candidates who were recommended but not appointed. Dr Michael White QC, in a recent article,[2] suggests that judicial nominations should be made by a small committee of the senior judiciary, in consultation with representatives of the Bar Association, Law Society and others or, alternatively, by a commission of senior judges, lawyers and lay persons who select their own members, rather than accept appointment from the government.

Others like Mr King, AC, QC, former Attorney-General of South Australia and former South Australian Chief Justice, make the valid point that the Attorney-General's power to appoint judges is the only influence of democracy upon the judiciary in Australia, where judges are not elected and once appointed fiercely maintain their independence from the

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1 *Judicial Legitimacy*, ABA Conference, New York, 2 June 2000.

2 Au*stralian Bar Review,* December 2000, *115-161, 160.*

other arms of government.[3] The power of the vote in a democracy should never be underestimated, although later in this conference Professor Rosemary Hunter will discuss the problem of the shrinking and less powerful state, questioning whether the state remains capable of responding to the needs of women.

The Law Council of Australia represents the Australian legal profession and speaks on its behalf at national level to promote the administration of justice, access to justice and the general improvement of the law for the benefit of the community. It has recently launched its policy on judicial appointments. It recommends that Attorneys-General continue to have the power to appoint judges and that Attorneys should consult widely with senior judges and members of the profession and also, where appropriate, with legal organisations such as women lawyers' associations. The policy sets out a comprehensive list of the qualities required by members of the judiciary which is, I think, largely uncontroversial: included in those qualities is "an awareness of gender and cultural issues". The Law Council's approach accepts the truism that judicial appointments should be on merit, makes a serious attempt to define the criteria establishing that merit and recognises merit as including gender and cultural considerations. This is an encouraging and welcome development. The Australian community will more readily accept the judicial legitimacy referred to by Chief Justice Gleeson[4] if they know their judges are appointed on merit, can make an impartial determination of the facts, understand and conscientiously apply the law and also able to understand Australia's egalitarian multicultural society.

The Federal Attorney-General's Report: Judicial Appointments – Procedure and Criteria[5] recognised that meritoriously appointed female judges may help eliminate gender bias by using their understanding of women's experiences in their fact finding and decision-making. Certainly, the appointment of more suitably qualified women to positions of power and influence in the community creates positive role models for other women, especially young women, and helps change the male culture of the institutions or organisations they join.

Similar considerations apply to merit-appointments to the judiciary and elsewhere from non Anglo-Celtic ethnic origins.[6]

Let me turn to the menu. Professor Kathleen Sullivan will shortly dish out the first course of your magnificent banquet, a course designed to whet, rather than satiate, your appetite, as she discusses whether women's rights should be protected in a Bill of Rights. It is 100 years since Australia's federation and the passing of the Australian Constitution, an appropriate time for Australian women to reflect upon its relevance, a complementary side-dish prepared by Jane Innes.

In Australia, there is a strong movement amongst a surprisingly diverse range of women and women's groups to ensure Australia becomes a signatory to the Optional Protocol to CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women). CEDAW is effectively a Bill of Rights for women. The Optional Protocol provides a complaints procedure and requires states to answer complaints within six

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3 "The Attorney-General, Politics and the Judiciary, 29, University of Western Australia Law Review, 155, 175.

4 See fn 1.

5 AGPS, 1993, para 5.63-5.69.

6 *Judicial Merit, Sir Harry Gibbs and a Representative Bench*, Alternative Law Journal, Vol 25, 3 June 2000.

months. Perhaps Professor Charlesworth will touch on this in her meaty address this afternoon, as may Dianne Otto, Emelia Della Torre and Sari Kouvo in their antipasto of women's human rights law.

Fresh baked bread is one of life's joys, and tomorrow Sally Kift, Leon Wolff and Monica Burman will address bread and butter issues such as the teaching of feminism, whilst others will consider change in the courts. I hope the conclusion will be that the appointment of more women judges has begun to make positive changes at least to the culture and atmosphere of the court room. I am delighted that this session is to be chaired by her Honour Judge O'Sullivan. Ten years ago at her Honour's swearing-in, she delighted some and dismayed others by using the f-word in her acceptance speech: she described herself as a feminist! It is only fitting that she play a significant role in F-LAW 2001.

Professor Sandra Berns might cause some to have indigestion and reach for the Mylanta with her concerning paper on Australia's earnings gender gap.

Lee Adams will re-assess the ingredients for Mom's American Apple Pie when she relates the disappointing response of the American academic hierarchy to the call for more women in powerful positions in legal academia by drawing analogies with Dorothy and the Wizard of Oz. Similarities have already been noted in Australia between Dorothy's Oz and our Oz down under: for example, leading Australian popular playwright, David Williamson, sees Sydney as the Emerald City. If Dorothy is a legal academic, she is likely to have just as much trouble having her voice heard in down under Oz, as in Frank L Baum's Oz, food for thought from Margaret Thornton.

Beth Gaze's secret recipe for refining the work-family juggling act will help us all achieve lives of balance, power and influence; if she can patent this she will surely become one of the new millennium's first feminist millionaires!

A salmagundi of side dishes will include the results of the survey of Queensland magistrates on domestic violence and the preliminary analysis of results from the feminist perspective of the Survey of Family Law Practitioners Views on Using Litigation to Resolve Family Law Disputes. Sue Currie's report on the Queensland Taskforce on Women and the Criminal Code and Jo Moran's views on continuing legislative frustration for Queensland women will provide additional delicacies supplemented by Rosemary Lyster's nourishing vegetarian dish on eco-feminism.

For those looking for some Devil's food cake, Belinda Morrissey will jolt the sensations with a fascinating analysis of three female evil, sadistic rapists and murderers.

Family law (custody of children, maintenance and property settlements after the breakdown of relationships) remains the area of law which is most likely to impinge on women's lives. Justice Neil Buckley will address the conference on Family Court initiatives which attempt to deal with the issues of gender and power to achieve justice in what, I hope, will prove to be a just dessert!

Like any great meal, these exotic courses will be interspersed with sparkling discussion and conversation, including that of treasured younger legal feminists such as West Australian academic, Karen Whitney.

My only regret is that I will be unable to partake in this intellectual gourmandising because of work commitments set before I knew the dates of this conference. I congratulate Dr Stacy and her team and invite you to celebrate achievements, set and work for future goals, challenge the boundaries, brainstorm, enjoy the supporting company of friends and savour the many delicacies prepared for this feminist feast of which Babette herself would have been proud!