Occasional Address Conferral of Degrees Ceremony School of Law, Graduate School of Business and School of Education, University of Sydney by **The Honourable Justice Mary Gaudron** High Court of Australia

Friday 29 October 1999

Sydney, NSW

Chancellor, Vice-Chancellor, Fellows of the Senate, Graduates, Ladies and Gentlemen:

It is a great honour to be here today as the recipient of an Honorary Doctorate from the University to which I came as an undergraduate a little more than 40 years ago. I arrived then with high hopes and a shiny new briefcase, almost evenly counterbalanced by a shaming weight of ignorance and naïveté.

My first impressions were not of the magnificent sandstone buildings that then predominated, nor of the remote and intimidating academics in their austere black robes, but of the sophistication of my fellow students. They had all the answers. They knew, for example, what was and was not examinable, what had to be read and what could safely be ignored, whose ideas were in and whose were out. All this they imparted to me and a clutch of other awestruck freshettes from the bush with solemn superiority. They also told us that the carved sandstone lions which flanked the steps to the old Fisher Library roared out loud every time a virgin walked past. Thereupon, some of us set about losing our virginal status. I decided it was easier to give the library a miss.

It took a little while but it gradually became apparent that it was sometimes wise not to believe those with all the answers. Rather, it was the question that was all important. Moreover, to find the answer, one could not avoid the library no matter how loud the lions might roar. Perhaps, that is the essence of a University education.

Forty years ago, there was much for a young graduate to question, particularly a young law graduate. Despite our democratic traditions, despite our self-proclaimed egalitarianism and despite our commitment to a fair go, ours was a society of marked inequalities, inequalities which were often entrenched or reinforced by the law itself. A working woman was, by law, worth approximately two-thirds of a male worker doing the same job. In some contexts, a woman was worth nothing at all. For example, a married woman could not work in the Commonwealth Public Service[1]. She could not sue for damages if injured by reason of her husband's negligent driving notwithstanding that he was covered by compulsory third party insurance[2]. And she could not complain of rape within marriage[3]. However, her legal status was infinitely superior to that of Aboriginal Australians.

Forty years ago, in New South Wales, there was no guaranteed freedom of movement for Aboriginal Australians, and no guaranteed freedom for them to communicate with non-Aboriginal Australians. Thus, until 1963, the laws of this State allowed that Aboriginal Australians who, in the opinion of the Aborigines Welfare Board, should be placed under its control, might be removed to and kept on Aboriginal reserves[4] - reserves from which other Australians were, by law, excluded[5]. Moreover, Aboriginal Australians were not even guaranteed the freedom to bring up their children. Until 1969, the Aborigines Welfare Board, regardless of welfare considerations, might place any Aboriginal child under the age of 18 under its control. It could, even, place that child in apprenticeship or other employment on terms that his or her wages were paid to the Board[6].

In the face of laws which mandated inequality, it was easy to pose the question "why should it be?". And when no satisfactory answer was forthcoming, it was easy to assert that, consistent with the great Australian tradition of "the fair go", no-one should be subject to legal disability or restraint on the grounds of race or sex. And so, in relatively recent times, Australia laid the foundations for what, hopefully, will one day become and remain a nation of true equals.

The notion of equality is not without its difficulties. After all, we are all manifestly different with our different aptitudes, our different talents and abilities. Perhaps, because of the difficulties inherent in the notion, the Parliaments have, by and large, left it to specialist tribunals and, ultimately, the Courts to determine what constitutes discrimination or, which is the same thing, what is involved in the notion of equal treatment. This they have done either by enacting laws which do no more than prescribe broad general principles or, in some areas, by not enacting any laws at all.

The last 40 years have seen Australia develop into not only a more equal society, but, also, into a more complex one. Thirty years of relentless social, economic and technological change have complicated and rendered less certain our family and working lives. Commercial structures and transactions have become infinitely more complex in our globalised environment. And although technological change may have made us better informed, new technologies cannot make us wiser.

It is not surprising, given the range and rate of change, that, in recent times, Parliaments have sometimes chosen to express laws in broad terms or to confer wide discretions on courts and tribunals, leaving it to them to decide what is "fair and reasonable", "just and equitable" or "appropriate in all the circumstances". Sometimes, they have chosen not to legislate at all, simply leaving it to the Courts to develop or adapt the common law or judge made law to ever-changing situations. In that context, it is, perhaps, to be expected that some should question the role of the courts within the democratic process and, even, charge them with usurping the law-making function of the Parliaments. However, that is to look at only one side of the equation. It is equally valid to question the role of the Parliaments and their failure to enact laws with precise legal effect.

As is often the case, however, the larger questions can be put aside. The smaller, niggling questions have greater urgency. In a context in which laws are expressed in broad, general terms or confer wide judicial discretions requiring resort to the Courts if rights and obligations are to be identified with any degree of precision, we must ask whether it is fair that access to legal representation is so costly; whether it is fair that legal aid is not universally available to those who need it. And we must also ask whether judges have sufficient experience of human diversity to make the value judgments necessarily involved in the exercise of broad discretionary powers.

I have always held it to be self-evident that, because judges exercise wide discretionary powers, it is essential that our lawyers should be drawn from the entire social spectrum. Which brings me, I suppose, to what I have always thought to be fundamental if we are to be a nation of equals, namely, equality of opportunity in education - a matter which has been the subject of vigorous, but not necessarily rigorous, debate in recent weeks.

One knows that Members of the Senate of this University are keen to ensure equality of opportunity in tertiary institutions. But the responsibility for equal educational opportunity is not theirs alone. It is a responsibility which devolves in substantial part upon those who teach in our infants, primary and secondary schools and which will devolve on those of you who, today, have received your (graduate and) post-graduate degrees in education.

No matter what our field of endeavour, it is important to remember that equality is not uniformity. Equality is about treating people as individuals and allowing for individual difference where that is necessary. Particularly is that so in the field of education, where equality of opportunity clearly demands that all individuals be taught according to their talents and abilities so that they, as individuals, can achieve their true potential.

There are some who would treat equality of opportunity in education as a basic or fundamental human right. Forty years ago that was a view I shared. Now, I would accord it a much higher status. In an ever-changing and ever competitive globalised economic environment, I see it as nothing less than a matter of national security. Whatever the appropriate label, the responsibility of those who would teach our future Australians is onerous indeed. Yet, in our economically rationalised society, our teachers and academics are accorded little status and significantly less by way of financial reward than they received 40 years ago.

The changes that have taken place in the last 30 years have posed and will continue to pose questions for all members of society. They are not questions that can be answered by doctrinaire theories which pretend to all the answers. One fundamental question that emerges is how to maintain equality of opportunity - in the vernacular - a fair go for all - in the face of changes that appear to have wrought significant inequality in wealth and in bargaining power. From the perspective of a mere lawyer, that translates as a challenge to ensure equal justice.

In the face of the mounting cost of legal representation and restricted legal aid budgets, that challenge cannot be met by resort, as a matter of course, to party and party litigation. It may be that, in some areas, it can be met by the wide dissemination of information and advice - perhaps, via the Internet; in others, it may be met by alternative mechanisms for dispute resolution and in others, still, by representative and class actions. Even so, I suspect that, increasingly, the primary responsibility for everyday justice, including some aspects of criminal justice, will move from the legal profession and the courts to special interest groups and administrative tribunals.

Of course, lawyers have never been solely responsible for ensuring justice and fair dealing. We each have a responsibility to ensure that we do not infringe the rights of others and that we deal openly and fairly with all. Particularly is that so if we enjoy superior power or influence, as will many of you who embark on careers in management in the corporate and commercial sectors.

The corporate and commercial sectors have not gained an enviable record for integrity and fair dealing in the past two decades. Nor has their reputation been enhanced by a tendency on the part of some to play legal hardball with those who would seek redress from the courts. And if, as I think will be the case, individuals increasingly find it beyond their means to pursue their rights in the courts, it is inevitable, in my view, that our corporate giants will be answerable to statutory bodies armed with wide powers to investigate complaints and to enforce the law. I suspect they will be little concerned with the niceties that we have come to expect from the courts.

On a more positive note, I wish today's graduates every success in their chosen fields. I congratulate your parents and families on your success. I sincerely congratulate you on your degrees, degrees for which, I know, you have worked long and hard. I feel humbled when I realise that you earned your degrees while I got mine simply for doing my job. Some things just aren't fair!

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1 Under reg 139 to the *Commonwealth Public Service Act* 1902 (Cth) (*Commonwealth of Australia Gazette* , No 60, 23 December 1902), the employment of married women in the Commonwealth Public Service was "deemed undesirable". Further, reg 140 provided for a general rule that any female officer continuously employed for at least five years in the Commonwealth Public Service was, upon her marriage, to be granted leave of absence on full pay according to a set scale, at the expiration of which leave, the female officer was deemed to have forfeited her office and was to cease to perform her duties. The bar on the employment of married women in the Commonwealth Public Service was not lifted until 1966 (see *Public Service Act (No 2)* 1966 (Cth)).

2 This arose from the position at common law under which the legal personality of a woman was subsumed within that of her husband upon marriage, so that the wife was unable to sue the husband (and vice versa). In New South Wales, s 16B of the *Married Persons (Property and Torts) Act* 1901 was introduced by the *Law Reform (Married Persons) Act* 1964 (NSW) to permit a wife to sue her husband in relation to a motor vehicle accident (and vice versa). The immunity of a spouse from action by the other spouse was completely abolished by s 119 of the *Family Law Act* 1975 (Cth).

3 In the States of Queensland, Western Australia and Tasmania where Criminal Codes were in force, the definitions of rape contained in those Codes were expressed, prior to their amendment, to operate "not [in relation to] his wife", thereby conferring marital immunity against rape on the husband. In the other states, there was no comparable exclusion in their criminal statutes. To the extent that the common law in these latter states conferred marital immunity on the husband in respect of rape of his wife, the High Court in *R v L* (1991) 174 CLR 379 held that that immunity no longer existed (at 390 per Mason CJ, Deane and Toohey J, 405 per Dawson J). Changes to the criminal legislation of all the state jurisdictions have now explicitly abolished marital immunity to rape. See, for example, s 61T of the *Crimes Act* 1900 (NSW).

4 Section 8A, *Aborigines Protection Act* 1909 (NSW).

5 Section 8, *Aborigines Protection Act* 1909 (NSW).

6 Section 11A, *Aborigines Protection Act* 1909 (NSW).