"Lift While You Climb"

QUT Graduation Speech 8 May 1995

The Honourable Justice Fitzgerald*

Deputy Chancellor, Deputy Vice-Chancellor, other members of the official party, graduands, distinguished guests, ladies and gentleman ...

Despite my medieval appearance, it is a mere thirty years since I graduated in law from another institution, after earlier experimenting with engineering followed by some difficulty with classical Latin. Like most graduands tonight, that was my first — and so far only — degree. I am aware that almost one-third of tonight's graduands already have one or more degrees, and note with awe that there are a number who will receive doctorates earned by scholarship. For all who are to graduate tonight, this joyful occasion marks the successful culmination of years of effort and the beginning of new opportunities.

Family and career ambitions — whether your chosen field is legal practice, public administration, commerce or law enforcement — will occupy much of your time, and you are entitled to take advantage of your talents and the qualifications you have gained to achieve material success. However, there will also be many other challenges and opportunities. As an aging judge, fast approaching his "use-by" date, with a captive audience of bright, young people, I will briefly indulge myself with a few iconoclastic, perhaps idiosyncratic, comments on a few only of those challenges and opportunities.

First, Constitutional Reform

As the end of the millennium, the centenary of federation and the transition to a republic rapidly approach, Australian society is transforming itself and its institutions. Possibly, hopefully, a revised Commonwealth Constitution will be adopted

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* LLB (Qld), Honorary Degree of Doctor of the University (QUT); President, Court of Appeal; Chancellor of Sunshine Coast University College; member of Mater Health Services Governing Board.

before the end of the century with provisions appropriate for a modern, multicultural, federal democracy. Decisions of the High Court in the last fifteen years — for example, those resulting in a major shift of power to the Commonwealth from the States and, more recently, finding restrictions on legislative power which are not expressed in the constitutional text — involve highly controversial political and social conclusions. More questions of vital importance remain unanswered and unanswerable purely as a matter of interpretation of the language of the present Constitution; for example: is there a constitutional right to life which limits the power of a government to authorise killing? If so, in what circumstances may killing be authorised? When does life begin? Unless the future shape of Australian society is to be determined by the lonely consciences of seven individuals — the High Court justices — irrespective of the community's will, Australia's twenty-first century Constitution needs to re-define the respective boundaries of Commonwealth and state legislative power, establish the core values of today's Australian society and, within that context, provide for the rights of individuals and minorities, including, of course, the country's indigenous people, and provide for adequate representation of all parts of Australia in the Federal Government and on the High Court.

The unrepresentative nature of the court has been noted by respected commentators for many years. Thus, for example, in 1967, in *Australian Federalism in the Courts* (Carlton, Melbourne Law Press), Professor Geoffrey Sawyer presciently said at page 36 that what he described as the "undue preference for Sydney and Melbourne" was partly due "to the professional snobbery of Commonwealth Attorneys-General from those states and the pusillanimity of those from other states". Since the creation of the High Court, eighty per cent of its judges have come from New South Wales and Victoria and more than fifty per cent from New South Wales alone. That continues to be the position. There has not been a Queensland resident appointed to the High Court since 1946, and there has never been a South Australian or a Tasmanian appointed to the Court. Despite the present Commonwealth Attorney-General's calls for the judicial selection process to be visible and comprehensive, the traditional secrecy has again been maintained, and the Sydney and Melbourne dominance of the High Court seems likely to continue while New South Wales and Victoria continue to dominate the Federal Executive Government. It is questionable whether that is acceptable in a court which makes critical decisions affecting the whole nation, including decisions which determine the validity of not only Commonwealth but also State laws.

Second, Law Reform: The Activist Judge

The legal system is also under pressure to reform, and many procedural innovations are under consideration. In the process, the judiciary is under scrutiny, revealing deep divisions of opinion concerning the judicial role and judicial selection.

As with other parts of our culture including, for example, language and literature, the common law inherited from England provides the foundation of our legal

system, and many of the rules of common law (including equitable principles) reflect values and attitudes which continue to find general acceptance in Australia today. However, we should not shrink from the conclusion that is not true of all aspects of the common law. Consistently with Australia's cultural diversity, our jurisprudence must be open to ideas and information from other parts of the world. Further, Australian appellate judges must modify, expand and correct the common law to give effect to the values of contemporary Australian society.

Both the judicial responsibility to produce a unique Australian jurisprudence and the values and policy choices involved in judicial decisions draw attention to the narrow social group from which judges — especially High Court and other appellate judges — are drawn. While judges represent the community as a whole, and do not, and should not, represent any section of the community, it is a legitimate criticism that the judiciary is drawn from an extremely narrow group and hence its opinions and perspectives on contemporary community values and attitudes are distorted and limited.

The conventional response to any discussion of judicial appointments is that merit must be the sole criterion. On the assumption that factors such as politics, religion, progressive or conservative social views, and personal or regional allegiances are immaterial, it is difficult to see what other position could be adopted. However, while capacity to perform judicial duties, integrity etc, must determine who is eligible to be appointed to the bench, merit is a surprisingly slippery and subjective consideration and sometimes merely a code-word for membership of the extremely conservative legal establishment. The opposition which the late Justice Lionel Murphy attracted on his appointment to the High Court was not related to the difficulties he experienced towards the end of his life but to the establishment perception that he lacked the necessary legal ability or "merit". In retrospect, he has been one of the most important members of the High Court in the last twenty-five years; some other High Court judges in that period who were acknowledged legal technicians have already been almost forgotten.

Further, the definition of merit is critically dependent on one's perception of what makes a good judge: most lawyers would agree that it is necessary for a judge to understand the overall structure of the common law, know or be able to ascertain and comprehend the detailed rules formulated by other judges, and reason by processes of inductive and deductive logic to conclusions suitable for the decision of particular disputes. Such a course exposes a judicial decision-maker to the experience and wisdom manifest in prior decision, and many consider that exhausts the judicial function. Others, myself included, consider that such an approach also perpetuates any errors, injustices or conflicts with modern Australian values which prior decisions involve, and that it is essential to constantly test current principles against the ideal of justice.

Of course, justice is not a mono-dimensional concept, concerned only with the rights and obligations of the immediate parties before the court. Other factors, such as certainty and predictability in the law and the potential effect of a decision upon other persons, must also be considered.

It is in both the community's and the judiciary's interests that there be greater acceptance of the reality of judicial power and of the importance of judicial appointments. Community support for the fundamental doctrine of judicial independence requires that the judiciary not exhaust its "political capital" but maintain public confidence. Judges, especially appellate judges, influence the development of the law and through it society, but either maintaining the status quo or contributing to a fairer society, and so helping to empower those who are disadvantaged. Both the community and the judiciary need to openly acknowledge that, as Professor Martha Minow put it in "Justice Engendered" (1987) *Harvard Law Review* 10 at page 93, "the judiciary [is] a critical arena for demands of inclusion". Those who are unrepresented or under-represented in the judiciary are entitled to insist that judges at least understand their concerns and take their perspectives into account.

Finally, the matter which gives tonight's speech its title "Lift While You Climb".

As citizens, you can all directly participate in issues such as constitutional reform and the role and membership of the judiciary. As university graduates in law and allied disciplines, you can all also contribute significantly to the community. I commend to you, an elite group with expectations of success and prosperity, an African-American saying — "lift while you climb"; that is, pursue your own ambitions, but raise others up with you, especially the disadvantaged and the needy. It is easy to offer some examples of need in today's Australian society, notwithstanding that our society is more diverse, open and tolerant than ever before.

First, an essential element of the continuing evolution of Australian society is the full recognition, protection and advancement of the descendants of this country's original inhabitants. This is important not only to indigenous people but to all of us: our country will not attain its full potential and international stature until the problems which Aborigines and Torres Strait Islanders experience, including appalling health and incarceration statistics, are justly resolved. Indeed, we should express pride in our indigenous people, and their resilience and achievements despite their experiences, and acknowledge not only their land rights, but, so far as possible, their right to their cultures.

Of course, Aborigines and Torres Strait Islanders are virtually unrepresented in either the formal political process or the legal profession. Nonetheless, their encounters with the law are common, either as victims or offenders. The law takes little account of their special difficulties or needs, or their cultural differences. Belatedly, the first tentative steps are being taken towards judicial involvement in cultural sensitivity programs, but ignorance of indigenous cultures is profound.

Needless to say, a number of other minorities in Australian society are also not yet fully empowered in the sense of formal representation in critical decision-making.

Second, women still do not receive the equal opportunities and advantages to which they are entitled. The community continues to waste a considerable part of

the talent produced by universities, including law and allied faculties. The promise that time would remedy the problem has proved hollow, at least in the legal profession. I recently opened, at random, a 1979 copy of the *Queensland Law Society Journal* and read the following:

> ... It appears to be incontrovertible that women are discriminated against on the basis of their sex ...
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> Women lawyers do not expect or ask to be treated more favourably than men ... what women seek is that they be given an equal opportunity to show their abilities in the practice of their chosen careers.

The same words are equally true today, almost sixteen years later.

Of course, there are notable exceptions, including the Deputy-Chancellor of this university, which also has a woman Chancellor. And there are also women judges and magistrates and barristers, women partners in legal firms, and women legal academics. However, given the number of women graduating, often with outstanding results, and entering the profession, the proportion of women lawyers in senior positions remains unacceptably small. It is certainly unacceptably small in the judiciary and in the senior ranks of the bar, from which most judicial appointments are made. Since January 1980, there have been eighty-eight senior counsel appointed in Queensland, of whom only three have been women, only one of whom has children. If we keep on at the present rate, we are unlikely to see any significant increase of women in the judiciary in the next decade.

It is time for a lot more affirmative action; time for governments to direct their legal agencies to include a significant proportion of women in those to whom they allocate legal work at every level; time for the large legal firms to do likewise, and to adopt policies which ensure women's advancement; time for women solicitors to ensure that women barristers receive a significant percentage of their work; and time for the bar to encourage women barristers and support them in their efforts. The only alternative that I can see is to accept that generally women will not succeed at the bar because of biological and cultural factors, and to broaden the groups from whom judicial appointments are made. Male imbalance in the legal profession, especially the judiciary, inhibits the just development of the law.

Third, we have in our society a substantial underclass — unemployed, uneducated or under-educated, under-empowered, underprivileged, and poor. These disadvantaged people are not isolated from the rest of us. They, and their anger and resentment at the inequities in our society, cohabit with us, and crime, which is often a by-product of their condition, affects us all. Self interest, as well as a commitment to justice, requires a fair distribution of the benefits and opportunities of this affluent community, including employment opportunities, especially for the young. Justice also requires that we acknowledge in the practical implementation of the criminal law that many people, especially young people, offend because they are damaged by their life-experience and are not intrinsically evil. It is not to condone crime or to ignore its tragic consequences for victims and their

families to accept that offenders, especially young offenders, should be treated humanely and with the aim of rehabilitation.

A fourth major challenge is conservation of the environment, which cannot be seen solely as an economic commodity, to be used and abused as market forces dictate. Present generations have no mandate to deplete and spoil the beautiful but vulnerable natural resources of this country, and immediate economic claims must be balanced against their environmental consequences for those generations still to come.

Let me conclude with a matter that at least those of you whose examination results were imperfect might find encouraging, although it is, in another sense, a cause for pessimism given my present position. My university results, all those years ago, were somewhat erratic, which some unkindly see reflected in my judgments and even my infrequent public statements. I was reminded of my academic limitations when I was offered an Honorary Doctorate, which, with no hope of obtaining one otherwise, I enthusiastically accepted. However, my delight was tempered when I learned that the Honorary Degree of Doctor of the University is bestowed in recognition of a number of matters and that one, for which I did not qualify, is scholarship. My former lecturers would not be surprised.