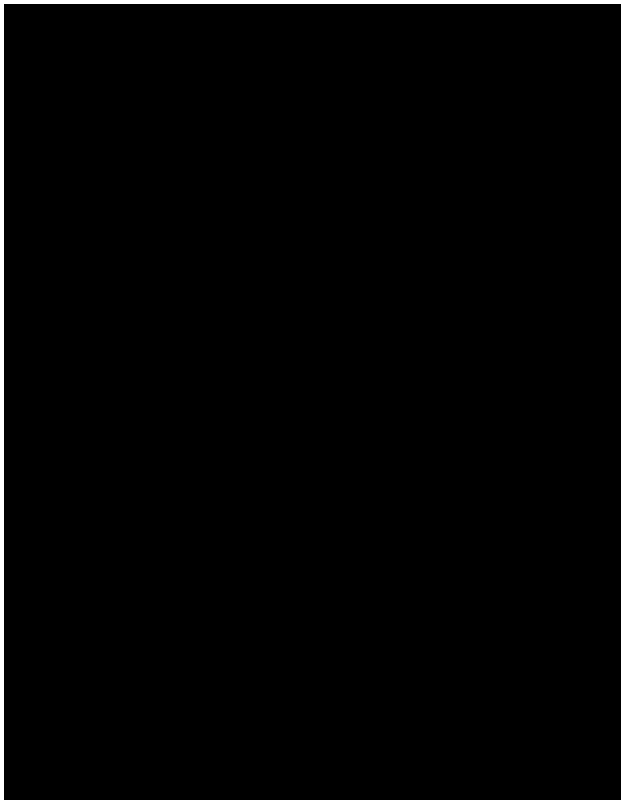

Robert Garran, first Commonwealth Solicitor-General

Over the years, in addition to drafting Bills (noted for their spare, economical style) and giving legal advice to governments and Commonwealth departments, Garran appeared for the Commonwealth in some constitutional cases, including an appearance before the **Privy Council** for the Commonwealth as **intervener** in *Webb v Outtrim* (1906). He held strong views about the meaning of certain constitutional provisions—later writing, for example, that 'the violence of the oscillations in the interpretation' of section 92 was unnecessary, since the section appeared clearly to intend 'an absolute prohibition directed to the Commonwealth and to States against the re-erection of any form of barrier to interstate trade' (see **Interstate trade and commerce**). In December 1912, an adviser to Attorney-General Hughes recommended that Garran be appointed to the High Court to fill the first of three vacancies created by the death of **O'Connor** in 1912 and by the increase of the **number of Justices** to seven in 1913. In 1920, Hughes said in Parliament that Garran would have been appointed to judicial office 'but for the fact that he is too valuable a man for us to lose. We cannot spare him' (see **Appointments that might have been**).

In 1927, Garran was invited to give evidence to the Royal Commission on the Constitution, established that year by the Nationalist government under Prime Minister Stanley Bruce. There, he took pains to trace the historical evolution of the Commonwealth, including the establishment of Commonwealth departments and a Commonwealth judiciary. This 'quarter of a century', he told the Commission, 'has been very largely a period of beginnings and getting things in order' and federal cooperation had been crucial to this process. Premiers' Conferences, he stated, 'might almost be said by this time to form an unwritten part' of the Constitution. The most serious difficulty with Australia's federal Constitution, Garran argued, lay in attempting to ascertain with precision the boundaries of the spheres of the state and the central governments.

These views were reiterated in his later writings; among other things, he called for urgent amendment to unify Australia's transport system under the Commonwealth. He also urged amendment to the **conciliation and arbitration** power on the grounds that it entrenched a particular method for resolving industrial disputes, and had contributed to a tendency for employers and employees to be organised into hostile groups.

Garran retired on 9 February 1932, but continued to work, taking up legal practice once more and occasionally appearing at the Bar, serving public authorities, promoting the establishment of the ANU, writing, singing, and playing music. In 1934, he assisted in preparing *The Case for Union*: the Commonwealth's reply to WA's secessionist movement. It argued that, contrary to the secessionists' claims, the High Court had rarely invalidated state laws and that it had been far from a one-sided arbiter of the Constitution. *The Case for Union* bears Garran's style, characterised by a lightness of touch, economy of expression, and, even in such a context, wit. In 1946, at the age of nearly 80, he won a national ABC song competition.

Garran's death in 1957 broke the last direct link with the making of Australia's Constitution. But, more than this, it marked the end of a generation of public men for whom the cultural and the political were natural extensions of each other and who had the skills and talents to make such connections effortlessly.

Helen Irving

Further Reading

Robert Garran, *Prosper the Commonwealth* (1958)

Gaudron, Mary Genevieve (*b* 5 January 1943; Justice since 1987) has, since February 1998, been the Court's senior **puisne Justice**. She was the first—and remains the only—female Justice of the High Court. In that sense, her appointment is remarkable. Yet Gaudron's career is a classic example of talent and industry triumphant over limited opportunity.

Gaudron was born in the NSW country town of Moree, daughter of Edward, a train driver, and Grace ('Bonnie'), née Mawkes. In 1951, a watershed experience occurred in her life. **Evatt** visited Moree, campaigning from the back of a truck for the 'No' case in the referendum that, if passed, would have permitted the banning of the Australian Communist Party (see ***Communist Party Case*** (1951)). Eight-year-old Gaudron inquired what was this 'Constitution' the 'Doc' kept on about? Evatt sent her a copy.

Gaudron had her secondary education at St Ursula's, Armidale, a Catholic school run by nuns. One recalled her as a 'quick-witted girl … determined to make the best of her abilities'. Those abilities secured Gaudron a scholarship to the University of Sydney. She arrived in 1960 with 'high hopes and a shiny new briefcase', graduating BA in 1962. At university, Gaudron married. In 1965, mother to a baby

Mary Gaudron, Justice since 1987

daughter, she graduated LLB with first-class honours and the University medal in law. She was the first female part-time student to receive the medal, and only the second woman (the first being Elizabeth Evatt) to do so. Later, Gaudron would receive Honorary Doctorates in Law from Macquarie University (1988) and the University of Sydney (1999).

Law students' publication *Blackacre* thought Gaudron displayed 'all the attributes of the thoroughly disconcerting … a keen analytical mind, a magnificent command of the language and sheer audacity'. University friends remembered her as 'brilliant', 'good fun' or both. Gaudron's law lecturers included **Mason** and, for **succession law**, Frank Hutley, later a renowned judge of the NSW Court of Appeal. Hutley remembered Gaudron's near-perfect succession exam paper as the finest he ever marked. He became an important early mentor at the Bar.

Gaudron lectured in succession at her *alma mater*, completed her articles, and was admitted to the Bar in October 1968. Stellar results should have facilitated early admission to membership of a floor. Instead, she experienced hostility. Initially, she shared a room with Janet Coombs, to whom Gaudron has paid tribute as a pioneer among **women practitioners**.

Despite those early difficulties, Gaudron's talent quickly began to shine. By the mid-1970s, she enjoyed a busy practice in all jurisdictions of the NSW Supreme Court, with a focus on industrial and **defamation law**. Appearances in the High Court during that time included her successful argument of *O'Shaughnessy v Mirror Newspapers* (1970). She was led by Hutley in *R v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots* (1971), and in *Leslie v Mirror Newspapers* (1971) by Harold Glass, also to become a distinguished judge of the NSW Court of Appeal.

In 1972, Gaudron became the first woman appointed to the NSW Bar Council. In 1973, she successfully appeared for the Commonwealth before the Arbitration Commission in the *Equal Pay Case*. That led in April 1974 to appointment as a Deputy President of the Commission. She was just 31. Commission decisions she participated in included the *Maternity Leave Case*, which she has remembered as a highlight of her career to that point. From 1979 to 80, Gaudron also served as foundation Chair of the NSW Legal Services Commission. In May 1980, she resigned from the Arbitration Commission. Newspaper reports suggested it was a protest over the attempted demotion of Commission colleague Justice Jim Staples, with whom Gaudron had worked at the Bar.

Following her resignation, Gaudron took up a visiting lectureship at the University of NSW Law School. But not for long. In February 1981, she was appointed NSW **Solicitor-General**. She was the first woman to occupy that office in any Australian state. Shortly afterwards, she was appointed NSW's first female QC. As Solicitor-General, Gaudron appeared frequently before the High Court in some of its most significant constitutional cases, including *Actors Equity v Fontana Films* (1982), the ***Tasmanian Dam Case*** (1983), *Hematite Petroleum v Victoria* (1983), *Stack v Coast Securities (No 9)* (1983) and *Miller v TCN Channel Nine* (1986). She developed a wide reputation for what the *Australian Law Journal* described as 'outstanding and ingenious' advocacy.

Murphy died in late 1986. Gaudron spoke powerfully at his memorial service at the Sydney Town Hall, to a packed audience. His death created a vacancy on the Court and, following the retirement of **Gibbs**, **Toohey** and Gaudron were appointed in 1987. She was just 43, among the youngest Justices ever (see **Background of Justices**). Gaudron's appointment was widely welcomed by the profession. Only the NSW legal gossip sheet *Justinian* dissented, charging her, in what today seems undisguised sexism, with 'an emotional disposition inappropriate in a holder of judicial office'. By contrast, the speeches made at a NSW Bar Association Dinner held in Gaudron's honour show the depth of enthusiasm for her appointment, and the affection for her personally, felt among her colleagues.

Since her appointment, Gaudron has contributed to the development of every important area of Australian law, from a workable theory of section 92 (***Cole v Whitfield*** (1988)) to recognition of **native title** (***Mabo*** (1992); ***Wik*** (1996)), as well as greater resolution of the implications of Chapter III for the federal system (*Re Wakim* (1999)—see **Cross-vesting**); identification of an implied freedom of **political communication** (*Australian Capital Television v Commonwealth; Nationwide News v Wills* (1992)—see ***Free Speech Cases***); progression of **administrative law** in areas including **standing** (*Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998)) and **natural justice** (*Ainsworth v Criminal Justice Commission* (1992)); and reform of both **criminal procedure** (***Dietrich v The Queen*** (1992)) and **conflict of laws** (*John Pfeiffer v Rogerson* (2000)).

Gaudron's judgments have been particularly influential in developing the **criminal law**. They combine technical mastery with a general tendency to insist on strict compliance by trial judges with their obligations in directing juries—a tendency that seems motivated by an interest in ensuring both procedural fairness for the accused and due respect for the function of the jury in the administration of criminal justice (see, for example, *Zecevic v DPP* (1987); the joint judgments in *Doney v The Queen* (1990) and *Edwards v The Queen* (1993); *Farrell v The Queen* (1998); *HG v The Queen* (1999)). Perhaps Gaudron's most significant contribution, however,

is her theory of **discrimination**, applied to section 117 of the Constitution in *Street v Queensland Bar Association* (1989) (see **Express constitutional rights**) and to section 92 in her joint judgment with McHugh in *Castlemaine Tooheys v SA* (1990) (see **Interstate trade and commerce**) and encapsulated in the statement in that case that 'discrimination lies in the unequal treatment of equals, and … the equal treatment of unequals'. Non-discrimination emerges in her judgments as an organising principle of the federal compact (see, for example, *Ha v NSW* (1997); **Excise duties**).

Gaudron's formulation of the principle of non-discrimination—'equal treatment under the law that allows for relevant difference'—has proved a key theme of her Chapter III jurisprudence. There, Gaudron has identified equal treatment as a fundamental characteristic of the judicial process required for the proper exercise of **judicial power**. In ***Leeth v Commonwealth*** (1992), she would have invalidated a law having the effect of requiring that courts designated to exercise the judicial power of the Commonwealth were to sentence certain Commonwealth offenders differently according to the state or territory they were tried in. In Gaudron's view, by failing to treat like offences against Commonwealth laws in a like way, the power created by the law exhibited an impermissibly discriminatory character repugnant to the judicial process, and therefore precluding its conferral on section 71 courts (see also **Equality**).

Gaudron's Chapter III judgments have also emphasised how effective resolution of controversies involving exercise of the judicial power of the Commonwealth depends on public confidence that courts and judges will act, and be seen to act, independently according to a judicial process: in short, that ordinary people will receive equal treatment under the law with government and other institutions of power. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996), Gaudron therefore joined the majority in holding a law invalid to the extent it directed the performance by judges exercising the judicial power of the Commonwealth of functions threatening to compromise that public confidence.

The principle of equal treatment similarly underscores Gaudron's view of independent **judicial review** of the exercise of administrative and executive powers as a fundamental feature of the **rule of law** (*Enfield Corporation v Development Assessment Corporation* (2000)).

Gaudron's judgment in *Re Tracey; Ex parte Ryan* (1989) suggests a broader principle of independent judicial power, describing as part of the 'general pattern of constitutional and legal arrangements obtaining in Australia' that ordinarily it is for the properly constituted civil courts alone to determine whether conduct offends against the general law and what if any penalty should be imposed for such conduct (see **Military justice**).

That the law under challenge in the ***War Crimes Act Case*** (1991) departed from that principle explains why Gaudron would have invalidated it as a usurpation of judicial power. By leaving it to the courts to determine only whether a person answered the description of someone already declared guilty by parliamentary enactment, Gaudron considered that the law foreclosed the exercise of the fundamental feature of judicial power in criminal proceedings: determination of guilt or innocence by application of the law to facts as found.

Gaudron's method of **constitutional interpretation** typically involves a search for the meaning required by text or necessarily comprehended by context. Accordingly, because the Constitution 'mandates whatever is necessary for the maintenance of the democratic processes for which it provides', Gaudron has held that, to that extent, there exist limited freedoms of association and of **movement** (***Kruger v The Commonwealth*** (1997)).

From the principle that judicial power must be exercised according to a judicial process, Gaudron has also held that there arises from Chapter III a limited guarantee of fair trial of those Commonwealth offences that must be tried in the courts named or indicated in section 71 (*Re Nolan; Ex parte Young* (1991)).

In her judicial method generally, Gaudron is a rigid logician, as her persuasive dissenting joint judgment with **Gummow** in *Osland v The Queen* (1998) demonstrates. Gaudron's judgments also reflect a respect for *stare decisis* (adherence to precedent), revealed as a reluctance to depart from authority without careful reconsideration of its correctness (see, for example, her reappraisal of *McInnis v The Queen* (1979) in *Dietrich*). That respect for *stare decisis* explains Gaudron's ungrudging adoption of views that have prevailed over hers (see, for example, her acceptance in *Nicholas v The Queen* (1998) of the 'minimum' position decided in *Ridgeway v The Queen* (1995)). Gaudron's preference for correctness over dogmatism also accounts for occasional revision of her own earlier opinions in later cases (compare her view of section 51(xxvi) in the ***Hindmarsh Island Bridge Case*** (1998) with that in *Chu Kheng Lim v Minister for Immigration* (1992)).

Gaudron has, however, also applied the principles that the Constitution prevails over inconsistent judicial pronouncements, and that existing decisions on questions of **constitutional law** are of limited authority if not based on a principle or reasoning that has commanded majority support (see, for example, *Re Tyler; Ex parte Foley* (1994)).

Gaudron's writing style is emphatic but not emotive—a rare exception being the passage in her joint judgment with **Deane** in *Mabo* (1992) identifying dispossession of **Aboriginal peoples** of their traditional lands as 'the darkest aspect of the history of this nation'. Increasingly, her judgments strive to build consensus of opinion in the interest of clarity and certainty (for example, the summation in her own judgment of the others in *Marks v GIO Australia Holdings* (1998)).

Gaudron lives in Sydney. She has a son with her husband, and two daughters from her previous marriage. She also has a superb sense of **humour**, which is often evident in her speeches, her dealings with her judicial colleagues, her **associates** and other staff.

In her speeches, and not inconsistently with her duties as a Justice, Gaudron has sought to draw attention to the status of **women**, particularly women in the legal profession (see, for example, (1998) 72 *ALJ* 119). Her speeches have also paid tribute to pioneering women lawyers including the late Dame Roma Mitchell. Where appropriate, Gaudron has also drawn attention in her judgments to the need in various areas of the law for greater recognition of women's paid and unpaid work (for example, *Baumgartner v Baumgartner* (1987) and *Singer v Berghouse* (1994)).