

CHIEF JUDGE KENNEDY'S ADDRESS

TO THE

CENTENARY TRUST FOR WOMEN LUNCHEON

SUNDAY 31 JULY 2005

A woman went to Heaven arriving at the pearly gates behind three men. They were all greeted by St Peter and told that there was a spelling test to get into Heaven. The first man was asked to spell "cat". He did that and was ushered in. The second man was asked to spell "dog". Again he did that and was ushered in and the third "mat" with the same result. The woman, grateful that at last she was going to get her first easy test, stepped forward and St Peter said, "Spell 'Czechoslovakia'."

It would not surprise me if she could not. The standards demanded from women, while pretending to be the same, are constantly higher than those for men; it is therefore hardly surprising if women do not always measure up.

During much of my career this has been an injustice I have faced. I try not to do it to other women and so should you.

I have heard it said that whatever women do they must do twice as well as men to be thought half as good. Luckily this is not difficult. That is amusing but

regrettably it is not true. While it is true that women do have to be better, it isn't easy and it is necessary that we guard against putting those standards on other women and that we protest when those standards are put upon us.

There are frequent examples of this and the public examples are often in politics. The example I'm about to give is not about my views of party politics because in my view it has happened to women on both sides of politics and indeed I have a cartoon on my office wall with two men sitting at the bar of a hotel and one is saying to another, "You have to watch women politicians more closely to make sure they're not getting special treatment."

The example is in relation to Judi Moylan who is a politician from Western Australia. I do not know Judi Moylan and I am not in her electorate. Some time ago she was made the Minister for something and given the job of selling what was then referred to as the "nursing home policy". It is not necessary that I remind you of that and it was of no particular interest to me but it was extremely unpopular and Judi Moylan simply could not sell it to the community. Judi Moylan was sacked and replaced by a man from Tasmania whose name I have now forgotten and we were assured that he would be able to explain the nursing home policy to the community in a way in which the community would be prepared to accept.

He went on to the Midday Show on television and about half a dozen little old ladies verbally attacked him for about 10 minutes and the nursing home policy was dumped. He wasn't dumped, the nursing home policy was dumped.

This was quite unfair treatment and this happens all the time and from time to time you may find that it will happen to you. You should be aware of what is happening and you should be aware of it when it happens to other women.

I realise that many of you are somewhat younger than I am and I come from what is referred to as "the second wave of feminists" and we are told from time to time that the young women coming behind us are not interested in feminism and believe that the battles have been won and that therefore they are different from us.

My experience is that so far as feminism (and by feminism I simply mean real equality) is concerned, women become more radical as they get older because now in most areas of endeavour the discrimination is subtle and it is only as you get older that you see it happening around you and affecting you.

Much to my embarrassment I have recently been reminded of an interview I gave to a local newspaper when I was starting out in the law in which I said, "There is no discrimination in the law – women are as good as men." At that stage there were no women Registrars, Magistrates or Judges. There were

no women who were partners in big firms, there were no women Queen's Counsel and there were no women as leading advocates. Nevertheless, no one had ever been rude to me and here I was a lawyer so it never occurred to me that there was discrimination.

I was badly in need of consciousness raising, as indeed were a lot of women in the 60's. Mary Gaudron (the only woman ever appointed to the High Court) tells a wonderful story of being a law student in 1964 and going along to the Women Lawyers' Association of New South Wales to find out what could be done about getting women into the law because so many of them had been told by law firms that they had a policy of not taking women. The advice they were given by the women practitioners was that they should learn to touch type, give up university studies and instead undertake the admission board course and then they would have no difficulty finding articles.

Mary Gaudron says and I quote:

"I left that meeting much encouraged. I knew, before the meeting, that for a woman to succeed, she had to be better than her male counterparts. I knew, after the meeting, that was as simple as learning to touch type – hardly an insuperable task."

Just as I learnt lessons, so did Mary Gaudron and she later says that she held a belief that once the doors were open women would prove that they were every bit as good and certainly no different from their male counterparts. However, she learnt differently as time went on.

Just as Mary Gaudron learnt that her views were wrong so I also learnt that there was discrimination and that my original opinion had been nonsense. It would have been gentler for me if I'd been warned and seen it coming. Also, it would have helped if women had supported me during that time and not assumed that if a man said I was wrong I must be. And, even more destructively, the best thing for anyone in the law to do who wanted advancement was to distance herself from me.

Of course, it is not the case that only men apply different standards to women; women also apply different standards to women. In many ways women can do each other more harm than men because if women give support to such behaviour it is considered that that gives it legitimacy that it would not otherwise have.

Plainly it is important that we give each other assistance. Still it is not all doom and gloom. My work is interesting and rewarding. At my stage, of course, I have very few problems myself in relation to discrimination. My major concern

with discrimination are the women coming after me. From my point of view either the damage has been done or I am passed being concerned about it and my major concern now is the role of the judiciary in the community and the fact that there is so little understanding of the third arm of government even amongst people who are well educated and should know better. So I will use this opportunity to finish on that topic.

There are three separate arms of government; the executive, that is the Governor with his Ministers, the legislature, that is the Parliament, and then the judiciary. Each is separate and each acts as a brake on the power of the other two. No one ever has enough power so no one can declare that he or she is dictator for life and we have the rule of law, not of men. Everyone is subject to the law. Dictators and their families and powerful friends are rarely subject to the law.

Judges are not public servants and despite constant requests either by the media or by citizens whipped into a state of indignation usually by misinformation, politicians cannot sack Judges, nor can they reprimand them. If they could sack us we would not be a brake on their power.

The 19th century social commentator, Walter Bagehot, is reputed to have said something to the effect that the British are famous for inventing wonderful institutions which they themselves do not understand. We have inherited those

institutions and our understanding is no better. The difficulty with that is that it is easy to allow ourselves to be persuaded that something we do not understand is worthless or even harmful and can easily be disposed of. We should always remember the words of G K Chesterton that you should never take down a gate until you know why it is there.

It is not by accident that those of us who live in countries who have inherited, maintained and nurtured the British institutions live with relative peace, order and good government. We should cherish these institutions. None of them is above criticism. All can be improved but the criticism must be soundly based on accurate information.

In the brief time left to me I do not want to speak to you about great areas of constitutional law but to speak to you briefly about the matter of sentencing because this is the area in which Judges are most usually criticised and the area in which a bit like football everyone is an expert and has an opinion.

Judges are soft targets for the media. By soft targets I mean that Judges by convention do not answer criticism about their own cases. It is not because we do not care about the criticism. Judges must give reasons in open court for any decision and those reasons are recorded and should be the Judge's only reasons. The fact that later on a Judge may think of something that would further support

his or her decision or explain it better is not something that the Judge can then add to the reasons. One important purpose of this convention is to ensure fairness to any party who is aggrieved by a decision of a Judge and wishes to exercise the right of appeal to a bench of three Judges. It would not be considered appropriate if a Judge was then seen to publicly "go into bat" for his or her decision because the appellant may fear that the Court of Appeal will be influenced by those remarks, remarks that may be made after the notice of appeal has been filed.

This is important for the people involved in the litigation and important to secure the integrity of the litigation but it certainly puts Judges in a very weak position *vis-à-vis* the media and talkback radio when there is for example a partial reporting of what has been done. Sometimes it may be a full reporting but it does not bring with it all of the learning that is involved in the reasons and which could perhaps have been better explained by the Judge.

Before speaking briefly about sentencing principles can I reassure you that it is not the case that Judges are people who do not care about victims and who somehow manage to live in a crime free bubble. We live in ordinary streets in ordinary suburbs. We have family and property in the community. We are just as likely to be the victim of crime as anyone else. Of course we care about the

problem of crime. If I had the answer – if there was one answer – I would sell it to every government in the world and retire to the south of France.

Sentencing is not simply between the victim and the offender. If it were we could simply identify the offender and invite the victim to take whatever action he or she thought fit. Sentencing is between the victim, the offender and the whole community and in the end the aim has always been to maintain peace and order overall. Destroying the offender, because that is what on occasions an outraged community appears to be calling for, is not generally in the interests of the whole community. It is counterproductive and ruinously expensive.

If the community wishes to shift from a model where the aim is relative peace and good order overall to a total revenge model then the Parliament does that by legislation. From time to time there are movements toward that but I express the hope that before the community demands a total revenge model it understands exactly what it is demanding and is prepared to live with the consequences. Already Western Australia has the highest rate of imprisonment of any State in Australia. Aboriginals make up about 3% of the general population and over 40% of the prison population. They are considered to be the most gaoled race of people in the world. So much for the furphy that they get special treatment. The cost of keeping one person in gaol is over \$90,000 and the reality is that gaol is not the complete answer to crime. Anyone who tells you that it is, is trying to sell you snake oil.

The reality is that while the judicial system is part of the answer to the crime problem it is certainly not the whole answer. The answer lies in dealing with the injustices further down the track, that is to say the social problems that frequently precipitate crime.

Finally, my education at the University of Western Australia opened up to me wonderful opportunities not only in the law but in other areas in which I have worked and also areas of great interest that are stimulating and entertaining that would not have become available to me had it not been for the degree.

I can recall that I enjoyed my time at the University and I now recommend it to anyone who has not had the opportunity because it is an experience that should not be missed. I am deeply grateful for the opportunities I have been given.

Antoinette Kennedy
Chief Judge
District Court of WA