

End of an Era

An Interview with Chief Judge Kennedy



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Brief Editorial Committee Member Alison Gaines sat down with Her Honour Chief Judge Antoinette Kennedy for an interview to mark her retirement from the District Court of Western Australia.

Q: Chief Judge, can you describe what motivated you to study the law when you were contemplating university study?

A: My mother was a very bright woman but in her day few women had the opportunity to be educated and she was one of them and she always wanted me to have an education and really she didn't care what I studied as long as I studied. My grandfather was the bailiff at the local court and in those days it was a private contracted job and my mother and some of her sisters occasionally worked in their father's office. My mother used to tell me stories about Sheila McClements and Molly Kingston and I think that probably planted the seed in my mind.

Q: Did the practice of the law meet your expectations? Specifically, how did the various aspects of your career as a solicitor, barrister and jurist meet your expectations of the practice of law?

A: I have to say that, like most women of my generation, I was not goal-oriented and I did not have any expectations about the practice of the law. Nevertheless, it was a source of great disappointment to me when, after a few years in the profession, I realised that there was considerable discrimination and that the profession was blithely unaware of the fact that they were being discriminatory.

On the other hand, it is a profession in which you can help people and I enjoyed that aspect of the work.

Q: In the 40 years of practice and judicial administration you have witnessed many reforms to the administration of justice. What are the high points of reform?

A: The high point of reforms over the last 40 years has been in the treatment of complainants in sexual assault complaints; in particular, in the treatment of children. I can still remember when children had to come into court to give their evidence. When I reflect on that now, the barbarism shocks me. The other matter is the High Court decision in *Dietrich*, which means that an accused person cannot be tried in most circumstances unless he or she is legally represented.

Q: Are there any reforms that are outstanding on your agenda for justice reform that you would like to see tackled soon?

A: The reintroduction of sentences below six months. It was madness to abolish them. The difficulty with sentencing is that

politicians either listen to academics or to talkback radio. It never occurs to them to listen to judges or magistrates. I think that is because they believe the media rubbish that is written about judges and magistrates. There is also a real need for alternatives to imprisonment and for a variety of programs.

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As far as I am concerned we are still grappling with the issue of self-defence so far as women are concerned, that is women who use lethal self-help and do this at a time where it is not considered to be self-defence. Amendments have been made, but it remains to be seen how they will work. There are a few women over the years that I have considered should have the Texas defence. You may not be familiar with the Texas defence: “he needed killing”.

Q: As the interviewer, I can say with confidence that your support for the status of women in the profession is unparalleled. You blazed over ground as a young principal of a solicitor practice, the second woman barrister at the independent Bar, first woman judge in WA and one of the few women to lead a court in Australia. You are a foundation member and patron of Women Lawyers of WA. You have spoken and written of the humiliation of Edith Haynes, who was considered ineligible to sit admission exams in 1903 after completing five years of articles because of her gender. How do you summarise the status of women in the profession circa 2010?

A: Plainly there are many more women in the profession now than when I started out but we still have a long way to go. There is still systemic discrimination. The law has been male-dominated since its inception hundreds of years ago and, accordingly, it is based on a very male way of thinking and there is a long way to go before that is put in its appropriate place. The result of this is that many women think that their point of view is wrong

because it is different from the male point of view and many men think that as well. It is not wrong; it is different. Those women who have adjusted and simply become honorary males should not set the standard.

Q: There is emerging a flourishing bar of Indigenous lawyers in WA. Our universities account for a large number of Australia's Aboriginal and Torres Strait Islander law graduates. How can the profession best play a part in nurturing this bar?

A: The profession in my view has a better understanding of the crippling effects of 200 years of bigotry and injustice than any other group of people whom I have ever encountered. Nevertheless, it is an issue that we need to give constant consideration to. Certainly the large firms should be making a substantial contribution to this and we should not assume that the only type of law Aboriginal lawyers want to engage in is defending other Aboriginals in the criminal sphere.

Q: You have also spoken on the diversity of clients and the challenges for the justice system. Do courts do a good job of responding to the diversity of people who appear in proceedings? Does the profession do a good job of adapting to the needs of clients? Where can improvements be made?

A: So far as the improvements to the law it is the issue of delay. That is the big issue. Governments will no longer pay the sort of

money required for lawyers to dally around and people cannot afford litigation because delay costs so much money. If the delay in the District Court had kept going in the way in which it was going, the criminal justice system would have become irrelevant.

I actually have a very high regard for the profession for the way in which the profession does its job and adapts to various situations. Certainly in the criminal law there is a great deal of interaction with various government departments who are poorly resourced and that makes the job extremely difficult.

I believe in the criminal law that improvements could be made by the recognition, not only by the profession but by various government departments who deal with criminal offences, that migrants have special problems. Not only migrants who do not speak the language, even migrants from prosperous homes do not understand the unwritten rules of society. Their parents expect them to be good members of their own society when they are at home and successful Australians when they are out, without being able to teach them the unwritten rules and the burdens and stresses on some of these young people, particularly the young men, are almost unbearable.

I do not think any of us do a particularly good job in explaining what is happening and making it so that people understand.

Q: From the bench you have seen all styles of advocacy. What are the most effective styles?

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A: To me the most effective thing to do is to be prepared and as far as I am concerned the first three rules of advocacy are preparation. As a minor example, if you are making a bail application for a client you should not have to seek his instructions as to where he is going to live while you are on your feet in court. The brief should be read. Nothing demoralises a client more than having a lawyer say things in court that the client knows are incorrect.

“...as far as I am concerned the first three rules of advocacy are preparation”

Q: What are the less effective styles of advocacy?

A: The less effective styles of advocacy are those which involve some form of dummy spit when a ruling is made against you. This is a most ineffective thing to do. The answer to any ruling is “May it please the court”. You may be thinking “I spit on your ruling” but you do not make that obvious. It is not going to cause the judge or magistrate to change his or her ruling; it is going to make him or her think that you are a person who is a sore loser, who lacks judgement and once you get a reputation for being a person who lacks judgement this stays with you throughout your career.

Q: Practitioners often muse or speculate about the life of the court and the judiciary. What are the elements that led to a functioning, happy team of judges?

A: The District Court judges are a happy functioning team of judges. It is difficult to say why that is. To some extent it is simply that we have been blessed with a lovely mixture of people. It is the case that the recent winner of the “Kennedy Cup” for golf would say that it is because he is such a good winner and the others are such good losers but that would probably be his personal view.

It seems to me that judges get enough criticism from outside the court without people inside the court joining in that criticism. We tend not to do that on the District Court. We endeavour to support each other and help each other in times of difficulty.

For my part, I find every judge on the District Court an interesting person and when he or she tells me about his or her case I find it interesting. It may be that the judge is interested in the work he or she is doing and that helps as well.

Q: From among Australians and internationally, who are the jurists, in history and among contemporaries, you most admire? What judicial decision is your favourite late night reading? (And is it by Lord Denning?)

A: The jurist in Australia I most admired was Sir Francis Burt. People who appeared before Sir Francis, and probably I didn't escape this as well, were irritated by the fact that he would occasionally show how smart he was and put barristers down. To me this was a very minor matter. He demonstrated enormous



wisdom. To me wisdom is understanding what you know. Many judges have a great deal of knowledge of the law but that makes them a form of human computer, it does not give them wisdom. His wisdom can still be read in his various judgements.

He has also given a number of speeches that I thought showed great wisdom and I have quoted them. Indeed, on one occasion I made a speech referring to this and I said I always remind myself of the story of Oscar Wilde, who said something very witty and his young friend said “I wish I'd said that”, to which Wilde said “You will Boisey you will”. I'm a bit like that with Red Burt.

My other admired jurist is Lord Atkins of the snail in the bottle case which is brilliant in its simplicity and its exposition of a particular area of the law.

I do not intend to read any judicial decisions late at night or at any other time in the future.

Q: You have had a very absorbing career, meaning you have absorbed it and it has absorbed you. When you reflect on your time in the profession and as a jurist what do you consider to be your enduring mark on the law in WA?

A: I seriously doubt that I have made an enduring mark on the law but I hope I have made a contribution. I hope I have made a contribution to the position of women in the profession. If I have, I think it is mainly that I refused to go away.

I hope also that I have contributed to holding the line on a sound, balanced use of the criminal law as an instrument controlling human behaviour with a proper understanding of its limitations.