

GA Kennedy AO — A Man Worthy of Memory

Chief Justice Robert S French AC

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Your Excellency the Governor, Chancellor Michael Chaney, Vice-Chancellor Professor Paul Johnson, Chief Justice Martin, Justice McKerracher, members of the Kennedy family present, your Honours, ladies and gentlemen:

In his quiet unremitting commitment to public service at its highest levels, Geoffrey Kennedy will be remembered in the history of Western Australia as one of its great citizens. The separate tributes we pay tonight to his memory each focusses upon a particular aspect of his life and work. However, no one speech, nor even three, can capture the true value, nor the complex reality, of any individual.

In these speeches however, we make a public acknowledgment not only of what Geoffrey Kennedy did for his community when he lived, but of the great value we place on his kind of contribution to the maintenance and strengthening of our social infrastructure in law, the administration of justice, in education and the ethical demands of public office and good government. My focus is upon his contribution to the law and to the administration of justice.

In its barest outlines the life of a lawyer and a judge might be reduced to a review of the cases in which he appeared as counsel and those on which he sat as a judge. A life so described may be encompassed in a row or two of bookshelves in a law library - a row which begins with the lawyer's first appearance as counsel and concludes with his last judgment as a judge.

Geoffrey Kennedy once made a rather humorous distinction between the roles of the lawyer and judge. In 1963, when he was in practice as a partner at the law firm of Robinson Cox & Co, he delivered a paper to the Law Summer School at the University of Western Australia about the newly enacted *Trustees Act 1962* (WA). In it he recalled that a prominent English lawyer, Denys Buckley, lost a case about a charitable trust before Justice Harman in

the Chancery Division.¹ Buckley was evidently put out by this judgment and as Geoffrey Kennedy recounted in his paper:

... with the passing of time, Denys Buckley became Buckley J and in *In Re Wykes*² with ill concealed relish, he declined to follow Harman J and gave the force of law to his argument, thereby illustrating once again the adage that it is not what you say that counts, but whether you are sitting down or standing up when you say it.³

Geoff went on to say:

The pleasure of Buckley J was shortlived, however, for his rival was then promoted to the Court of Appeal and quickly gave notice of his continued interest in the matter.⁴

The notion that a series of Law Reports could encompass a person's life as lawyer and judge is not a new one. Geoff Kennedy used it in his farewell speech when he said that he had entered the Law School at the University of Western Australia when volume 80 of the Commonwealth Law Reports had just been published, and retired from the Supreme Court in September 2001 when volume 202 was about to be published. He made his mark upon those volumes at a relatively early age. As appears from volume 103 of the Reports, covering the years 1959 and 1960, he joined the list of the reporters for the Commonwealth Law Reports when he succeeded FT Burt as the reporter for Western Australia. He continued as a reporter for Western Australia until 1978.

When Geoff Kennedy delivered his paper about the *Trustees Act* to the Law Summer School in 1963, there were not many in Australia who thought that a lawyer who became a judge might need some education about the business of judging and continuing education about the law. There was, however, some new thinking beginning to emerge about that topic. In 1969, a few years after the Law Summer School address, Lord Wilberforce presented a paper in England in which he said that:

¹ *In re Gillingham Bus Disaster Fund* [1958] 1 Ch 300.

² [1961] Ch 229.

³ (1963) 6 *University of Western Australia Law Review* 81, 90.

⁴ (1963) 6 *University of Western Australia Law Review* 81, 90.

Anyone who is appointed a judge is, I suppose, as astonished at the metamorphosis which is forced upon him as a colourless grub that suddenly finds he can fly with painted wings!⁵

That was a passage which Justice Kennedy quoted in his own persuasive and prescient argument on the topic, which was published as a paper in the *University of New South Wales Law Journal* in 1987. He began the paper with a classical allusion to make his point about the necessity for such training. He said, no doubt to a classically educated audience:

It will be recalled that, after Cadmus had slain the dragon on the future site of the city of Thebes, obeying the voice from the immortal gods, he extracted the dragon's teeth and sowed them in the ground. No sooner had they been sown than a crop of men sprang from the soil, fully grown and fully armed. In Australia, when members of the Bar are elevated to the Bench, the expectation appears to be somewhat similar. The assumption which is made is that the newly appointed judges are fully equipped immediately to discharge their responsibilities in whatever field of the law they may be called upon to exercise their calling.⁶

He went on to make the cautionary observation that the conclusion to the legend of the dragon's teeth came when Cadmus cast a stone into the midst of the soldiers who had sprung up from the ground. Each of them believing that his neighbour had thrown the stone; they set upon one another until only five subservient soldiers remained.

Geoff Kennedy's call for the training of judicial officers was not the first in Australia. He acknowledged that the suggestion put forward in 1983 by then Justice Michael Kirby for the establishment of a national judicial institute, was less than enthusiastically received among many members of the judiciary in Australia.⁷ After a comprehensive review of other jurisdictions and the arguments for judicial education, Kennedy concluded by criticising that complacency which may have led to the belief that the present system was the best system, and that it was sufficient that each new judicial appointee should go through their own learning process, at their own expense, in their own way and in whatever time they could make available in a full schedule, on the basis that if the new judge made a mistake it could be corrected on appeal. He argued for a more structured process of learning which,

⁵ Lord Wilberforce, 'Educating the Judges' (1969) 10 *J Socy Pub Tehrs L (NS)* 245, 260 quoted in GA Kennedy, 'Training for Judges?', (1987) 10 *University of New South Wales Law Journal* 47, 48.

⁶ (1987) 10 *University of New South Wales Law Journal* 47.

⁷ (1987) 10 *University of New South Wales Law Journal* 47, 48.

nevertheless, safe-guarded the independence of the judiciary. In a statement of principle, which was reflected in the instigation and development of judicial education in Australia, he said:

it is of the greatest importance that any programme of education should not be compulsory - although it is highly likely that it would be well supported - and that it be conducted by the members of the judiciary themselves, with such outside assistance as they deem desirable.⁸

His view was that any program should be a national program. No State on its own could provide a program as frequently or as broadly based as could a national body established for that purpose.

Today, we have the National Judicial College. The vision of a single national training program is still not complete with separate institutions in Victoria and New South Wales. In his paper, however, Geoffrey Kennedy revealed himself as a lawyer and judge who could speak persuasively to his own time and legal community in a way that was ahead of its time.

At about the same time that his paper on the training of judges was published, Justice Kennedy had been appointed as a member of the Advisory Committee of the Constitutional Commission, which reported to the Commonwealth Government on constitutional change in 1988. On the Committee with him were its chairman, Justice David Jackson of the Federal Court, now David Jackson QC at the Sydney Bar, Professor James Crawford, now a Professor of International Law at Cambridge University, and Justice William Gummow, then a member of the Federal Court, who will complete his term, covering nearly 17 years, as a Justice of the High Court of Australia on 8 October. Also on the Committee were Roger Jennings QC, Solicitor-General for Tasmania, and Justice Richard McGarvie of the Supreme Court of Victoria, who later became the Governor of Victoria and a leading participant in the debate about an Australian Republic

The Committee debated matters of the highest importance to the future of the Australian judicial system, including its future structure. It was deeply divided on whether federal and State courts should be amalgamated. The majority was opposed to such an amalgamation. Justice Kennedy and Justice Jackson denied the premise of the majority that

⁸ (1987) 10 *University of New South Wales Law Journal* 47, 58,

it was essential for each government in a Federation to have its own courts. Broadly speaking, they took the view that the impact of the creation of the Federal Court upon the jurisdiction of State courts was so serious that immediate steps should be taken to amalgamate the Supreme Courts, the Federal Court and, possible, the Family Court into a single court. That position did not win the day, but on many other questions of great importance the Committee was not so divided. As that part of the Final Report of the Commission dealing with the judiciary demonstrates, the matters upon which the Advisory Committee made its recommendations were of great significance and most of its recommendations were accepted by the Commission. In the end, the political circumstances of the day did not favour the changes to the Constitution which were recommended. But the Report of the Commission and that of the Advisory Committee remain invaluable resources for generations of researchers, lawyers, judges and law reformers thereafter.

Geoffrey Kennedy was an important part of that process and in that, as in other ways I have mentioned, contributed to national discussion about the Australian judicial system.

One of the most challenging public tasks which Justice Kennedy undertook was to act, for nearly two years in 1991 and 1992, as Chairman of the Royal Commission into the commercial activities of the Western Australian Government. The Honourable Sir Ronald Wilson QC and the Honourable Peter Brinsden QC were members of the Commission with him. The use of serving judges as Royal Commissioners has long been the subject of debate in Australia. In a well-known letter, written in 1923 by the Chief Justice of Victoria, Sir William Irvine, to the Attorney-General of that State, the Chief Justice expressed his general opposition to such appointments. The focus of his letter was upon the limits of the judicial function and the risk to the Bench of being drawn into the region of political controversy. Although many in the judiciary would agree with that position, judges of both federal and State courts have from time to time been appointed by executive governments to conduct Royal Commissions. Whatever may be said today about the appropriateness of such appointments from the point of view of the proper constitutional relationship between the courts and the executive, there can be no doubt that the conduct of the Commission by Justice Kennedy and his colleagues and their status and integrity underpinned the independence and integrity of their findings and of their recommendations. History repeats itself from time to time and successive generations sometimes have to learn anew the significance of the public office as a public trust and the ethical and other obligations that

attach to such office. The work done by Justice Kennedy and his colleagues in the early 1990s will stand for a long time in Western Australia as a judgment about those obligations and what is necessary in order to meet them.

Geoff Kennedy's career in the law began in 1950 when he enrolled in the Law School at the University of Western Australia. He obtained a Bachelor of Laws Degree with First Class Honours in 1953 and also completed a Bachelor of Arts part time, majoring in economics. He undertook his Articles at Robinson Cox & Co in 1954, and was selected as the 1955 Rhodes Scholar for Western Australia. He spent two years at Wadham College in Oxford where he completed a Bachelor of Civil Law with First Class Honours. In his retirement speech Geoff Kennedy remembered with fondness the Head of Wadham College where he was a student when studying for the BCL. He described Sir Maurice Bowra as 'a wonderful character' who would finish his address to new members of the College by saying:

And if you get into trouble, come along and see me. I shall be helpful, but not sympathetic.⁹

Justice Kennedy said in his retirement speech:

That I have always thought to be a splendid approach to the resolution of problems.¹⁰

When he returned from England he completed his Articles and was admitted to practice in December 1957. As he observed in his retirement speech he was then number 670 on the Roll of Legal Practitioners in Western Australia. By the time he retired, in September 2001, 6,735 persons had been admitted as practitioners. He observed in his retirement speech:

That, I suppose, puts me in some perspective ...

In July 1958, he became a partner in Robinson Cox & Co. He remained with that firm until December 1975 when he went to the Independent Bar. He was appointed Queens

⁹ The Supreme Court of Western Australia, Farewell to the Hon Justice Kennedy, Transcript of Proceedings, 5 September 2001, 14-15.

¹⁰ The Supreme Court of Western Australia, Farewell to the Hon Justice Kennedy, Transcript of Proceedings, 5 September 2001, 15.

Counsel in 1977. He became the undisputed leader of the Commercial Bar. During his time at the Bar he also served as Chairman of the Western Australian Legislative Review and Advisory Committee, which advised the Western Australian Parliament on the impact of legislation on the rights of citizens.

In 1981, Geoff Kennedy was appointed as a judge of the Supreme Court. He became the senior puisne judge on that Court in 1991. During his time as a Judge he also served the judiciary generally as a member of the Steering Committee for the Supreme and Federal Court Judges' Conference and also served as Chairman of the Law Reporting Advisory Board.

At his retirement his judicial work was described by the then President of the Law Society, Mr Ken Martin QC, now Justice Martin of the Supreme Court. He pointed to 20 years of judicial activity in which Justice Kennedy had written leading or significant reasons in many important judgments. In his Honour's writing he had the capacity to bring order to complex areas of the law and explain them in a way which was comprehensible to lawyers and law students alike - an achievement which some judges still find elusive. As Ken Martin said:

It is a tribute to your Honour that over a 20 year period on the bench you have maintained the intellectual rigour of your reasons for judgment to the extent that they command universal respect not only in Western Australia but across the nation.¹¹

And as Mr Michael Buss, now Justice Buss, representing the Western Australian Bar Association said:

His Honour's achievements and service are not of course attributable solely to his having been endowed with remarkable natural abilities. They are also a product of his Honour's great industry, his subscription to ethical values and his devotion to public duty. His Honour has never been an adherent to passing political or social fashions. As a judge, his Honour's commitment has been to the attainment of a just outcome based on the ascertainment of the truth and the application of principle.¹²

¹¹ The Supreme Court of Western Australia, Farewell to the Hon Justice Kennedy, Transcript of Proceedings, 5 September 2001, 10.

¹² The Supreme Court of Western Australia, Farewell to the Hon Justice Kennedy, Transcript of Proceedings, 5 September 2001, 11.

As his judicial colleague for so many years, the Chief Justice, David Malcolm, described his work as a judge as 'absolutely outstanding'. There seems to have been something of an effort on the part of those addressing the Court at Justice Kennedy's retirement sitting to find cases in which he had been overruled. These efforts were singularly unsuccessful. I can only hope that nobody undertakes such an exercise upon my retirement.

Geoff Kennedy gave great service to the State and to the nation. I will remember him as a man of quiet dignity, high intelligence and the highest standards of integrity and commitment to public service. He provided a model for all who knew him.

In concluding, can I acknowledge that his great service and achievements must be shared by his wife, Alison, and family. In retiring he said that he owed Alison a debt he could never repay and thanked his children for their remarkable tolerance towards him over the years. He was a man worthy of memory. In that memory and in his many writings, his voice will be with us for a long time to come.