

# Three Women Judges



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*In this issue we present short biographies of three women judges — Antoinette Kennedy, Kate O'Brien and Julienne Penny. After sketching their backgrounds and careers in the law we look at their opinions on some topical issues. Why are there still so few women in the upper echelons of the legal profession? Are female lawyers discriminated against by male lawyers? Do women judges approach the task of decision-making in a different way from their male counterparts? Should gowns and wigs be abolished? Is mandatory sentencing a good idea? While the three judges share a similar outlook on some of these issues, on others they differ widely.*

## JUDGE ANTOINETTE KENNEDY

Antoinette Kennedy was born in Western Australia in 1945 and grew up in Joondanna, a suburb of Perth, attending St Kieran's Catholic school. She later attended Leederville Technical College before enrolling as a student in the Law Faculty at the University of Western Australia in 1963.

Judge Kennedy's decision to study law was an unusual one for that era. She was one of only four women who enrolled in the Law Faculty in 1963, out of 80 law students overall. She cannot recollect exactly when or why she decided to take up law. She did not come from a professional or legal family background and the only connection that she had with the law was through her grandfather, who was a bailiff in Perth.

Judge Kennedy graduated from the Law Faculty in 1966 and was awarded two prizes in that year – the HCF Keall Memorial Prize, awarded to the top final year law student, and the Herbert H Wheatley Memorial Prize in Commercial Law. She was the only female law student in her year to obtain articles, which she completed with

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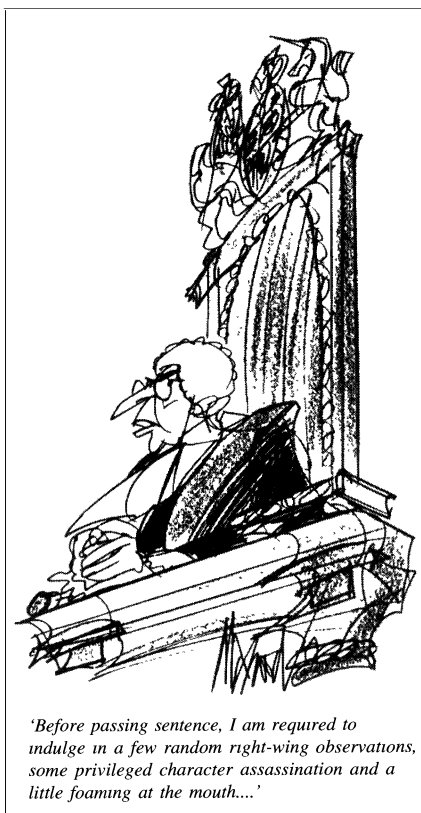
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SE Tippett & Ellis, a firm in Perth. In 1967 she was admitted to practice as a barrister and solicitor and then spent some time at a large Perth law firm, Godfrey Virtue & Co, working predominantly in the areas of family, commercial and criminal law. Later Judge Kennedy started her own firm, AG Kennedy & Co (the 'G' stands for 'Gemma', which is her Catholic confirmation name).

In 1975 Judge Kennedy became the second woman in Western Australia to go to the Independent Bar. During her time as a barrister she took on numerous additional responsibilities, including an appointment as a special magistrate in the Perth Children's Court, as a referee on the Small Claims Tribunal and as a member of the Parole Board and the Catholic Archbishop's Social Justice Committee. Judge Kennedy was a founding member of the Women Lawyers' Association, later serving as its president and now as its patron.

Judge Kennedy earned the distinction of becoming Western Australia's first female judge, being appointed to the District Court in March 1985. Within a few months of her appointment she publicly attacked the community's demand for longer prison sentences in an interview published in *The West Australian*.<sup>1</sup> In that interview, the judge urged that custodial sentences be used only as a last resort.

In about 1988 Judge Kennedy had what she calls her 'road to Damascus experience' as a District Court judge. In that year she came across a *Punch* cartoon depicting a judge imposing sentence on an offender. The judge had a mean and hungry look on his face as he said, 'Before sentencing you, I am required to indulge in a few random right-wing observations, some privileged character assassination and a little foaming at the mouth...'. Appalled, Judge Kennedy realised that this is exactly what she had been doing. She vowed that from then on she would only make statements of fact, and statements that would be useful to the offender who she was sentencing. She would also be careful to treat each offender individually.



*'Before passing sentence, I am required to indulge in a few random right-wing observations, some privileged character assassination and a little foaming at the mouth...'*

1. 'A Sentence of Last Resort' *The West Australian* 28 Aug 1985, 9.

The issue of sentencing is particularly controversial in Western Australia, as this State is one of only two States in this country to have introduced mandatory sentencing laws – amidst heated public debate. Judge Kennedy opposes mandatory sentencing, arguing that it infringes the doctrine of the separation of powers.<sup>2</sup> She also believes it is an unfair system that works in a racially-biased way, in practice targeting the types of crime that happen to be committed by Aboriginal people.

Judge Kennedy firmly believes that a large part of the solution to crime lies in greater education and increased spending on community-based services. However, she feels that community services have traditionally been under-resourced and as a result they have been less effective than they should be.

Another issue about which Judge Kennedy feels deeply is women lawyers and their relationship with the law, both from the perspective of women coming before the courts and women working in, and being a part of, the legal system. As the first woman appointed to the District Court, Judge Kennedy feels that she has had some influence on the increasing proportion of female judges that have recently been appointed to that court – now 25 per cent of the total. ‘I like to think that I operate like Chinese water torture here, with a slow drip, drip, drip – what about a woman?’ she quips.

Judge Kennedy is aware, from her own experience, that women lawyers are discriminated against. When a woman in the legal profession becomes a threat, she explains, sections of the profession aim to make her life difficult by portraying her as eccentric, disloyal or irresponsible. She stresses, however, that she is not referring to her brother judges on the District Court when she makes criticisms of the legal profession or refers to difficulties that she personally has faced.

Judge Kennedy believes that the retention rate of women in the legal profession is too low. She attributes this to the fact that women do not have the same level of self-esteem as men and also to the fact that the legal profession does not treat men and women lawyers equally. There are not enough women in the law and men often judge women lawyers harshly and unfairly. For example, if a female judge or magistrate



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2. Judge Kennedy has opposed the proposal for a sentencing ‘matrix’ on similar grounds.

is rude, sections of the legal profession use this as an argument against appointing other women to judicial office. In contrast, if a male judge or magistrate is rude, the criticism from the profession is restricted to that individual. It is important for women in the law that when unfair criticisms are made of them, those criticisms are recognised as such and strenuously opposed by other women. If women do not get this message, Judge Kennedy believes, their retention rate will continue to be low.

The judge feels that much still needs to be done before women in the community are equally represented on the bench and before women entering the legal profession can feel confident that they will be treated equally with men. She encourages women entering the profession to form a power group and to be loyal to one another.

Judge Kennedy's presence on the bench has brought about a number of changes – some welcome, others not. One change concerns the way in which the local media now refer to judicial officers. In the past, judges were traditionally referred to by their title and surname alone (eg, 'Judge Smith'). Immediately on her appointment, however, Judge Kennedy was referred to in the media by her nickname, 'Toni' or 'Toni Kennedy'. One of Judge Kennedy's brother judges teased her that one day the media would drop all formalities and simply refer to her as 'Dear'. Once this problem was pointed out to the media, they agreed that all judges, male and female, would thereafter be referred to in a uniform manner – that is, by their title, first name and surname (eg, 'Judge David Smith'). However, many male judges were unhappy to be known in the media by their first as well as their last name, believing this to be too familiar. Instead of directing their wrath at the media, somewhat unfairly Judge Kennedy was held responsible for the change.

The media have also, on occasion, used gender-specific terminology to criticise her. For example, Judge Kennedy has been described in the press as 'scolding' and has been accused of giving 'emotional' judgments – language she feels would not be used to describe any male judge.

Judge Kennedy has chalked up a long list of personal achievements, yet she remains humble about her feats. She is a determined and focused person who is not easily deterred from her path. She takes her role as a judge most seriously and is dedicated to important social issues. She is also a considerate person who has developed a great capacity for understanding the plight of those who appear before her in court. However, a short time in that court leaves the observer under no misapprehension that she can be a stern judge when appropriate.

Judge Kennedy has a wide circle of friends with whom she socialises and entertains. She also enjoys gardening, reading and walking. From time to time she undertakes non-degree courses at the University of Western Australia, studying subjects such as Shakespeare and Italian, areas which she chooses deliberately because they are unconnected with the law.

[K.P.]

## JUDGE KATE O'BRIEN

Kate Joan O'Brien was born on 25 March 1950 in Broken Hill, Victoria, where her parents had also been born. The family later moved to South Australia and Kate was educated in a convent school in Adelaide. She had no interest in or talent for sports, and the subject at which she most excelled at school was ancient history, in which she received the top mark on matriculation.

Following this success the judge enrolled in the Faculty of Arts at Flinders University, majoring in drama, but she completed only one year of her degree before leaving to work as a shop assistant at Myers. It was at this time that she married her husband who, although from Adelaide, was studying law at the University of Western Australia. Thus it was that she found herself in Perth.

Judge O'Brien's entry into law was almost accidental. She certainly never imagined herself as a judge. It was her husband who encouraged her to return to university to study law – something that seemed a better proposition to her than working in a shop for the rest of her life. In 1972 the judge enrolled in the Law Faculty at the University of Western Australia. She obtained a Bachelor of Jurisprudence with second class Honours in 1975 and a Bachelor of Laws in 1977. Looking back, the judge remembers law school as a fairly dull experience which had little relevance to her subsequent career at the bar.

The judge undertook her articles with EM Heenan & Co, a small firm in Perth. In November 1977, two weeks after being admitted to practice, the judge gave birth to a son. She left private practice and for the next three years taught law part-time at the University of Western Australia.

In 1980 Judge O'Brien joined the Legal Aid Commission. During her eight years there, she rose to become assistant director of the civil, criminal and youth law division. Later she joined the Independent Bar, practising from Wickham Chambers, predominantly in criminal law. She spent an illuminating and harrowing three years as counsel assisting the Royal Commission into Aboriginal Deaths in Custody, followed by two consultancy periods with the Australian Securities and Investment Commission. Additionally, the judge gained some extremely useful quasi-judicial experience: she was Deputy President of the Equal Opportunity



Commission (WA) for 10 years and also a member of the Social Security Appeals Tribunal.

Prior to her elevation to the bench, Judge O'Brien played a prominent role in a number of associations: she was a founding member and president of the Criminal Lawyers' Association; a founding member and vice-president of the Women Lawyers' Association; and she was heavily involved in the Law Society, serving as its president in 1998.

On 3 May 1999 Judge O'Brien was appointed to the District Court. On reflection she believes that nothing can prepare a person for the experience of being a judge. At the time she was offered the appointment she was prepared to accept it because she thought it would be a good way to continue her career. She felt that she had reached a crossroad and, before the offer of appointment to the bench, was undecided on exactly which direction her career should take.

Nearly two years after taking up her appointment, Judge O'Brien has developed a number of insights into life on the bench. Although there is the same degree of responsibility on a judge as on other court officers, she has come to see that the bench and the bar have quite different aims. At the bar, the focus is on getting the best result for the client; in contrast, for the judge the focus is on being fair to all parties and coming up with a just result.

The big challenge for a judge in a criminal trial, Judge O'Brien says, is to be able to communicate effectively with the jury. The process of giving the jury 'standard directions' and stating the law, as well as summing up the facts, can be a lengthy and tedious process, far exceeding the attention span of the average juror. To facilitate communication, Judge O'Brien and her fellow District Court judge, Mary Ann Yeats, have developed PowerPoint presentations for use in their summings up. They encourage the jury to take the slides with them into the jury room. In addition, Judge O'Brien always takes care to use plain English in the courtroom to ensure that the jury understands everything that is going on.

In light of her opinions regarding the importance of effective communication, it is not surprising that the judge is in favour of discarding wigs and gowns. She finds it odd that in the 21st century, judges presiding over criminal trials in the District Court still have to wear archaic dress. That dress, she believes, acts as a barrier to community acceptance and understanding of judges and the law. The civil gown also irritates her in a more practical way, the disproportionately long sleeves continuously getting caught up in the armrests of her chair.

On the question of sentencing, Judge O'Brien expresses the need for wider community education and more responsible reporting of criminal cases by the media. She would like to see more members of the public attend court and thus witness how the trial and sentencing process really works. She is also a believer in giving the judges wide discretion when it comes to sentencing; in common with a number of her colleagues, she is aware of particular situations where the mandatory sentencing laws may make it impossible to do justice to individual offenders.

Judge O'Brien is one of only five female judges on the District Court, but she does not feel that her gender has disadvantaged her own legal career or that she personally was discriminated against at the bar. However, she acknowledges that there is still a wide disparity between the small number of women in the upper echelons of the legal profession – including the judiciary – and the large number of women who graduate from law school. She believes this is a problem which needs to be rectified.

Judge O'Brien would like to see more female lawyers taking a leading role in complex trials, particularly in civil cases where women still seem to be restricted to chambers appearances. The judge does not believe that the under-representation of women barristers in complex cases is the result of any lack of ability; on the contrary she feels that, generally speaking, women who practise at the bar are very skillful and caring advocates.

In relation to judicial appointments, the judge thinks that in the past women have had to be very much better than men in order to come to the attention of the people who recommend and make appointments. She is gratified that today the Law Society generally puts up equal numbers of men and women for consideration for appointment to the bench. She believes that, given women comprise 50 per cent of the population, the case for working towards equal numbers of men and women on the bench is clear.

Judge O'Brien feels that female judges have made an important contribution to the work of the District Court, and acknowledges that from time to time they can challenge the prejudices of their male counterparts. However, she sees this as a healthy thing: in her view, it is important for men in positions of power to have their decisions questioned by women who are on the same level professionally.

The judge has only one child, a son aged 23 who now lives in England. Thus at present there is no tension between her family life and her career. However, this was not always the case. During her time at the bar, the judge found it particularly difficult to balance those tensions. In fact it is with real regret that she looks back and ponders the sacrifices she had to make. As a trial lawyer with a demanding workload, she was often unable to attend important functions at her son's school. As a result both she and her son missed out on the opportunity to share many of his childhood experiences. Whilst some innovations have been made in recent years to assist women who wish to join the workforce, for example 'flexi-time' and job-sharing, these improvements are of little use to women at the bar.

As the most recent appointment to the District Court, Judge O'Brien has enthusiastically embraced her new position. Her focus is on effective communication and making the legal process more transparent and understandable for those who are affected by it. Despite the fact that judicial appointment was never something to which Judge O'Brien aspired, she seems set to make her mark in the judicial arena.

## JUSTICE JULIENNE PENNY

Julienne Penny brings an impressively diverse wealth of life experience to her current role as a judge of the Family Court of Western Australia. Born in Port Pirie, South Australia, in 1949, her Honour spent her youth in that State, attending St Mark's Catholic School in her home town. A career in law did not immediately beckon upon matriculation, her Honour noting that country girls in the 1960s generally chose between teaching and nursing as a career. Justice Penny chose teaching. Having graduated from the Adelaide Teachers College in 1969, she commenced a six-year stint as an Accountancy and Physical Education teacher, first in South Australia and later in Western Australia. Her Honour was always aware that teaching was not her true calling, and when it was suggested to her by friends that her love of talking would make her an ideal lawyer she began to consider a career change.

Justice Penny studied Economics part-time at the University of Western Australia for one year before entering the Law School full-time in 1976. Looking back on her time at Law School, she admits that she was a somewhat mediocre student but explains this by the fact that she had very little time to concentrate on her studies. Her Honour was faced with a challenge common to most mature-age students, that of staying financially solvent while studying for a degree. Not being eligible for any grants, Justice Penny combined study with running a catering business. She also supported herself by teaching Accountancy at night school and working part-time as a book-keeper for a liquor store.

In 1980 Justice Penny was admitted to practice after completing articles at the firm of Solomon Cullen & Co in Fremantle. She spent the next decade practising law in the port city, preferring its relaxed country-town atmosphere to that of Perth. In 1981 she moved to Parkinson & Co, becoming a partner in 1984. Thereafter the firm was known as Parkinson, Penny & Co. When that partnership was dissolved in 1988, Justice Penny started her own firm, Julienne Penny & Associates, which is still in existence today.





During her years in practice, Justice Penny specialised in criminal law, and she was appointed president of the Criminal Lawyers' Association of Western Australia in 1985. She touched only briefly on family law matters, believing that many women lawyers were inappropriately pigeon-holed in that area. It was only after joining the Independent Bar in 1991 that she took on more family law briefs.

Justice Penny has served as an elected member of the Legal Practice Board and has sat on its disciplinary tribunal; she has also been a member of the council of the Western Australian Bar Association (1993-1994) and has served on Legal Aid Review Committees. She is a former member of the Children's Advisory Council.

Justice Penny is the second female judge to be appointed to the bench of the Family Court of Western Australia, joining Her Honour Justice Carolyn Martin who has served on the court since 1996. She describes her appointment on 1 June 1999 as both flattering and a little overwhelming. Her Honour's main aim as a judge has been to ensure that all litigants leave her court believing that they have been treated fairly, even if the outcome has not been favourable to them. Given the stressful nature of many cases that come before the Family Court, the judge emphasises the importance of being able to distance herself from the litigants whilst at the same time remaining sympathetic to their sometimes irrational behaviour.

While Justice Penny has never been genuinely fearful for her safety, she is always aware of the potential risks of her position. The Family Court of Western Australia is the only superior court in the nation that dispenses with the formality of the wig and gown. Her Honour feels that this arrangement does not adequately distance the judge from the litigants and would welcome a change back to the gown. She does, however, support the abolition of wigs, largely for aesthetic reasons.

Justice Penny has taken a keen interest in women's issues throughout her career. She is a past president of the Women Lawyers' Association of Western Australia and is particularly proud of the outcomes achieved by the Chief Justice's Task Force on Gender Bias, having served on its executive. Her particular focus was on the status of women lawyers and on improving their position within the legal profession. Justice Penny still feels, however, that the larger city firms could do more to retain their female lawyers – for example, by more clearly acknowledging that their part-time work does not equal a part-time commitment. Her Honour is also disturbed by the lack of women coming up through the senior ranks of the profession, a problem that has not been adequately addressed in the last 10 years. She is particularly disappointed that in the Family Court, where half the litigants are women, 21 years elapsed before the first female judge was appointed. Her Honour believes there is the potential for such problems to be remedied and points to a proposal for part-time courts in New South Wales and Victoria as an example of what innovative thinking may be able to achieve.

Justice Penny cannot definitively state what it is about her gender that impacts upon her role as a judge, but she categorically denies that female judges are always

softer and kinder than male judges. While her Honour does not feel that she has had many difficulties because of her gender, she believes that this is because she chose a less orthodox route to the bench than some of her male counterparts. Her decision to work in smaller firms was one many other women practitioners have made. Although this choice has the potential to marginalise women, leaving a dearth of female lawyers in the larger city firms, it does allow women the freedom to combine work and family life.

Such autonomy has allowed Justice Penny to successfully juggle her family and professional roles and she notes that her 15 year-old son has dealt reasonably well with his mother's appointment as a judge. She jokes that the main conflict she has found in that role has been dealing with lawyer friends who occasionally appear before her in a professional capacity. She wonders how many cancelled dinner engagements are the result of unfavourable judgments.

Justice Penny has many interests outside the law. As one might expect of a former PE teacher, she is a keen runner, swimmer and cyclist. She is also an avid supporter of the Fremantle Dockers football team and has a framed, autographed Dockers jumper occupying pride of place in her chambers. Her Honour also enjoys spending time at her beach house in the South-West of the State, reading fiction, socialising with friends and cooking.

[N.B.]