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AUCKLAND DISTRICT LAW SOCIETY

AUCKLAND, NEW ZEALAND

THURSDAY 21 OCTOBER 1993

EQUAL EMPLOYMENT OPPORTUNITY - A CHALLENGE FOR OUR
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The Hon Justice Michael Kirby AC CMG
Acting Chief Justice of New South Wales

OUT OF THE PAST

A few weeks ago I was fulfilling one of my last functions as Chancellor of Macquarie University in Sydney. I had to toast the Army at a dinner in Sydney for the University Regiments. The military personnel at the dinner looked resplendent. Their dress uniforms of red and black. Their white ties. The medals that glistened in the candlelight. All reminiscent of an aspect of the past which Australia and New Zealand share in common. The long banquet table could have been lifted from a scene in Ootacamund in India, or from Ladysmith in South Africa or Mount Royal in Quebec.

The band marched around the tables, caressing us with the tunes of Empire. Stirring songs, marching songs of daring, of adventure, and of imperial self-confidence. We should not mock the past. But for the spirit of those military and commercial adventurers, we would not know each other. Our lives (assuming we would have existed) would have been so very different. I would probably be shivering in the rain somewhere in the north of Ireland. I cannot speak for you.

We cannot roll back the past. But we can learn from it. We can avoid its mistakes. We can seize the opportunities which, today, it presents to us for tomorrow.

As I took the long walk up the regimental table to propose my toast, the decanters of port moved their anticlockwise course, to fill the glasses. I looked about me. On a campus of a Sydney University, filled in the daytime hours by so many Asian-Australian faces, I could see not one soldier of Asian ethnicity. The tiniest handful of women was there. Not a single Aboriginal Australian could I spy. In terms of EEO, the Army has a long way to travel. In my toast to the Army of the future, I reminded the participants that the Army exists to serve, to sustain and to support, the democracy of a multicultural, highly diverse community. In the future it should be a better reflection of that community. Only then will it fully understand and cherish the society it defends. "You judges should talk", I heard them mutter into the port.

In a different ceremonial setting, I sat in the Banco Court in Sydney as new recruits for the legal profession took the oaths of honesty and service which are administered before their admission. I have no doubt that those promises are the same on this side of the Tasman. Around me, again, were the symbols of our constitutional continuity. The Royal Coat of Arms. Judicial robes of scarlet and ermine - well, rabbit, the symbol of the mighty damage that imported beast wrought on the flora and fauna of isolated Australia. The horse hair wigs. The black robes of the young barristers, still in mourning for the death of Queen Anne. The language of the admission order:

"Let, so-and-so be admitted".

The old world courtesies of our profession:

"May it please the Court ...".

There is a studied insult there. Never say: "If it please the Court ..." in case it might not. "May it please the Court ..." tells the Judges that it has to please them, or it is just too bad.

Again, my distracted eyes wandered around the faces of the new recruits. Lots of pale Johnsons and Wilsons and white Joneses and Smiths. A goodly few names from Central Europe, spared, in the Antipodes, the battles of their cousins. Not yet many faces of Asian-Australians. No Aboriginal Australians at all. The number of women admitted to the Bar has actually declined of late. The number of women solicitors in my jurisdiction increased from 13% to 26% in the decade from 1984 - 1993. But this happy figure masks an under-representation in private practice and a very poor representation in legal partnerships.

In 1993, in New South Wales, in the private sector of the legal profession, there are nearly 4,000 partners - but fewer than 300 are female. That is about 8% of all solicitor partners are women. The same position is true of universities. Fewer than 10% of the professors of Australian universities are women. Little wonder that the review of progress in equal opportunity for women's employment in Australia produced a Senate report in 1992 entitled *Half Way to Equal*. Perhaps it should have been a tenth of the way, rather than a half.

In our shared and inherited past, we in New Zealand and in Australia see in the stable, bedrock, constitutional institutions of our countries many strengths which we can value. A small citizen military, without the authoritarian great standing armies that cause wars. An independent, painstaking, and generally just judiciary, working with a devoted legal profession. But we must move quickly to ensure that these precious institutions are brought into closer harmony with the changing societies which they serve. That is what lies behind the notion of Equal Employment Opportunity (EEO). It is the fundamental idea which supports the EEO kit which the Auckland District Law Society has prepared, and which I commend to its members.

Why should I trouble to sail in a cylinder of steel across the Tasman, snatching a day from a busy life in court, to be with you on this occasion?

* First, because of my admiration for this country. In many ways, Aotearoa is still a leader in legal and practical steps for the removal of discrimination, and the assurance of equal opportunity. Its democratic Parliament in August of this year, led by Associate Minister Katherine O'Regan, adopted important reforms of the *Human Rights Act* to protect equal opportunity rights, and to redress discrimination, on the grounds of sexual orientation and (effectively) HIV status. The Act also carried forward a wide range of amendments; banning discrimination in this country on the grounds, of disability, age, political opinion, employment status, and family status; adding these to the familiar list of race and gender. As a result of the passage of this legislation, I believe that New Zealand now leads the way with the most forward-looking equal opportunity legislation in the world. If it can succeed anywhere, it will succeed in New Zealand. You will point the way for our region, and beyond. Be bold and proudly give the lead.

* Secondly, I consider that you in New Zealand (and we also in Australia) are at a critical moment in our history. I will not return to the idea of constitutional association that used to so upset the late Sir Robert Muldoon, until, that is, I dangled before him the prospect of portly statues of himself across Australasia, as the founder of CER. Instead, I refer to the need for both of us to reflect upon our histories, our geography and our unique opportunities. It is wrong to say of either of our societies that we are truly Asian or Polynesian. We remain profoundly and indelibly affected by the experience of the settlers who came here from Europe. We share the English language as our common medium. We still have stable institutions of Parliamentary democracy and of independent courts. But we are in a region of the world which is

about to explode with enormous economic potential. If only we in New Zealand and Australia can realise our opportunities, as we face the new century, we can make the most of our past, and seize the future presented to us by our place in the world. We will make more of that future if we mobilise the great variety of our people. We will *deserve* a place in the Pacific sun if we have the assurance and strength of just and fair societies.

Thirdly, the profession of the law need to be a model for an equal opportunity society. This is because, as judges and lawyers, we are members of a community whose mission is to protect and uphold the rights of individuals, and to maintain the laws of our communities. The legal profession serves the entire populace. It should therefore be open to all members of the community, without prejudice or discrimination. It should reflect, in a general way, the diverse character of the community. Its members as civilised, educated citizens, should make sure that they conform to the law. But also that they conform to a rational and just policy of equal opportunity within their own ranks. This means more than a passing nod to the *Human Rights Act* 1993, and to the national laws and international conventions that require us to respect the equal opportunity rights of others in employment situations. It is a matter of attitudes and approaches to the task of recruitment of new employees; the proper acknowledgment of the vital contributions of current employees; the protection of employees against harassment or embarrassment, or from dismissal upon grounds other than those strictly related to their performance as employees. In New South Wales, in August 1993, the Law Society adopted a *Policy on Equal Employment and Promotion*. Now, across the Tasman, the Auckland District Law Society has committed itself to help implement principles of EEO

amongst its members. The kit which has been produced provides the framework for the path of justice which we lawyers, above all, should proudly tread.

THE EEO KIT

Many of the cases on equal opportunity generally, and equal employment opportunity in particular, which come before courts and tribunals demonstrate that thoughtlessness, rather than vicious, cruel or prejudiced action, often lies behind acts of discrimination. The recruitment of taller people because the employer thinks they are more impressive may discriminate against women, or against people of particular ethnicities. The recruitment of employees from particular schools may have been traditional, especially in the law. Yet it may involve discrimination on grounds of religion, or ethnicity, or wealth, or other illicit bases.

Nor is discrimination a stable concept. We should not stereotype even the discriminators. As I left Australia, there was a debate about the need to develop specific educational strategies for boys, who claim they have been neglected in favour of long term strategies developed for the education of girls. In curing one wrong we must not create another. In an increasing number of advertisements in Australia, we are seeing an indication "knowledge of Cantonese an advantage". This may be explicable for clerical work. But it hardly seems justifiable for panel beaters! Unfair discrimination in employment, education or anywhere else does not become more tolerable because it is targeted at a majority, or against people who formerly enjoyed the benefits of unfair discrimination.

The enemy here is stereotyping. The basic idea of equal employment opportunity is extremely simple. It is that people should have their rights in employment judged on their own individual merits as employees, and not upon

suppositions of prejudice, mythology, or long-held expectations. This is all the EEO policy demands. It does so in the belief that, once adopted, and faithfully implemented, a neutral approach to access in recruitment and opportunities within employment will produce a body of employees which reflects the full diversity of our communities.

In the legal profession, this will mean greater work satisfaction and an increased capacity of the ordinary legal firm to respond and relate to the community it serves. It will mean the avoidance of unlawful and unfair practices. And it will be a contribution to a fair society.

The EEO Kit rests its strategy upon awareness of the need for equal employment opportunity and a commitment to its ideals. It proposes the formulation of a policy statement of such a commitment and the adoption of a strategy. It suggests the establishment in legal firms of a team to carry EEO principles into operation, and to ensure that they are fairly observed. It involves consultation with all members of the firm. And because of the necessity to update and review the strategy, it proposes the gathering of information, and the regular review of policies and practices, to see what progress, if any, has been made in the achievement of EEO targets. The setting of objectives and the monitoring and evaluation of the implementation of EEO principles are designed to turn the simple idea of equal employment opportunity into practical reality.

Some lawyers will doubtless say that such a formalised system is unnecessary or unsuitable to their needs. It is probably true that in smaller offices, with highly personalised relationships, the detailed formal strategy of this kit will need to be adapted and simplified. But the trend in the legal profession is the same as amongst grocers. It is towards big firms. In a large, and more impersonal environment, it is extremely useful to have basic rules which translate the EEO strategy into a practical course of action. Simple suggestions, such as the balanced constitution of recruitment committees and

interviewing panels to assure (wherever possible) the participation of people sensitive to EEO principles and reflective of social diversity, represent one step that should be taken. The assignment of a particular partner to have the responsibility for an EEO policy is important. So is the very acceptance that this is an important thing for legal firms to do. Within our profession there is a whole range of strong-minded individuals. Some will denounce anything of this kind as the latest dollop of political correctness. They will call it unacceptable interference in their managerial prerogatives. They will decry it as the work of do-gooders and intellectual nannies, who think they know best. You have all heard these protests in the past. I do not doubt that in many cases these views are sincerely held. Certainly they are passionately advocated.

The fact remains that some people in our societies do suffer wrongful discrimination. The law on both sides of the Tasman has moved to try to alter and reduce this discrimination. Employment is a vital part of human well being and self identification. And that the legal profession must be in the forefront of faithful observance of the law, and intelligent leadership of society, away from stereotypes, and towards the goal of equal opportunity for all.

If this means a measure of formalised commitment, the adoption of a published policy, the modification of current practices, the gathering of information, and the regular monitoring of equal opportunity in practice, so be it. These are the tools by which equal employment opportunity in practice will be secured.

A civilised profession will not tolerate sexual harassment, racial harassment, or harassment on other grounds of prejudice and stereotyping - such as sexual orientation, age and disability. A profession committed to justice will exclude from its recruitment, employment and termination policies, unfair discrimination on the grounds of age, gender, marital status, medical status, race, ethnicity, or nationality, religion, disability unconnected with the job, irrelevant past or spent criminal convictions, involvement in trade union

activity, political opinion, sexual orientation, or the activities of relatives and associates. None of these, unless by law it be a past criminal conviction, is or should be necessarily a bar to employment in the legal profession. The question at the forefront of the recruiter's and employer's minds must always be: What are the qualities needed for this work - does this person have those qualities, on his or her own individual merits?

AN END TO APOLOGY

In Australia, and doubtless in New Zealand, national and local EEO programmes have been adopted to enhance especially the position of groups which, until now, have suffered serious disadvantages in securing their basic human rights of equal employment on their merits. New bodies have been established. Reviews and enquiries have been conducted. National strategies, particularly for Maoris, Aborigines and women, have been adopted. Laws have been passed. Kits have been distributed. Speeches have been made. Prosecutions have been launched. Yet still, prejudice and disadvantage persist. The myths abound:

- * Women are no good at figures.
- * Women are over-emotional.
- * Women are not ambitious.
- * Women cannot stand up to pressure.
- * Aborigines all drink too much.
- * Asians stick together.
- * Gays are irresponsible and anyway they wear earrings.
- * HIV positives deserve what they've got.
- * Half the Maoris of New Zealand are living in Bondi on social security.
- * The Pacific Island people all commit crime.
- * People with disabilities are just too much trouble.

* All a lesbian needs is a good man.

We all know these words of prejudice. Words that wound. Words that feed attitudes and nurture stereotypes.

A HARMONY OF MANY DRUMMERS

Each precious individual is a unique being. Each one is important to herself or himself. Each one has a life's experience, with love and pain, joy and tears. Some, perhaps many, will squander their opportunities. But so far as we can jolly well do it, each should have the fullest and fairest chances. We will organise our society to make sure this is so. We will organise our laws to encourage due observance. We will promote this precious and moral idea through our churches, in our professions and jobs, in the Marae of the Maori people, and in the town meetings and Parliaments of the descendents of the settlers. We will not stamp out diversity. We will rejoice in it for it is a strength of our people. We will not succeed in ensuring to everyone success in life. But we will strive, with energy and determination, to ensure, so far as we can, that everyone starts out equal, and is given an equal opportunity to make the most in their work of the gifts which God or Nature has given them.

I have flown across the ocean to this Marae. I have listened to the representatives of the Nga Puhī. I have been called to the Marae by Ngati Whatua. As I attended to the Powhiri, my mind raced back through my own culture, to the words of Henry David Thoreau, writing of Walden. Today we would amend his text a little to accommodate our great sensitivity to gender issues. But the lesson is still there for all of us: men and women, Maori and Pakeha, New Zealanders and foreigners, occidental and oriental, gay and lesbian or straight, young and old, disabled or without disability, lawyer and laity.

"If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away. It is not important that he should mature as soon as an apple tree or an oak. Shall he turn his spring into summer?

There are many drums and many drummers throughout our seasons. The legal profession beats a very big drum in our societies. To it, much power and influence is given. From it, much is expected. We, the judges and lawyers, must be the leaders of the great moral movement for equal opportunity. It is a movement for basic human rights. For fairness and justice. For equality and merit. For equal chances for all people of equal ability. And for an end to stereotypes and prejudice causing harm and disadvantage.

It is for these high objectives that the EEO kit of this District Law Society has been designed. In this historic place, in such diverse company, I feel privileged to take part in its launch. Yet the launch is only the beginning. Words come easily. Translating EEO into action is what matters. Let it be resolved to go beyond words to action. To right wrongs. To be ready for, and worthy of, the new century which beckons us forward to a better time and a fairer world. Let lawyers, for once, lead the way.

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