Jessie Street Trust Annual Luncheon

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Kay Keavney, a pioneering woman journalist, wrote the Sydney Morning Herald's obituary on Jessie Street. She ended it with a quote from Jessie's friend and fellow feminist, Dorothy Irwin:

> "In Australia, you needn't say 'equality of status for women', say 'Jessie Street'".

It's an honour to speak at an event celebrating the life of this great Australian feminist.

Like increasing numbers of supporters of the Trust, I cannot lay claim to having known Jessie Street. The closest I come is to having an improbable friendship with one of her contemporaries, and a Foundation Trust member, Eve Higson. Eve joined the United Associations of Women (UWA) in 1939 and served under Jessie's Chairmanship on the Committee of Australian Women's Conference, which in 1943 drew up the Australian Women's Charter – the feminist manifesto for Australia's post-war society. Eve made contact with me in 1990 when I was nudging 40 and she was around 95 - ostensibly to get legal advice but, as she came to explain, more because in your mid-90s you have to be proactive about making new friends.

I had seen myself as part of what, wrongly, we call the second wave of feminism in the early 1970s – a view that's apt to overlook the generation of feminists who, in the midst of war, were working to secure a better deal for women in the society that was to come after it. Through Eve, I got a glimpse of the heady days of the Women's Conference and of the impact that Jessie Street had on the women who worked with her. Eve's admiration for Jessie was undimmed at

97. In the tribute that she wrote in the introduction to Heather Radi's Collection of Documents and Essays on Jessie – Eve selected a quote from a fellow activist from the UAW to sum up Jessie – she was "a woman without malice". Possibly the nicest tribute of all.

These were all visionary and energetic women of my mother's generation – to whom mine owes a debt. It's easy to overlook how great were the changes that they were instrumental in bringing about.

The United Associations of Women was active on all fronts. One was a campaign to secure the right for women to serve on juries. Legislation to confer a limited right in this respect was before the New South Wales Parliament in 1947. At the heel of the hunt, there was a call for the Government to seek out the opinion of judges and eminent counsel before the legislation was enacted. The UAW wrote to the editor of the Sydney Morning Herald – pointing out that trials in those States in the US which allowed women to serve as jurors had not miscarried. The letter drew attention to inquiries that had been made years earlier by Sir Philip Street, former Chief Justice of NSW, and notably, Jessie's father-in-law, of five eminent English jurists – four had spoken in high praise of women jurors.

The concern in the mid-20th Century about women serving on juries was based on our irrationality. In 1953, when the Western Australian Parliament was debating a proposal to amend the jury statute, the Minister for Justice expressed concern that a modest woman hearing the details of some criminal cases "would be so embarrassed a true verdict would not be returned". Her judgment, the Minister explained to the House, "would be clouded and her presence would probably be embarrassing to those with whom she was

sitting"[1]. The Minister volunteered that were he to serve on a jury dealing with a sexual case he would find it embarrassing to encounter a fellow female juror at a social function. She would, in the Minister's eyes, have "deteriorated to a great extent"[2].

The amendment to the New South Wales Jury Statute was passed in 1947, which allowed women to serve on juries – but only if they were determined enough to apply. It was not until 1968 that women were included in the jury roll as a matter of course. Even then, provision was made for a women to have her name removed from the roll simply by notifying the Sheriff. I had qualified as a lawyer before women in New South Wales were treated equally with men in the matter of jury service: a fundamental obligation of citizenship.

The views of the Western Australian Minister for Justice still had currency when I started my law studies at the University of Queensland in 1969. One other female student was enrolled in the full-time law course. She is now a Judge of the Supreme Court of Tasmania. During our second term holidays we were all required to prepare a report on a criminal case that we had watched in the District or Supreme Court. Our criminal law lecturer, singling out the two female students, instructed us not to attend the trial of a sexual offence since the Sheriffs' officers would almost certainly not permit young women to sit in the public gallery making notes in such a case. It would be nice if I could tell you that we stood our ground and insisted on knowing what conceivable power the Sheriff might have to

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[1] Walker, "Battle-Axes and Sticky-Beaks: Women in Jury Service in Western Australia 1898-1957" (2004) 11(4) *Murdoch University Electronic Journal of Law* 32.

[2] Walker, "Battle-Axes and Sticky-Beaks: Women in Jury Service in Western Australia 1898-1957" (2004) 11(4) *Murdoch University Electronic Journal of Law* 32.

exclude us from the public gallery of a courtroom. I am unworthy to be speaking at this lunch when I report that we meekly accepted the injunction.

The story does have a happy ending – one of those rare intimations that the deity may be female. All the male law students took themselves off to watch a well-publicised case involving allegations of buggery. It proved to be an unremarkable trial that occupied the whole of the second term holidays. We watched a break, enter and steal case in the District Court, which, as things turned out, proved to be highly entertaining and salacious and only took up two days of the holidays.

Years later when I was at the Bar and appointed as a Public Defender, I was at a Public Defenders' Dinner – these events have a tribal quality which only those who have practised at the Criminal Bar would understand – the former Senior Public Defender said to me "I want you to know Virginia, I was not opposed to your appointment, it's just that it didn't occur to me that a woman would want to do the job, it's such ugly work that we do". His wife, a wonderful woman, lent across the table to tell him not to be such a damn fool.

On the shoulders of Jessie Street and her colleagues who framed the Women's Charter and who worked so doggedly for the equality of women, I have seen immense change over the course of my professional life and I have benefited from it. As one of three women out of seven Justices on our country's ultimate court of appeal, I, as they say, "mustn't grumble".

Judging, like most occupations, requires the application of skills taught in the course of professional training and honed in practice. I think it's important that we have women judges, not because I expect us to decide cases differently to the way men who have had the same

training and experience decide them, but just because I'm the product of years spent in endless shared households which had one decorative feature in common: that poster that said of us "We hold up half the sky".

A case decided by the High Court at the beginning of this year breathed life into the question of whether women decide cases differently from men[3]. It was a case concerned with the implied freedom under our Constitution for people to communicate freely about political and governmental matters. In question was the validity of an offence that is provided under the Commonwealth *Criminal Code* – making use of a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive. The provision of an offence of that description was suggested to impermissibly burden the implied freedom.

Ordinarily in such a case all seven Justices would sit. On this occasion, one of our number was about to retire and for that reason he did not sit to hear the case. It was heard by six Justices and, in the event, we were evenly divided as to the answer. This is a relatively unusual event. As it happened, the division was on gender lines.

The three male Justices found that the offence did impermissibly burden the freedom of political communication and was for that reason invalid[4]. The three female Justices found that the burden was not an undue burden on the freedom and for that reason its enactment did not exceed the legislative power of the Commonwealth Parliament[5]. There was a deal more to the reasoning

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[3] *Monis v The Queen* (2013) 249 CLR 92.

[4] *Monis v The Queen* (2013) 249 CLR 94 at 105-135 per French CJ, at 135-178 per Hayne J, at 178-185 per Heydon J.

[5] *Monis v The Queen* (2013) 249 CLR 94 at 184-216.

on each side than that short summary suggests. It's not my purpose to give an account of the differing views – the reasons for judgment expose the cogent arguments on each side of the debate.

I mention the case because a leading legal academic, Professor Zifcak, wrote a lengthy piece about the case in *The Australian*[6]. He suggested that the reasons of the women Justices gave prominence to the fact that the offence is concerned with the receipt of invasive and offensive material in the home or workplace, which he characterised as the private domain. His thesis was based on psychological studies that are said to provide persuasive evidence that male and female conceptions of justice may differ. Men, Professor Zifcak said, tend to define justice in formal and contractual terms. By contrast, women, he said, are inclined to see it in contextual and relational terms in which the private sphere assumes greater significance. Professor Zifcak suggested that the split in the Court in this instance might provide "an intriguing example" of the distinction between male and female conceptions of justice.

The thesis may be thought to be weakened by reference to the history of the proceedings before the matter reached the High Court. It was an appeal from the decision of the New South Wales Court of Appeal[7]. That Court was constituted by the Chief Justice, the President of the Court of Appeal, and the Chief Judge of Common Law – all of whom at the time were men. Their Honours were unanimous in concluding that the provision was valid. If Professor Zifcak's theory holds good, it suggests that, by some uncommon but happy quirk of nature, these three senior male judges

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[6] Zifcak, "Justices split on gender lines over tenor of cleric's letters", *The Australian*, 15 March 2013.

[7] *Monis v The Queen* (2011) 215 A Crim R 64.

in the New South Wales judiciary have a female conception of justice. Another view, and one to which I'm inclined to subscribe, is that the case was finely balanced and its outcome was one about which minds can and did reasonably differ and that gender had nothing to do with it.

In rare cases, courts are called upon to decide novel questions raising ethical considerations, and in which there is no clear legal rule to apply. In such cases there is much to be said for the judge being open about the values that are brought to bear in her or his decision. The resolution of cases of this kind make me think it's no bad thing for women to have a seat at the table.

The case that best illustrates the category that I have in mind is one which many members of this audience will be familiar with – the *Superclinics* case[8]. The plaintiff, a young woman, brought a claim for damages against a number of doctors for their alleged negligent failure to diagnose her pregnancy. She was a 21 year-old full-time student with limited financial resources, who had not intended to have a child and who was not in a settled relationship with the father. Over the course of five visits to the Clinic her pregnancy had not been diagnosed. By the time it was, it was too far advanced for her to be able to procure an abortion. Her claim was for the loss of opportunity to have an abortion and for the costs associated with the birth and raising of the child.

The doctors raised the defence of illegality in answer to the claim. For the first time in many years, the lawfulness of abortions in New South Wales was raised for judicial determination. The availability of “abortion on demand” in NSW continues to rely on the

[8] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

instructions given to a jury by a District Court Judge on the trial of a doctor charged with procuring an abortion in 1971[9]. The Judge directed the jury that the prosecution must exclude that the doctor had an honest belief on reasonable grounds that the performance of the termination was necessary to preserve the woman from serious danger to life, or physical or mental health, which the continuance of the pregnancy would entail.

The trial judge in the *Superclinics* case considered the plaintiff had not demonstrated that her pregnancy involved the serious danger of either kind and it followed that had she procured an abortion it would have been unlawful. Judgment was given for the doctors.

On appeal, the New South Wales Court of Appeal by majority held that the trial judge had erred and that the loss of the opportunity to have a lawful abortion was capable of supporting a claim for damages.

Putting to one side the fault line that the *Superclinics* decision exposed respecting the legal status of abortions in NSW, the case raised a lively question about the policy of the law with respect to the recovery of damages for the birth of a healthy baby. There was no binding authority on the question.

The doctors argued that it was against public policy to award damages because the birth of a healthy baby is a blessing and because it might damage the child to grow up knowing that her birth had been the occasion of the award of compensatory damages. The differing approaches of the judges to the resolution of this question suggests that if there is a male conception of justice, it's elastic.

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[9] *R v Wald* (1971) 3 NSWDCR 25 at 29 per Levine DCJ.

By the time of the trial the child was six. It was not in question that her mother loved her. Kirby A-CJ favoured the view that there was no obstacle to recovering damages. He took into account that the doctors' negligence, if proved, had resulted in the young woman facing financial burdens for which she was unprepared. She had been obliged to give up her studies and had lost the ability to pursue her planned career. Kirby A-CJ thought it was unconvincing to deny recovery on the ground that it would demean the sanctity of human life. He considered that "[s]entiments which permit a judge to proclaim that a conscious decision or expressed desire not to have a child is an 'unnatural rejection of womanhood and motherhood' are out of harmony with the modern Australian society in which the common law must operate"[10]. He did not accept that the child would be affronted to learn that damages had been awarded – he favoured the view of an English judge who had been confronted with the like problem:

> "I do not think that if I award damages here it will lead little Samantha to feel rejection … by the time she comes to consider this judgment (if she ever does) she will, I think, welcome it as a means of having made life somewhat easier for her family."[11]

Priestley JA agreed that in the event the plaintiff established negligence, she would be entitled to recover damages associated with the birth of the child. His Honour applied the principle of mitigation of damages to conclude that there should be no recovery for expenses occasioned after the first time at which the mother could have given the child up for adoption[12].

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[10] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 74.

[11] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 75 citing *Udal v Bloomsbury Area Health Authority* [1983] 1 WLR 1098 per Jupp J.

[12] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 84.

Meagher JA took a different view. He described the mother's claim as "improper to the point of obscenity"[13]. He speculated that the proceedings may have afforded the child an opportunity to witness "her mother's rejection of her"[14]. Even if she was not in court, the "unfortunate infant" might still learn that her mother had publically declared her unwanted[15]. Meagher JA concluded that the policy of the law was firmly against the recovery of damages. His authority for that conclusion was St John's Gospel 16:21[16]:

> "A woman when she is in travail hath sorrow, because her hour has come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world".

Years before the *Superclinics* case, Jessie Street wrote to the Minister for Health responding to a press report that the National Health and Medical Research Council was looking into methods of improving the birth rate including by recommending the enactment of more stringent laws to deal with abortion. She suggested that instead of recourse to the criminal law it would be more constructive to provide adequate financial and other support to women. In her view, the status of mothers and the birth rate were closely related. This was no more than a reflection of views she had long publicly expressed that it would be a good thing if we endeavoured to make "the glory of motherhood" a lived experience instead of a sentimental phrase.

Jessie Street came from a background of privilege and yet throughout her life she had the imagination to appreciate the reality of

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[13] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 86.

[14] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 86.

[15] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 86.

[16] *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 87.

the lives of those who did not have that advantage. She was overseas when the High Court handed down judgment in the *Communist Party Case*[17]. She wrote to Doc Evatt, who had argued the case for the invalidity of the *Communist Party Dissolution Act* 1950 (Cth), to congratulate him on a job well-done and to encourage him to keep up the good fight. The letter, written just before her 62nd birthday, is passionate and idealistic. It speaks to the belief that she conscientiously maintained throughout her adult life that socialism would produce a fairer society for women and men. She encouraged Doc Evatt, telling him that the secret of Roosevelt's success was that greatness never comes to those who seek it but as a by-product of integrity and service[18]. The letter ends with a postscript:

> "Have you heard this one? A canvasser visiting a woman surrounded by numerous children, one in her arms and another on the way – 'I've come to ask you to vote Labor madam'. The woman – 'Well I don't know, I've been in labour all my life now I think I'll give them contraceptives a go'".

We should continue to celebrate her life at these lunches for a long time to come.

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[17] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

[18] Radi, *Documents and Essays Jessie Street* (1990).