

**Ceremonial Sitting on the Retirement of the Honourable
Justice Hilary Penfold**

Supreme Court of the ACT

23 March 2018

Chief Justice Murrell

Justice Penfold, Chief Magistrate and other Magistrates, judicial officers from other courts, Attorney-General, Presidents, other distinguished guests, family and friends of Justice Penfold and other friends of the Court,

The Court acknowledges the traditional custodians of this land and we pay our respects to their elders, past and present.

Thank you Aunty Tina and your family for performing the traditional Ngunnawal “sweep dance”. I understand that this dance is designed to bring closure and to cleanse the spirit for new journeys. We hope that it helps Justice Penfold as she begins her new journey.

I first met Justice Penfold at the ANU legal workshop in Canberra. The workshop was particularly memorable for me because it was there that I learned to play the card game 500. Unlike me, Justice Penfold was already a skilful 500 player. She had of course had the advantage of studying law at ANU.

I soon discovered that her Honour was revered by other ANU law graduates as a great intellect. She also had an aura of glamour because her husband, Mark, was a local radio personality, albeit on commercial radio. Only relatively recently I was disappointed to learn that Mark did not pursue that career but went into a far more mundane occupation as a very successful public sector lawyer.

2 August 1977 was a big day for Justice Penfold (and me). We were both admitted as legal practitioners in this courtroom. I did manage to sign the roll of practitioners five places ahead of Justice Penfold—possibly because the admissions were recorded alphabetically.

A few things have changed since August 1977, but I observe that this court building hasn’t changed (yet) and of course, Justice Penfold and I have aged barely at all.

Career as a legislative drafter

Before she was elevated to the bench, her Honour had a formidable legal career with the Commonwealth.

She began her legal career in the Commonwealth Office of Parliamentary Counsel.

In 1993 she was appointed to the position of First Parliamentary Counsel. She retained that position until 2004. She was the first First Parliamentary Counsel to be appointed for a second term.

She became the President of the Commonwealth Association of Legislative Counsel and was a widely respected speaker and adviser on drafting matters.

In 2000, she received the Public Service Medal in recognition of her work in legislative drafting.

In 2001, she was appointed Queens Counsel for the Commonwealth.

Her Honour's work as First Parliamentary Counsel left an enduring legacy. Her Honour championed plain language while maintaining standards of excellence. At the Office of Parliamentary Counsel, her Honour drafted a wide range of legislation, including in the areas of taxation, defamation, industrial relations and human rights. She also drafted the constitutional amendments that were proposed in 1999 to create an Australian republic.

From 2004 to 2008 her Honour performed another demanding role: as Secretary of the Department of Parliamentary Services.

Appointment to the Supreme Court

Not only is this courtroom the place where her Honour's legal career commenced, it is also the place where, a decade ago, her Honour was sworn in as a judge of this Court.

When her Honour was appointed as a judge, she entered a challenging and foreign environment.

I don't know whether, before accepting the appointment, her Honour reflected on comments that she had made soon after being appointed as First Parliamentary Counsel. From the safe confines of the Office of Parliamentary Counsel, her Honour boldly said:

The difficulties of extracting clear reasons for a decision from several separate judgments, written in several different styles by judges whose positions as members of the majority or the minority might shift in the course of a single judgment from issue to issue (and who often don't even address the same issues in the same order or even under the same names) affect most lawyers, not only legislative drafters.

On a personal level, drafters may find these difficulties more frustrating than other lawyers do. ...Presumably it would not be acceptable for drafting offices to produce 2 or 3 or even 7 different versions of each Bill, drafted by different drafters, which could all be enacted by the Parliament and which, taken

together, would form the law on the particular subject. Should it remain acceptable for judges to make law in this fashion?¹

In defence of judges, I note that these days—at least on this Court of Appeal—we try to speak with one voice: as the Court, and sometimes, the troublesome separate voice is that of her Honour herself!

With modesty more characteristic of her Honour, at her swearing in her Honour said:

I have appeared twice in court. Once here to be admitted and once in the High Court to announce my appointment as a Queens Counsel. I don't believe I had to say anything on either occasion. So, I have a lot to learn.²

Her Honour did indeed have much to learn. Such an admission would never have been made by a former practising barrister. Upon appointment, such persons generally speak only of glittering triumphs, undiminished by any lack of experience or capacity—and they certainly do not concede that they have anything to learn.

Despite her lack of significant prior acquaintance with this courthouse, her Honour quickly settled in, making up for lost opportunity by sitting long hours in court and enjoying herself so much that she is frequently here until late at night.

Her Honour's achievements—both before and since appointment—are many.

A woman in a man's legal world

First, and most obviously, she is a woman who has risen to the top of what was a man's legal world.

For some time after she commenced working at the Office of Parliamentary Counsel in 1977, she was the first and only female drafter in the Office.

She was the first woman to be appointed as First Parliamentary Counsel.

She was the first woman to be appointed as Queens Counsel for the Commonwealth.

She was the first woman appointed as a judge of this Court.

At the Office of Parliamentary Counsel, her Honour displayed a cartoon in her office. It depicted a meeting of six men and woman. The chairman of the meeting is saying, "That is an excellent suggestion Miss Triggs, perhaps one of the men would like to make it."

Her Honour graduated from being Miss Triggs to having a recognised seat at the table and then to chairing the meeting itself.

¹ Hilary Penfold, 'The Genesis of Laws' (Paper presented at "Courts in a Representative Democracy", a national conference presented by the AIJA, the LCA and the CCF, November 1994).

² Penfold J, Speech delivered on the occasion of her swearing in on 1 February 2008

But her Honour did not forget the difficulties that she had faced in her early years as a woman in a predominantly male legal profession. In her capacity as patron of the ACT Women Lawyers Association, her Honour has worked tirelessly to promote and encourage women within the profession.

And what a difference a decade makes. Today, three of the six members of our Court are women.

Intellectual rigour and stubborn attention to detail

Her Honour has always prioritised doing a job well and abhorred sudden and ill-considered changes of tack.

Another of the cartoons that she displayed in her room at the Office of Parliamentary Counsel was a picture of an axe in a glass case with a sign that read, "In case of tax reform, break glass and cut off own head."

On this Court, her Honour is renowned for her intellectual rigour or, to put it another way, for her stubborn attention to detail.

Her Honour's voice, as expressed in her judgments, is a thoughtful and considered voice, unafraid to engage with complex legal questions.

Numerous decisions of the Court Appeal have been enriched by her Honour's persistence in working over an issue until all its complexities have been resolved.

Where necessary, her Honour has not hesitated to call for better legislative drafting.

Patient and compassionate towards the disadvantaged

At times her Honour has spoken plainly, expressing her frustration with the changeability of legislators, the incompetence of other legislative drafters and the businesslike approach of her brother and sister judges. But her Honour has always displayed remarkable patience with disadvantaged litigants, including self-represented litigants.

In an admission speech, her Honour said:

Members of the class sometimes identified as "querulous" litigants or "morbid complainants", many of whom are self-represented, make considerable demands on both the court system and on other parties. It is not clear that our current systems and procedures are well-adapted to ensure that justice is done for those litigants, and those on the other side of their matters, in the most efficient and effective way.³

Her Honour went to great lengths to ensure that justice was done for each self-represented litigant who appeared before her.

³ Penfold J, Speech delivered at the Ceremony for Admission of Lawyers on 17 October 2008.

A former associate recalls a self-represented indigenous litigant who had appealed from a decision of the Magistrates Court. One of the litigant's complaints was the failure of the Court to recognise him properly for the man that he was. As part of his submissions, he presented a large and disorganised folder of torn and coffee-stained pictures, letters and articles about the contribution that he and his family had made to the indigenous community and the broader Australian community. Her Honour read the whole lot, which occupied her well into the night. In her judgment, she acknowledged that the appellant and his forebears had "made a significant contribution over many years to the lives of Aboriginal people in the ACT and New South Wales, and perhaps more broadly still"⁴. While the outcome of the case may not have been to the appellant's liking, undoubtedly he would have appreciated her Honour's recognition of his life story.

Commitment to community service

All aspects of her Honour's legal career have been permeated by a commitment to public service and unwavering integrity.

In a speech that she gave to ANU graduates in 2006, her Honour said:

If you pass through the world without changing anything, you won't have done much harm, except for your personal contribution to greenhouse gas emissions. But you won't have done any particular good, either. I believe that your university education imposes two moral obligations. One is to make a difference in the world. The second moral obligation, therefore, is to ensure that when you do make a difference, it is a difference for the good.

As a woman in a man's legal world, as a lawyer of uncompromising intellect, and as a compassionate judge with an enduring commitment to public service, her Honour has made a difference. And it has been a difference for the good. For the good of women lawyers, for the good of Australian legislative drafters, for the good of ACT jurisprudence and—most importantly—for the good of those litigants whose cases her Honour has heard patiently and decided wisely.

We will all miss Justice Penfold.

⁴ *Ferguson v Smorhun* [2017] ACTSC 192 at [37].