Ceremony for Admission of Legal Practitioners

Friday 21 April 2006

Speech by Chief Justice Terence Higgins

Welcome, and congratulations. You have been admitted as Legal Practitioners of the Supreme Court of the Australian Capital Territory before my brethren Crispin, Gray, the Master – Master Harper – and myself. For many of you this is the first time you have viewed judicial proceedings from beyond the public gallery – and for one of you, facing this direction[1]. It is an area generally reserved for legal practitioners and criminal defendants. Fortunately, you sit in this area for the first time as a lawyer and not, at least figuratively, in the limbo between the public and the bar table. From today you are entitled to apply to the Law Society for a Practicing Certificate entitling you to hold yourself out as a legal practitioner and bill clients for your professional legal services. As an aside, please be realistic when you bill clients. If you do find a way to cram more than 24 hours in a day, then spend that extra time with friends and loved ones rather than by accruing more billable hours. It is said that one lawyer was greeted at the Pearly Gates by St Peter who exclaimed "For all the billable hours you've accrued, you must be older than Methuselah".

As I look around the courtroom I notice several things. Firstly (and I hope I'm right in saying this), that for once the air-conditioning in this courtroom is working. I am obliged to point out that this building was state-of-the art at the time it was built. On the other hand, so was the Titanic. The current problems with this building go well beyond temperamental air-conditioning and the lack of technological aids such as a DVD player; but extend to perilous internal staircases, dangerous levels of asbestos and interruptions to both court proceedings and work upstairs in Chambers due to inadequate soundproofing. Contrary to the rumours, the clanging from downstairs is

[1] The Chief Justice Associate Anna Haynes, who sits on the bench facing the same direction as the Chief Justice, was admitted in this ceremony.

not the sound of confessions being extracted. Until we receive significant funding for the requisite upgrades we will have to weather the building's deficiencies.

Secondly, I am heartened to see that your friends and loved ones have come to share today with you. I am sure that they are very proud. Take today as an opportunity to consider all the people who have supported you throughout the course of your law education. You are now called upon to serve those same people as an adviser and advocate for their legal rights. If at any point of your career you are faced with an ethical dilemma, or lose confidence in why you embarked on a legal career, remember them and what they expect of you. Of course, if you need professional guidance on how to act you also have the support of the Law Society and your fellow practitioners. Do not hesitate to call upon them if you need to, or are in doubt.

Countless are the occasions I have been in this court and this particular courtroom. I was admitted to legal practice in the 1960s and made a name for myself, in part, by representing conscientious objectors to the Vietnam War who refused to be subjected to compulsory conscription. In my following years of practice, and since my swearing in as a judge of this honourable court in 1990, I have consistently been an advocate for individual rights. This is a trait I share with my fellow judges. The examples are numerous. Let me provide just a few.

My predecessor, Chief Justice Jeffrey Miles, in his 1993 decision *The Queen v Holingshed*, embarked upon a frank and detailed dissertation as to whether the NSW prison system delivered outcomes for prisoners consistent with the civil rights contained within the International Covenant of Civil and Political Rights. The late Justice Xavier Connor, in 1973, famously relied upon an unpublished draft Bill abolishing the then-mandatory death sentence for murder to announce at a murder trial that the accused would not be subject to capital punishment following his conviction. As a barrister, I argued before a full Supreme Court bench that an Ordinance under which certain defendants had been charged had not been properly gazetted and was therefore inoperative. The defendants were Aboriginal people who had been prosecuted for attempting to resist the dismantling of the Aboriginal Tent Embassy opposite the then-Parliament House. The court held that not only was that particular Ordinance inoperative, but that all Ordinances made for the governance of

the ACT since 1930 were inoperative. Their Honours noted that this decision "may have highly inconvenient consequences." I had a holiday for my birthday so I could not agree with that view.

Over many decades, and often in dramatic fashion, this court has built a reputation for protecting individual rights. This tradition continues into the 21st century with one significant change: the enactment by the ACT Legislative Assembly of this nation's first human rights legislation, the *Human Rights Act 2004*. In addition to the techniques this court has previously employed in its protection of fundamental individual rights, there now exists an additional legislative basis for doing so.

It has therefore been somewhat disheartening that this Court has been criticised for not embracing the ACT's *Human Rights Act* with more vigour. It is true that there have been proceedings during which useful reference to the Act could have been explicitly made but wasn't. However, this court bases its decisions on the submissions before it. As lawyers, part of your responsibility will be to formulate arguments to put before the courts which will advance your client's cause. A judge can encourage counsel to direct their arguments to particular issues, but cannot tell counsel how to do so.

With the first major report on the Human Rights Act due soon, now is a timely opportunity to discuss the potential of that Act with you, the jurisdiction's newest practitioners, in the hope that you will take that knowledge to your future workplaces.

Part 3 of the Human Rights Act sets out a list of civil and political rights to be enjoyed by all individuals in this jurisdiction. By way of example, included in that list are the right to a fair hearing, to peaceful assembly, to freedom of expression and to the protection of the family unit, as well as a suite of rights applicable to criminal proceedings. The Act does not stipulate that a breach of a person's Part 3 rights gives that person an automatic cause of action. Rather, a person seeking to rely upon the Act has two options. Section 30 states that in working out the meaning of a Territory law, an interpretation consistent with human rights is as far as possible to be preferred. In other words, when a statute lends itself to more than one interpretation, then the interpretation that best protects an individual's Part 3 rights is to be preferred. I will

come back to the significance of Section 30 in a moment. The other alternative is to rely on Section 32. That provision allows the Court the opportunity to declare that a Territory law is inconsistent with an individual's Part 3 rights. A Territory law is not invalidated by virtue of such a declaration.

On their face, the combined effect of Sections 30 and 32 merely allow this Court to interpret Territory legislation in a way consistent with human rights, or else declare that the legislation is so inconsistent with human rights that the intervention of the Attorney-General and the legislature is required. For that reason, the Human Rights Act was initially criticised for lacking teeth. I would urge a reconsideration of that view. It ignores just how proactively this Court has applied the Act in response to appropriate submissions by parties.

As a superior court of record, the ACT Supreme Court has inherent powers. These include the powers grant injunctive relief, to control the proceedings before it and to punish individuals and corporations for contempt. Section 20 of the Supreme Court Act is the statutory basis for the Court's inherent powers. As a Territory law, Section 20 of the Supreme Court Act, and therefore the inherent power of the Court, is subject to Section 30 of the Human Rights Act. The consequence is that Part 3 rights stipulated in the Human Rights Act can be protected using the Court's inherent powers. Let me provide examples.

In *R v YL*, the Crown sought to compel a child to give evidence against the child's mother. The test under the Evidence Act for doing so was met. However, there was expert evidence before the Court that compelling the child to give evidence would cause the child profound damage. The court, with reference to a child's Part 3 right to be protected on account of being a child, refused to exercise its coercive power to compel the child to give evidence notwithstanding that the Evidence Act permitted the Court to do otherwise.

In both *R v Upton* and *R v Martinello* the Crown sought to adjourn criminal proceedings within days of the trial date in circumstances that would have unfairly prejudiced the defendant's right to a fair hearing, a Part 3 right. It is within the inherent power of the Court to permanently stay proceedings in these circumstances.

However, in these two particular cases the Court held that the prejudice to the defendant could be remedied by staying proceedings until the Crown paid to the defendant the reasonable costs he had incurred by reason of the adjournment.

As lawyers, you ought to appreciate the breadth of power within this Court's inherent jurisdiction in both its criminal and civil jurisdictions. At law school you will have learned of Anton Pillar and Mareva injunctions. Although those names are not Latin, they are still designed to confuse. There are, therefore, conceivable modes of urgent injunctive relief that may be available to restrain breach of Part 3 human rights beyond the ancient writ of habeas corpus. Perhaps an employee could apply for an injunction against his or her employer allowing an employee to engage in prayer on the work premises during his or her lunch break in circumstances where the employer had otherwise forbidden it.

If, having perused the legislation and the case law, you are of the opinion that even if the *Human Rights Act* does have teeth, those teeth are very small, expensive and difficult to extract, then the good news at least is that there are others who share your view. For example, a consideration for the current review of the Act by the ACT Department of Justice and Community Safety is whether social and economic rights should also be included in Part 3. There is also a question whether a breach of rights should sound in damages. However, it must be conceded that Supreme Court litigation is an expensive pursuit. These issues and many others no doubt will be considered by the Department in its report and in any subsequent public debate.

You are now about to enter the world outside this court as a lawyer. Of you being admitted today almost two-thirds of you are women, and among you are people who have graduated from universities from every Australian State and the ACT. Take with you the confidence to be passionate advocates for the legal rights of your clients and to carry that confidence with you when you enter this court.

My congratulations once more to you, your families and friends. I wish you all the best in your future endeavours, wherever they lead.