

Commencement of the Legal Year

4 February 2013

Great Hall, University House

Chief Justice Higgins AO

Good Morning and welcome to the inaugural Procession and Celebration Ceremony to Welcome the New Legal Year. I begin by paying my respects to the Ngunnawal people, the traditional owners and continuing custodians of the land on which we gather.

This morning's ceremony provides an opportunity for the ACT legal community to reflect on our roles in the justice system, ideally with the benefit of a restful and rejuvenating holiday period behind us. Inevitably, each year brings new challenges – some welcome, some less so. In the ACT the delays in hearing matters is undoubtedly one of those challenges. It is notable that last year the legal community worked together to ensure the success of the Blitz and the introduction of the Docket system resulting in a decrease in waiting times and a more efficient system for allocating cases. This year will no doubt bring fresh challenges (again, some welcome, some less so), as well as times of change with a new Master and Chief Justice and the September federal election called to coincide with my retirement.

This ceremony provides us with an opportunity to consider the ethical obligations implicit in practicing law. Legal Profession (Solicitors) Rules 2007 (ACT) state that “practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures

to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.” I have no doubt that we all aspire to fulfill these obligations, but perhaps our practice could improve, particularly with respect to timely preparation of materials for both the court and opposing practitioners.

The Australian Solicitors’ Conduct Rules states that ‘a lawyer’s duty to the court and the administration of justice is paramount’.¹ As Brennan J stated in *Gianarelli v Wraith* : ‘counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel’s duty is to assist the court in the doing of justice according to law’.² His Honour referred to the position articulated by Lord Eldon in the 19th century case *Ex parte Lloyd*, stating that counsel is ‘merely an officer assisting in the administration of justice, and acting under the impression, that truth is best discovered by powerful statements on both sides of the question’.³ This may be contrary to the impression a client, and the public, may have of the legal system and the role of the solicitor or barrister, an impression reinforced by modern media. People may be under the impression that the overriding duty of counsel is to secure a judgment in favour of their client, (after all, they are paying them) however this is not an accurate understanding of the duties of legal practitioners, duties we must uphold in order to maintain the integrity of our legal system.

The duty to clients is an ‘obligation subsumed by and contingent upon the duty to the court’ which was stated by Pembroke J when faced with the prospect of a 500 page affidavit.⁴ Further, his Honour noted that ‘in all cases, to a greater or lesser degree, the efficient administration of justice depends upon ... co-operation and collaboration.

¹ Law Council of Australia, ‘Australian Solicitors’ Conduct Rules’ (June 2011), www.lawcouncil.asn.au/programs/national_profession/conduct-rules.cfm, rule 3

² *Gianarelli v Wraith* (1988) 165 CLR 543, 578 (Brennan J)

³ (5 November 1822, reported as a note in *Ex parte Elsee* (1830) Mont 69 at 70n, at 72)

⁴ *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822.

Ultimately this is in the client's best interest'. It is certainly in the best interests of justice.

The NSW Court of Appeal addressed the court's right and obligation to supervise the conduct of practitioners in *Kelly v Jowett* [2009] NSWCA 278. McColl JA (with whom Beazley JA and Barrett J agreed) stated that this right and obligation extends to considering penalising 'any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which the solicitor is engaged professionally'.⁵ In December's Bar Bulletin, my colleague, Justice Burns reminded ACT Bar Association members of the contribution the profession can make to assist the court in the administration of justice and preventing delay. His Honour detailed the benefit of briefing early, of taking instruction early, refining issues and assisting the Bench.

It is timely also I think, to recall the case of *Clyne v NSW Bar Association* (1960) 104 CLR 186. It is the duty of counsel not to make allegations or to advance a claim which is not supported by apparently credible evidence. It is not good enough to hope that such evidence will later emerge.

So, as we commence another legal year, my last as your Chief Justice, I urge you to do so with a strong sense of your individual responsibility, your ability to contribute in assisting the court in the administration of justice, ensuring that all timelines are met and due diligence is taken in preparing matters to ensure that the real issues are addressed. I ask you all to remember that the foundation of a lawyer's ethical obligation is the paramount duty owed to the court⁶ and I wish you all well for the coming year.

⁵ *Kelly v Jowett* [2009] NSWCA 278, [61] per McColl JA (with which Beazley JA and Barrett J agreed).

⁶ Speech delivered by the Hon. Marilyn Warren AC, at the Bar Association of Queensland Annual Conference, Gold Coast, 6 March 2011.