Equal and Substantive Justice

Opening of the Legal Year 2017

30 January 2017

Supreme Court of the Australian Capital Territory

Chief Justice Murrell

Attorney-General, fellow judicial officers, Presidents of the Bar Association and Law Society, members of the legal profession and friends of the Courts and profession,

I acknowledge the first peoples of the ACT as the traditional and continuing custodians of this land, and I pay my respects to their elders, past and present.

I thank the Attorney-General for his remarks. The judiciary looks forward to enjoying a cooperative relationship with our new Attorney-General.

This is – or at least should – be an historic occasion in that it should be the last time that the ceremony marking the opening of the legal term is held in this building. Stage 1 of the new building works – which includes the new Supreme Court building – is scheduled for completion in late November.

Today provides a rare opportunity for the judiciary and profession to reflect on our roles and aspirations before we are absorbed into the hard work of the legal year.

In 2016, the Supreme Court judges agreed upon a strategic statement. We identified as the key purposes of our Court:

1. To maintain and promote the rule of law

2. To provide leadership within the justice system[1]

The maintenance and promotion of the rule of law has long been the guiding principle for courts in western democracies. Now, the UN's Sustainable Development Goals 2016 acknowledge that the rule of law is essential to sustainable development generally, not only for western democracies.[2]

The rule of law holds everyone equally accountable under the law. In this limited sense, the application of the rule of law is about equality.

[1] Supreme Court of the Australian Capital Territory, *Annual Review 2015-16* (2017) 10.

[2] *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, Agenda Items 15 and 16, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015).

At the coal face, the equal application of law and practical access to justice depends on the profession's commitment to these goals and to resisting the gravitational force of executive power. I am happy to say that the ACT Government has a strong commitment to funding legal aid, including Aboriginal legal aid and to access to justice generally.

Today's ceremony attests to the close – indeed symbiotic – association between the courts and the profession. Without the profession, there would be no morning tea.

This ceremony also speaks of the respectful relationship that should exist between the judiciary and profession on the one hand, and the executive on the other.

At the same time, it is healthy to have some tension, both between the courts and the profession and between the judiciary and profession, and the executive. Our perspectives differ. By listening to each other we can strengthen the rule of law.

Recently, Bret Walker SC (delivering the 2016 Hal Wootten lecture) said:

> Lawyers are in a real sense part of the process of government. The title 'officers of court' and the traditions of the bar in its relations with the judiciary are reminders that lawyers are not users of the legal system; [they] are an integral part of it and indispensible to its operation. Judges are not the only ministers of justice...[3]

Apparently, the word "profession" was first used to signify the taking of vows upon entering into a religious order, so Walker's use of the expression "ministry" was particularly apposite. In the mid 16th century, the word "profession" acquired its modern meaning of an "occupation professed".[4]

It seems that, when it comes to ministry in its various manifestations, our Attorney General has some competition ... and not only from judges.

There is no doubt that an engaged and committed legal profession is essential to ensuring the practical application of the rule of law, to achieving equality in that limited sense.

However, the judiciary and profession are also committed to promoting equal justice in a more substantive sense.

---

[3] Bret Walker, 'Lawyers and politics' (2016 Hal Wootten Lecture, UNSW Law, 4 August 2016).

[4] Chief Justice Kiefel, 'Ethics and the Profession of the Lawyer' (Speech delivered at the Vincents' 48th Annual Symposium 2010, Queensland Law Society, 26 March 2010).

It is surprising that in the ACT, which we regard as a socially progressive community, there are still so many social inequalities. Even more surprisingly, some of these inequalities are growing. In the ACT as elsewhere, there has been a significant increase in the rate of imprisonment of Indigenous people. ATSI people comprise 1.8 per cent of the ACT population, 12 per cent of those charged and 23 per cent of detentions in the Alexander McConnachie Centre, i.e. 2 per cent of the general population but almost one quarter of the prison population.[5] The ACT prison population averages 413 detainees, of whom there are, on average, 31 ATSI detainees on remand and 65 sentenced detainees.[6] This is not just an issue for Australia. In New Zealand, Maori people are overrepresented in the prison population in roughly the same proportion.

The discrepancy between the charge rate and the imprisonment rate (for the ACT Indigenous population, 12 per cent of those charged but 23 per cent of detentions) is also interesting, suggesting that Indigenous people are charged with more serious offences and/or are more likely to be repeat offenders for whom lesser sentences have not worked and/or are more likely to be imprisoned than are other offenders who commit similar offences. To the extent that this last possibility applies, presumably it does not reflect judicial racism but a poverty of sentencing options.

Last year, when addressing the question of enduring values in the law, Chief Justice French said:

> Equal justice is a value to which most if not all members of our community would be expected to assent. Its content, however, is not easy to define. Its application can be difficult, particularly when courts are asked to take account of individual or cultural differences in the application of the law.[7]

And Justice Bell observed:

> ...we may speak of the right to "equality before the law". We require courts and tribunals in a just legal system to treat people equally, applying the same procedures and affording the same fair trial protections to all. However, individuals and groups are differently placed in their ability to fully enjoy all of the rights and freedoms that international human rights law recognises,

[5] ACT Government, Justice and Community Safety Directorate, *Statistical Profile: ACT Criminal Justice, September Quarter* (2016) Appendix 1, 139 (Corrective Services Table 2); Australian Bureau of Statistics, *3238.0 Estimates and Projections, ATSI Australians, 2001 to 2026* (April 2014) and *3101.0 Australian Demographic Statistics* (March 2016) <http://www.abs.gov.au>.

[6] ACT Government, Justice and Community Safety Directorate, *Statistical Profile: ACT Criminal Justice, September Quarter* (2016) Appendix 1, 51 (ACTP Table 1), 142 (Corrective Services Table 4).

[7] Chief Justice French, 'Law making in a Representative Democracy: The Durability of Enduring Values' (Speech delivered at the Catherine Branson Lecture Series, Adelaide, 14 October 2016).

> including social and economic rights. A just legal system needs to acknowledge disadvantage and allow special measures to redress it if disadvantaged groups and individuals are to enjoy substantive equality.[8]

It is difficult to work out how disadvantage should be recognised and when, how and what "special measures" should be invoked to achieve "substantive equality". How do you afford "equal justice" to offenders who have lacked access to the same resources as other members of the community; who, in that sense, have never been equal?

The task of attempting to apply "equal justice" to the socially disadvantaged who have breached laws that set standards that are appropriate for the socially advantaged is the daily chore of judges. It is uncommon to encounter an offender who has had the benefit of a supportive family and a good education, who is not addicted to drugs or alcohol, who is of at least average intelligence and who suffers from no mental disorder. Extreme social disadvantage is a feature of most Indigenous offenders whom we see.

The law may be applied equally to these offenders but this does not achieve substantive equality and does little to address the sentencing goals of rehabilitation and protecting the community against crime.

This is because imprisonment is only the symptom of a cluster of problems associated with social disadvantage, including inadequate housing, mental illness and limited employment opportunities. Substance abuse is often the glue that binds these problems together. For Indigenous people, beyond and behind this cluster of problems there is often social trauma and a loss of cultural connection.

History shows that top-down attempts by the bureaucracy to improve incarceration rates (particularly Indigenous incarceration rates) have failed. The revolving door is swinging even faster. What is needed is the individualised justice that a Court can provide.

Consequently, the Supreme Court wants to partner with the profession, health, police, community corrections and Indigenous people to try to develop a new process for offenders for whom there is a close link between substance abuse, serious and repeat offending, and incarceration. All partners are interested in reviewing existing drug court models and developing a new model that is appropriate for our offenders and individualised to meet their needs.

[8] Justice Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (The Sir Ninian Stephen Lecture, University of Newcastle Conservatorium Concert Hall, Newcastle, 29 April 2016).

This is only one challenge (or, euphemistically, “opportunity”) in what promises to be a year of many challenges. But one thing of which I am confident is that 2017 will see the judiciary and the profession continuing to work together to strengthen the rule of law and enhance substantive justice for everyone in the ACT.