

Ceremony for Admission of Legal Practitioners

Friday 21 October 2005

Speech by Chief Justice Terence Higgins

Congratulations on your admission as Legal Practitioners of the Supreme Court of the Australian Capital Territory, before my brothers Connolly, Gray and myself. You should take pride in the fact that each of you, after years of study, sweat and tears, have finally joined the elite ranks of the ACT legal community. But before you step outside the door and ask, “Are there keys for a BMW waiting for me,” it pays to remember that although your admission today is the culmination of years of your personal effort, you would not be here today but for the people around you. You might want to take time to consider who has helped you on your way to this day. For example, the family and friends who gave personal support to you. The lecturers and students you have befriended along the way. That mysterious stranger who sold you a torts summary in first year.

From today you will be called upon to serve those same people as a lawyer, as an advocate, as the upholder of their legal rights. Do not take this duty lightly. It imposes duties as well as privileges. Unwavering integrity, honesty in dealings with other practitioners, clients and the court is essential. You may need to stand between the Executive and the citizen. As proud as we might be to stand in the capital of one of the world’s greatest democracies we must be ever mindful of what consequences might result from the heavy-handed action of the State. This is not a reference to the State of NSW and their recent legislative reforms of personal injury litigation, as painfully as that might have been felt by practitioners in that jurisdiction. Nor the nature of debate in the Legislative Assembly as recently publicised. Rather, I refer to the latest proposal for the enactment of terrorism laws at a national level.

A speech of mine earlier this month received some media attention. My point then was that we must ensure proportionality between the erosion of individual rights and protection against terrorism. Local press reported the speech as a “swinging attack” on

anti-terrorism laws. I am not here to make political statements. It is the Parliament's right to pass whatever laws the Constitution permits. My concern then, now, and always is for the maintenance of a strong and independent judicial system. As legal practitioners you ought to be aware of the difficulties anti-terror laws might create for the judiciary and for you as officers of the court.

Under current anti-terror legislation a person detained for interrogation by ASIO can only obtain legal advice from a lawyer not disapproved by ASIO. ASIO is also authorised to monitor the lawyer's first interview with his or her client. The only document the lawyer may leave such an interview with is the warrant. I can only say that convicted prisoners in Australia's highest-security prison cells do not face these barriers before being convicted of their crimes. How can I, or one of my colleagues on the bench, factor the hindrances on a terror suspect's access to legal advice and upon counsel in preparing that advice in our decision-making? You will answer that question in your pleas of mitigation to us in the future.

Other provisions in current anti-terror legislation warrant our attention. A person detained by ASIO may be held for interrogation for up to a week. Once released, that person commits a strict liability offence if he or she discloses to anyone, including their spouse or child, where they disappeared to for a week. It is foreseeable that one day yourself or one of your colleagues will return to this courtroom as an advocate for a man who, asked by his wife whether he had taken an old flame to a holiday retreat, reveals that he been detained by ASIO for questioning. I concede that, if you become a divorce attorney, it may be more likely you will represent a man who told his wife he had been detained by ASIO when he had in fact spent a week with an old flame, but that makes light of a serious issue.

The serious issue is that we now live in a country where the State can make individuals disappear without the broader public asking why – or at least being able to be told why. Surely, in a democracy, individuals must have the right to ask questions freely, to engage in policy debate and to keep the executive accountable. It is our calling, as lawyers, to assist individuals in the exercise of these rights, be it for the purpose of a criminal, family or civil matter. Be it the protection of this nation against terrorists or a simple conveyance, your clients will depend on you diligently applying

your special skills to ensure their legal rights are protected, assuming that their legal rights are still open to them.

But what is troubling is that despite these already problematic encroachments on citizens' civil rights, the current anti-terrorism proposals seek to go even further. Mr Stanhope has kindly provided us all with an insight into the direction in which the "war on terror" is moving. It really is amazing what you can find on Google these days.

A troubling feature of the anti-terrorism bill is that it does not recognise the importance of judicial review of administrative decisions, or the right to be heard before administrative decisions are made, save in emergencies. For example, a person who has not committed a crime can be held in preventative detention, yet there is no reference to the importance of checking that a decision to do so was reasonable or legitimate in the circumstances. Similarly, certain groups can be banned because ASIO has characterised them as "terrorist organisations," but there is no check to make sure that such a characterisation was reasonably open on the facts. Perhaps it is not excluded. It may be that a court might assume such a role. But, in order to remove any confusion, the legislation must explicitly recognise the importance of the judicial function in maintaining the rule of law. If not the courts, who will act as a check on executive excess?

For those of you who plan to practice in the area of criminal or administrative law, I wish you well. These are certainly interesting times. As officers of the Court, you all shoulder a heavy responsibility to uphold and support the rule of law. That is because the quest to uphold and respect the principle of Human Rights for all is ever-present. Ensuring that the written principle is applied in practice is one of the most difficult aspects of human rights. I urge you to use your positions of privilege and education to ensure that our freedoms as citizens of a democratic community are properly protected, regardless of the legal field you choose.

Once more I congratulate you and your family and friends upon your admission today. You are admitted today as a Legal Practitioner in the Supreme Court of the Australian Capital Territory. No matter where you find your skills employed, you are

now part of a privileged community. So go forth and enjoy the rest of your day, a celebratory drink or two, and the road that being a Legal Practitioner has opened for you wherever it may lead.