Speech given by Chief Justice Higgins

Ceremonial Sitting on the occasion of the retirement of Justice Gray

Friday 29 July 2011

Welcome to everybody who is in attendance today and particularly may I welcome our guest of honour Justice Gray, his wife Laura and the extended Gray family, two generations thereof being present.

I welcome the judges who are present today. Particularly we are honoured by the presence of Chief Justice Robert French of the High Court of Australia, former judges of this Court, the Honourable Jeffrey Miles, the Honourable John Gallop and former Master of this Court Alan Hogan. It is a great pleasure to have them with us today along with the Magistrates, Members of the Legislative Assembly, Practitioners, staff members, and of course, ladies and gentlemen.

I acknowledge the apologies of those unable to attend this ceremonial sitting; their Honours, Justices of the High Court, otherwise than of course his Honour the Chief Justice, Chief Minister Katy Gallagher, the Federal Attorney General the Honourable Robert McClelland, the Commonwealth Solicitor General Stephen Gageler, Patrick Keane Chief Justice of the Federal Court, Deputy Chief Justice John Faulks and her Honour Justice Mary Finn of the Family Court, former judge of this court the Honourable Dr Ken Crispin who offers the inadequate excuse that he is sojourning in the south of France, and the further additional and recent acting judges of this court.

Before I begin, I wish to acknowledge the traditional owners of the land the Ngunnawal people before I mention his Honour, Justice Gray, who joined the

ranks of this court on 12 October 2000 from South Australia, and was later appointed President of the ACT Court of Appeal on 21 December 2007, following the retirement of Justice Ken Crispin. The only other South Australian import in this court, as resident judge, was the former Chief Justice Sir Richard Blackburn, whose portrait of course if over there. Interestingly, Sir Richard lectured Justice Gray at the University of Adelaide. I will say no more about it than that.

As Mr Purnell said on the occasion of Justice Gray's appointment, *"Sir Richard demonstrated that excellence in imports from South Australia is not only contained in bottles, restrained by corks".* I think everyone will agree that in his time on the ACT Supreme Court bench, Justice Gray has only further demonstrated the accuracy in this statement.

His Honour once said "*it is true that I have had a diverse background, but I adopt the philosophy that Seneca adopted – it is not really productive to look back or forward, rather it is useful to concentrate on the present".* While his Honour may be reluctant to dwell on the past, or focus too much on the future, I would like to take this opportunity to do just that. His impressive and diverse past cannot be ignored on such an occasion.

His Honour was admitted to practise in South Australia in 1964. In 1966 he joined the Office of the Crown Solicitor in South Australia and was appointed the Solicitor General of South Australia. During this time he was a frequent visitor to Canberra while he represented the state of South Australia before the High Court.

In 1982 his Honour took silk and was appointed a Senior Public Defender in 1986. That year he was also appointed Queens Counsel in New South Wales, a state that is arguably reluctant to recognise talent outside their state boundaries. Such appointment is demonstrative of his Honours talent as an advocate, recognisable across borders.

In 1989 his Honour returned to South Australia as the Chief Counsel for South Australian Legal Aid.

In 1991, he joined the National Crime Authority, fighting organised crime nationally and internationally. In this role, much of his Honour's work involved the use of the controversial coercive powers of the National Crime Authority to require witnesses to answer questions and produce documents. His activity in that respect was not reviewed by Justice Benson.

From 1995, until his appointment to this Court, his Honour practiced at the private Bar in the areas of criminal, administrative, industrial, commercial and constitutional law, a very wide portfolio.

His Honour's legal career has been distinguished by many meaningful contributions to the community, both at a state level and nationally. His Honour served in the Australian Army Legal Corps from 1978 to 1997, Dr Boss, rising to the rank of Colonel, as have you.

In South Australia he was the President of the South Australian Bar Association from 1998 to 2000, the Chair of the State Theatre Company of South Australia and South Australian Youth Arts Board. It is not recorded as to whether his Honour starred in any of their productions.

Nationally, he was the Vice President of the Australian Bar Association from 1999 to 2000 and the Vice President of the Arts/Law Centre of Australia from 1998 to 2000.

His Honour has maintained an active involvement in the arts community in Canberra and I am sure he will continue to do so upon his retirement and he may thereafter be persuaded to take an active role in some productions.

His Honour has made significant contribution to all areas of the law in the Territory. In particular, he has substantially contributed to the development of the ACT *Human Rights Act 2004*, while it in its early stages.

As president of the ACT Court of Appeal, his Honour presided over the case of *R v Fearnside* ACTCA 3 (24 February 2009). This case was the first in which detailed consideration of the *Human Rights Act 2004* was given by the Court.

Fearnside was an appointee of the Australian Federal Police who allegedly administered capsicum spray to a prisoner. There was evidence that the prisoner was naked at the time, as a result of being sprayed by another officer, and splashed herself with water from the toilet bowl in her cell in order to alleviate the pain. Fearnside felt that this evidence would be prejudicial if put before a jury and instead sought a trial by judge alone.

Section 68B (1) (c) of the *Supreme Court Act 1933* (ACT), provides that an accused person in criminal proceedings shall be tried by judge alone if an election is made before a trial date is allocated to the accused. A trial date was fixed at a directions hearing on 9 October 2007. While Fearnside had

previously decided to be tried by judge alone, no election was actually made before 9 October.

Fearnside made an application to the court seeking to vacate the trial date to revive his right to elect to be tried by judge alone. I, of course mistakenly, made such orders vacating the trial date and gave leave to Fearnside to elect to be tried by judge alone as I considered that the respondent's right to a fair trial in section 21 of the *Human Rights Act 2004* would be impinged if he was statutorily barred from making an election.

The Crown, however, sought orders that this election be declared ineffective. The question before the Court of Appeal was whether section 68B engaged a right to a fair trial.

The Court observed that the right to a fair trial in section 21 of the *Human Rights Act 2004* comprised of two elements:

1. The body hearing the charges must be competent, independent and impartial; and
2. The hearing must be fair.

The Court considered that a jury is a competent, independent and impartial body for the purpose of a criminal trial and that fairness is a question of objective fact. The Court concluded that the right to elect for trial by judge alone is not part of the right to a fair trial under section 21 of the *Human Rights Act 2004.*

The Court also found that section 30, the interpretive principle in the *Human Rights Act 2004,* requires laws to be interpreted compatibly with human rights,

therefore, did not need to be applied. This decision was reached after consideration of both sections 30 and 28 of the *Human Rights Act 2004.* Section 28 provides that human rights may be subject to reasonable limits. The Court found that time limits, as imposed by section 68B of the *Supreme Court Act 1933,* were reasonable limits for the purpose of section 28 of the *Human Rights Act 2004.*

In the case of *Moro & Ahadizad v Australian Capital Territory* [2009] ACTSC 118 (10 September 2009), his Honour again significantly applied the *Human Rights Act 2004*. He found that section 18 (7) of the *Human Rights Act 2004* (ACT) created a statutory right to compensation for unlawful arrest or detention.

In that case, the plaintiffs claimed false imprisonment against the ACT, arising out of breaches of the ACT sentencing legislation, and procedural fairness, by the ACT Sentence Administration Board. While the ACT admitted liability, the question that arose was whether section 18(7) of the *Human Rights Act 2004* created a new statutory right to compensation.

Section 18 (7) states that 'anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention'. His Honour stated that the express provision for compensation under that section did not require public law compensation when the existing remedy of false imprisonment at common law provided a sufficient remedy.

His Honour also made a significant contribution to the law of medical negligence in the case of *Radovanovic v Cutter* [2004] ACTSC 9 (19 March 2004). The matter was brought on behalf of Lainie Radavanovic who was

born with cerebral palsy in 1980. Dr Brian Cutter was the obstetrician who attended the plaintiff's mother, Cherie Radovanovic.

His Honour found that Dr Cutter had care of the plaintiff *in utero* and was negligent in failing to diagnose *vasa praevia* or *placenta praevia. Vasa praevia* is a condition when the umbilical vessels insert into the fetal membrane.

The mother had profuse bleeding, without pain, prior to being admitted to hospital to give birth. That was a sign of possible *praevia,* which the obstetrician was made aware of. Even if not aware, it would have been negligent for the obstetrician not to have enquired of the mother or midwife or consulted hospital notes containing such information. If the obstetrician had been aware of the bleed he would have ensured that the *praevia* condition was not present before rupturing the mother's membrane or would have taken extra care when rupturing the membrane.

Additionally, the obstetrician knew that the mother was a high risk patient due to past pregnancy experiences so his Honour found that Dr Cutter thus owed a higher duty of care, on top of his normal duty.

The failure to diagnose resulted in the rupture of the mother's membrane, which caused blood loss to the plaintiff, as a fetus, causing her to suffer a heart attack and subsequent cerebral palsy.

His Honour held that the obstetrician's duty of care to the plaintiff, and mother, extended to diagnosing the *praevia* condition, as the injury suffered was a class of injury reasonably foreseeable as a possible consequence of his

conduct. His Honour awarded total damages of $8 380 660, which was then a record.

More recently, on 25 March this year, his Honour handed the first murder conviction in the ACT since 1998 in the matter of *R v McDougall* [2011] ACTSC 51. He found Scott McDougall guilty of two counts of murder.

In May this year, a jury returned a guilty verdict in the trial of *R v Massey*, another murder trial which his Honour presided over.

As a result of these two matters, the last few weeks of his Honours time at the ACT Supreme Court has been far from slow. Instead, his Honour has finished his time at the Court by handing down murder sentences. Such a crescendo ending is perhaps indicative that his Honour is not ready to slow down once he leaves this court and enters into retirement.

On, and off, the bench, his Honour is fondly known as the 'smiley judge'. This name is attributed to the fact that you would be hard pressed to find him without a smile on his face, indeed he has now, whether in court, or around chambers. However, that may not necessarily translate to lenient sentences, do be warned.

Apart from his warm and friendly smile, his Honour always patiently and willingly helps others. His staff and colleagues speak highly of him and regard him as a great mentor. His Honour is well known for his sense of humour. While I would like to say that all of us judges are comedic geniuses, I have heard that his Honour's associates are often found entering the court trying their best to suppress laughter or cover up a chuckle, as a result of a wise

remark from his Honour behind court. This is to be contrasted of course with former Justice Gallop’s kind remarks to batsmen when he was a wicket keeper. Helpful advice he called it. His Honour has an ability to engage and share a joke with anyone he may come into contact with.

As for retirement I doubt his Honour will slow down and I am sure the timing of his newly purchased toy was not coincidental. It is a shiny grey Mercedes, obviously a grey one, and I am sure there is many a joke to be made about that. Personally, I would have preferred a red Mercedes because I hear they go faster, but I am sure Justice Gray would have had his own reasons for choosing that colour.

With his grandkids spread all over Australia, along with his great love of travel, interstate highway users should keep an eye out for a fast grey Mercedes, with classical music blaring from its speakers and driven by a smiley retiree of course.

On the other hand, with his love of cooking, we may see him on our television screens trying out for MasterChef, with his allegedly famous duck breast recipe.

I know I speak on behalf of everyone when I say that his Honour will be greatly missed both on and off the bench. His warmth, patience, willingness to help, and humour will be missed by all.

On a personal level I will miss the daily contact with a good friend, and sharing a laugh with a brother.

I thank Laura and the Gray family for their ongoing support to his Honour. Nobody can undertake this office, I have to say, without the support of an unflagging supporter, and Laura has been all that and more to him.

Please join me, in not saying goodbye or farewell, but best wishes for the future. I wish you both, Malcolm, you and Laura, all the best and may you enjoy all the good things retirement has to offer.