

**SUPREME COURT OF THE
AUSTRALIAN CAPITAL TERRITORY**

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**THE HONOURABLE CHIEF JUSTICE MURRELL
THE HONOURABLE JUSTICE PENFOLD**

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**CEREMONIAL SITTING FOR THE RETIREMENT OF
JUSTICE HILARY PENFOLD**

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CANBERRA

30 **9.33 AM, FRIDAY, 23 MARCH 2018**

MURRELL CJ: Penfold J, Chief Magistrate and other Magistrates of our sister court, judicial officers from other courts, Attorney-General, Presidents, other distinguished guests, family and friends of Penfold J and other friends of the court, the Court acknowledges the traditional custodians of this land and we pay our respects to their elders past and present.

Thank you, Aunty Tina, and your family, for performing the traditional Ngunnawal sweep dance. I understand that this dance is designed to bring closure and to cleanse the spirit for new journeys. We hope that it helps Penfold J as she begins her new journey.

I first met Penfold J at the ANU legal workshop in Canberra. The workshop was particularly memorable for me because it was there that I learned to play the card game 500. Unlike me, Penfold J was already a skilful 500 player. She had of course had the advantage of studying law at ANU.

I soon discovered that her Honour was revered by other ANU law graduates as a great intellect. She also had an aura of glamour because her husband Mark was a local radio personality, albeit on commercial radio. Only relatively recently, I was disappointed to learn that Mark did not pursue that career but went into a far more mundane occupation as a very successful public sector lawyer.

2 August 1977 was a big day for Penfold J and for me. We were both admitted as legal practitioners in this court room. I did manage to sign the roll of practitioners five places ahead of Penfold J, possibly because the admissions were recorded alphabetically.

A few things have changed since August 1977, but I observe that this court building hasn't changed yet, and of course Penfold J and I have barely aged at all.

Before she was elevated to the bench, her Honour had a formidable legal career with the Commonwealth.

She began her legal career in the Commonwealth Office of Parliamentary Counsel. In 1993, she was appointed to the position of First Parliamentary Counsel. She retained that position until 2004. She was the first Parliamentary Counsel to be appointed for a second term.

She became president of the Commonwealth Association of Legislative Counsel and was a widely respected speaker and adviser on drafting matters.

In 2000, she received the Public Service Medal in recognition of her work in

legislative drafting.

In 2001, she was appointed Queen's Counsel for the Commonwealth.

5 Her Honour's work as First Parliamentary Counsel left an enduring legacy. Her Honour championed plain language while maintaining standards of excellence. At the Office of Parliamentary Counsel, her Honour drafted a wide range of legislation, including in the areas of taxation, defamation, industrial relations and human rights. She also drafted the constitutional amendments
10 that were proposed in 1999 to create an Australian republic.

From 2004 to 2008, her Honour performed another demanding role as Secretary of the Department of Parliamentary Services.

15 Not only is this courtroom the place where her Honour's legal career commenced it is also the place where a decade ago her Honour was sworn in as a judge of this court.

20 When her Honour was appointed a judge, she entered a challenging and foreign environment.

I don't know whether before accepting the appointment her Honour reflected on comments that she had made soon after being appointed as First Parliamentary Counsel. From the safe confines of the Office of Parliamentary
25 Counsel, her Honour boldly said:

The difficulties of extracting clear reasons from a decision from several separate judgments written in several different styles by judges whose positions as members of the majority or the minority might shift in the course of a single judgment from issue to issue, and who don't even address the same issues in the same order or even under the same names, affect most lawyers, not only legislative drafters.

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*On a personal level, drafters may find these difficulties more frustrating than other lawyers do. Presumably, it would not be acceptable for drafting offices to produce two or three or even seven different versions of each bill, drafted by different drafters, which could all be enacted by parliament and which taken together would form the law on the particular subject. Should it remain
40 acceptable for judges to make law in this fashion?*

In defence of judges, I note that these days, at least on this Court of Appeal, we try to speak with one voice as "The Court", and sometimes the troublesome
45 separate voice is that of her Honour herself.

With modesty more characteristic of her Honour, at her swearing in her Honour said:

5 *I have appeared twice in court: once here to be admitted; and once in the High Court to announce my appointment as a Queen's Counsel. I don't believe I had to say anything on either occasion, so I have a lot to learn.*

10 Her Honour did indeed have much to learn. Such an admission would never have been made by a former practicing barrister. Upon appointment, such persons generally speak only of glittering triumphs undiminished by any lack of experience or capacity, and they certainly never concede that they have anything to learn.

15 Despite her lack of significant prior acquaintance with this courthouse, her Honour quickly settled in, making up for lost opportunity by sitting long hours in court and enjoying herself so much that she is frequently here until late at night.

20 Her Honour's achievements both before and since appointment are many. First and most obviously, she is a woman who has risen to the top of what was a man's legal world. For some time after she commenced working at the Office of Parliamentary Counsel in 1977, she was the first and only female drafter in the office. She was the first woman to be appointed as first parliamentary counsel. She was the first woman to be appointed Queen's Counsel for the Commonwealth. She was the first woman to be appointed as a judge of this court.

30 At the Office of Parliamentary Counsel, her Honour displayed a cartoon in her office. It depicted a meeting of six men and a woman. The chairman of the meeting is saying, "That is an excellent suggestion, Miss Triggs. Perhaps one of the men would like to make it." Her Honour graduated from being Miss Triggs to having a recognised seat at the table and then to chairing the meeting itself. But her Honour did not forget the difficulties that she had faced in her early years as a woman in a predominantly male legal profession.

35 In her capacity as patron of the ACT Women Lawyers Association, her Honour has worked tirelessly to promote and encourage women in the profession, and what a difference a decade makes. Today three of the six members of our court are women.

40 Her Honour has always prioritised doing a job well and abhorred sudden and ill-considered changes of tack.

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Another of the cartoons that she displayed in her room at the Office of Parliamentary Counsel was a picture of an axe in a glass case with a sign that read, "In case of tax reform, break glass and cut off own head."

5 On this court, her Honour is renowned for her intellectual rigor or, to put it another way, for her stubborn attention to detail.

Her Honour's voice, as expressed in her judgments, is a thoughtful and considered voice unafraid to engage with complex legal arguments. Numerous
10 decisions of the court of appeal have been enriched by her Honour's persistence in working over an issue until its complexities have been resolved. Where necessary, her Honour has not hesitated to call for better legislative drafting.

At times her Honour has spoken quite plainly, expressing her frustration with
15 the changeability of legislators, the incompetence of other legislative drafters and the business-like approach of her brother and sister judges. But her Honour has always displayed remarkable patience with disadvantaged litigants, including self-represented litigants. In an admission speech, her Honour said:

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*Members of the class sometimes entitled as querulous litigants or morbid complainants, many of whom are self-represented, make considerable demands on both the court system and other parties. It is not clear that our current systems and procedures are well
25 adapted to ensure that justice is done for those litigants and those on the other side of their matters in the most efficient and effective way.*

Her Honour went to great lengths to ensure that justice was done for each
30 self-represented litigant who appeared before her. A former associate recalls a self-represented indigenous litigant who had appealed from a decision of the Magistrates Court. One of the litigant's complaints was the failure of the Magistrates Court to recognise him properly for the man that he was.

35 As part of his submissions, he presented a large and disorganised folder of torn and coffee-stained pictures, letters and articles about the contribution that he and his family had made to the indigenous community and the broader Australian community. Her Honour read the whole lot, which occupied her well into the night. In her judgment, she acknowledged that the appellant and
40 his forebears had "made a significant contribution over many years to the lives of Aboriginal people in the ACT and New South Wales and perhaps more broadly still." While the outcome of the case may not have been to the appellant's liking, undoubtedly he would have appreciated her Honour's recognition of his life story.

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All aspects of her Honour's legal career have been permeated by a commitment to public service and unwavering integrity. In a speech that she gave to ANU graduates in 2006, her Honour said:

5 *If you pass through the world without changing anything, you won't*
 have done much harm, except for your personal contribution to
 greenhouse gas emissions, but you won't have done any particular
 good either. I believe that your university education imposes two
10 *moral obligations: one is to make a difference in the world; the*
 second moral obligation, therefore, is to ensure that when you do
 make a difference, it is a difference for the good.

As a woman in a man's legal world, as a lawyer of uncompromising intellectual
ability, as a compassionate judge with an enduring commitment to public
15 service, her Honour has made a difference and it has been a difference for the
 good. For the good of women lawyers, for the good of Australian legislative
 drafters, for the good of ACT jurisprudence and, most importantly, for the
 good of those litigants whose cases her Honour has heard patiently and decided
 wisely. We will all miss Penfold J. Attorney-General?

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ATTORNEY-GENERAL: May it please the court. Your Honours, I am both
pleased and slightly saddened to be here today at this ceremonial sitting to
farewell Justice Hilary Penfold. As I begin, I also wish to acknowledge the
25 traditional custodians of this land, acknowledging the elders past, present and
 emerging and committing myself to ongoing acts of reconciliation with our
 nation's first peoples as well.

Your Honour, Justice Penfold, today marks the end of this chapter of your
30 substantial contribution to law and justice in the ACT, and I am both pleased
 and delighted to be able to extend my thanks to you in the presence of your
 family, the justices and the associate justice of the Supreme Court, magistrates,
 judges of the Federal Circuit and Family Court and many leaders in the ACT
 legal profession.

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It is clear from today's attendance that you have been a constant and a valued
part of the ACT legal community, as well as a trusted friend, a respected
colleague for many of those who are here today. Your Honour's career has
40 been one of broken glass ceilings, and maybe that is one of the reasons why
 you have shone. Your Honour was the first woman to hold the positions of the
 Commonwealth First Parliamentary Counsel, Commonwealth Queen's Counsel
 and resident judge of the Supreme Court of the ACT.

Thankfully, it is no longer unusual to see senior drafters, lawyers and judicial
45 officers who are female, and I'm sure that you will be pleased that an even

gender split on the permanent bench of the Supreme Court will be maintained with the appointment of your replacement, Ms Chrissa Loukas-Karlsson SC.

5 Your Honour joined the Commonwealth Office of Parliamentary Counsel, as has been noted, in 1977, and you worked there for more than 20 years drafting legislation on such matters as taxation, corporations law, industrial relations and human rights.

10 You became the first woman to progress to each senior level of that organisation and worked as First Parliamentary Counsel for 10 years. Your Honour demonstrated an admirable commitment to enabling your employees to achieve a balance between work and home life, and it was under your initiative that family-friendly policies such as part-time work options commenced.

15 In 2000, your Honour's outstanding public service as First Parliamentary Counsel was acknowledged through the award of the Public Service Medal. In 2001, you received the Centenary Medal and you were appointed as Commonwealth Queen's Counsel and, as has been noted, you were the first
20 woman to be granted that title.

In 2004, your Honour was appointed the Secretary of the newly created Department of Parliamentary Services, and you demonstrated your capabilities in administration by managing Parliament House, including its security, its art collection, its library and its Hansard services.

25 You continued to demonstrate a commitment to assisting employees to achieve a balance between work and home life by overseeing the introduction of childcare facilities in Parliament House.

30 In 2007, your Honour, you were appointed as a judge of the Supreme Court of the ACT, and following that appointment, your Honour has used your intellect, your legal knowledge and your wine experience to quickly master judicial processes with advice from your Honour's colleagues, especially President Gray.

35 Your Honour has acted as Chief Justice of this Court, which reflects on the esteem with which you are held. You have also represented the Court on the Governing Council of the Judicial Conference of Australia, as the ACT regional convenor for the National Judicial College of Australia and as a
40 member of the Federal Law Review Advisory Board.

Your Honour has been known for the rigorous standards that you apply in court, as well as the thoughtful judgments you deliver. Your Honour has repeatedly demonstrated exemplary intellectual rigor in your analysis of
45 complex litigation, particularly around the application of the *Human Rights Act*

2004. Your judgments have set out a clear process for interpreting and assessing the human rights implication of Territory legislation aiding in the integration of human rights from the statute book into court jurisprudence and shaping the development of policy across the ACT government.

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The court has benefited greatly from your Honour's drafting experience, and I understand that your Honour has used and advocated for the use of the Oxford comma for years despite heavy resistance that I understand came from Justice Refshauge. And I further understand that this led to intense debates over the appropriate use of commas in joint judgments.

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I understand that when, in a recent US Court of Appeals for the First Circuit court case, a missing Oxford comma led the court to award the applicant an additional \$6.4 million in overtime payments. I understand that your Honour quickly disseminated the story with relish. Might I add on a personal note that as having been one who has been inclined towards the Refshauge school of commas, I must admit, your Honour, that I am being persuaded to your wisdom.

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The Court has also benefited from your Honour's experience in administration. Of particular note is your Honour's contribution to a review of the court's case management system. The court management has now been further improved with the progressive rollout of the integrated case management system. The system that has been developed by your Honour did improve indeed the processes of the court during its operation.

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Your Honour's style has been generally direct and unassuming. I am reliably informed that on one occasion as duty judge, you found yourself wearing jeans on the bench. I also understand that fortunately it was in one of the larger court rooms where the height of the bench covered any alleged informality from the members of the profession.

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Your Honour has been known to include some quite contemporary references in the reasons for your decisions. In the recent case of *R v Woutersz* in 2017, you referred to an episode of *The Simpsons* to highlight a widely-held misconception that the premises of a consular post are part of the territory of the sending state. Your Honour's suggestions in that same case led to the ACT government developing reforms of the *Evidence (Miscellaneous Provisions) Act 1991* to clarify the ability of courts to receive evidence by audio or visual link from locations outside Australia. Those reforms have passed the Legislative Assembly earlier this week.

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For your Honour's ongoing contributions to law form in the ACT, I am most thankful.

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At the ceremonial sitting to mark your Honour's appointment, you commented that, "There are still many career paths that do not offer women the same opportunity, and some of those career paths are in law." As patron of the Women Lawyers Association ACT for many years, your Honour has
5 generously offered your stories, guidance and encouragement to help female lawyers overcome the challenges that they face in pursuing a career in law. As patron, one of your duties was to assist in selecting the winners of the Inaugural ACT Women's Lawyers Awards. During the painstaking process of selecting the winners, I am advised that your Honour turned and explained,
10 "Can't they all win? I think they all deserve to win. If they can't all win, tell them all to apply again next year."

This displays the unfailing and contagious way in which your Honour has inspired the next generation of female lawyers.
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Your Honour, without question, you are one of the most remarkable and pioneering lawyers in the history of the ACT legal profession. You have made an enormous contribution to the work of this court and your legacy will be significant. Today I join all present in this courtroom in pausing to recognise a
20 distinguished career of service to justice, to the legal profession, and to the broader community.

While our farewell to you as a judge of the Supreme Court marks the end of your tenure as a member of the ACT judiciary, I am certain it will not mark the
25 end of your contribution to the ACT community.

On behalf of the ACT government, I wish you all the best in your retirement.

May it please the court.
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MURRELL CJ: Thank you, Attorney-General. Mr Archer, President of the Bar Association.

MR ARCHER: May it please the court, your Honours, Magistrates past and
35 present, family members, distinguished guests, ladies and gentlemen. I too am honoured to be on the ancestral lands of the Ngunnawal people. I acknowledge the first Australians, the traditional custodians of the continent whose cultures are amongst the oldest living cultures in human history. I pay respect to the elders of the community and extend my recognition to their descendants who
40 are present.

Your Honour, the Attorney-General and the Chief Justice have spoken about your career in the law, and I won't repeat the detail of what has been said other than to observe that it reads as if you were an over-compensating
45 New Zealander.

Interestingly and fittingly, your Honour's life story forms part of the online Australian Research Council-funded oral history project called *Trailblazing Women and the Law*, and your Honour even has an oral history entered into the National Library. I didn't get a chance to listen to it for the purpose and preparation of this speech.

I remember when your Honour was appointed that there was some controversy that surrounded that appointment, and I'll come back to that controversy in a moment, but I remember not knowing a lot about you. So I went to the Internet, as all good researchers do, to find out more about you, and there were lots of references there to your time as First Parliamentary Counsel and as Secretary of the Department of Parliamentary Services.

For the purposes of preparing this speech, I again went to the Internet and re-read some of those stories. Now, occasions like these are an opportunity for reflection, so I'll share one of the stories that I read. It goes back to 2007 and our Treasurer was at that time Mr Peter Costello and, as seems to be habitual these days, he was a runner, and his runs often took him to the top of the Parliament House building. To get there you had to jump over a low security wall that was designed to stop vehicles from going up over the roof. I'm told by other people that he would run up there and Balboa-like raise his hands and say things like, "I could have been PM."

I don't know if that's true or not, but let's move onto a Senate Estimates hearing where your Honour was appearing in your role as head of the Parliamentary Services Department and you were being asked questions, and I think they included one from John Faulkner, who I'm sure was a good friend of yours.

Now, never missing an opportunity to put a man's machismo in its proper place, you told the Committee that the Treasurer was breaking the law and that no special arrangements had, or would, be put in place to accommodate the Treasurer's behaviour. You told the Committee that if caught, "He will be dealt with in the way other fence jumpers are dealt with; politely, and sent back down the hill." I laughed when I read that.

I said a moment ago that your appointment was attended with some controversy, and I become sheepish now as the head of the Bar. Heaven forbid a woman and not a practicing lawyer being appointed to the court, and times do not change, the President of the Bar was heard to decry the process of judicial appointments. A welcoming dinner was held at Ottoman, you were one of the guests of honour, and Justice Refshauge I think was another, and of course you had an opportunity to speak.

You didn't hold back and told those assembled as representative of the

profession in no uncertain terms that it was time for them - I don't know if you used the expression, but I'll use it here - to "suck it up" and to get used to the idea of a woman judge, and even a woman judge who hadn't practiced at the Bar. It was stirring stuff and absolutely characteristic of your Honour, and defines the way that you were going to approach your time on the bench.

You were not to be messed with, and nor were you going to be bullied by anyone. Your Honour, you have always been a straight shooter and counsel has never been left to guess what has been on your Honour's mind.

Your Honour will leave behind a considerable body of jurisprudence which will be influential beyond this jurisdiction.

On the Odgers-meter, you rank as a 20-footnote judge, and several of your judgments are extracted in the texts of his most recent volume. Tellingly, I think, it's your 2009 judgment of *Lee* that attracts considerable attention. Passages from it are extracted twice in Odgers' text. It's interesting because I think it covers an area of particular concern to your Honour, the interface between the citizen and the State, and that particular concern is something that has exercised your mind during your time on the bench.

Your judgments speak of your considerable intellect and the curiosity and restlessness of that intellect, often returning to first principles in resolving complexities of the legal issues before you. As the Chief Justice and the Attorney-General have observed, perhaps it's the influence of legislative drafting that has been reflected in your legal problem solving, analysing a legal problem from all points of view to ensure the end product works.

Now, there are many judgments, can I pick out one of them? It's the case which is entitled, wordily, *In the matter of an application for bail by Islam*, it's a 2010 decision. Now, I don't want to be unfair. It's not just a 403-paragraph, 88-page decision refusing Mr Islam bail. There's a bit of law associated with it that people might want to recall.

Section 9C of the *Bail Act* imports a presumption that bail will be granted only in special or exceptional circumstances. Mr Islam had at that stage been accused of attempted murder, and what was put forward as the basis for special and exceptional circumstances was the delay that was going to be encountered in bringing him to trial, which was going to be somewhat over 23 months.

Now, that aspect of the bail application got pretty short shrift by your Honour and he was refused bail on the basis there was no exceptional circumstance, but his Honour - well, now his Honour, Justice Gill - was keen to see how far your Honour was prepared to go in relation to the *Human Rights Act*, and sought a declaration under section 32 of the *Human Rights Act* that 9C of the *Bail Act* was incompatible with the *Human Rights Act*.

Now, it was a complex question involving law both in Australia and overseas and, as I've noted, the judgment was comprehensive and, typically of your Honour, highly organised. In the first part of the judgement, the effect of your Honour's findings were summarised, but in a typical Penfoldian way, the basis on which those findings were made were cross-referenced against paragraph numbers.

I often reflected upon the life of your associates because the publication of your judgments must have always been a challenging thing.

Your Honour found that section 9C was incompatible with the *Human Rights Act*. Now, I see the Attorney-General go to his computer which is on the table there to see if 9C has been changed, and it hasn't, but that speaks, I think, not of the power of your Honour's reasoning, but the relative toothlessness of the declaration of incompatibility process.

Your Honour can take pride in the fairness of the way you conducted your court and in the balance of your judgments. Parties were always given an opportunity to be heard. In the criminal sphere, your Honour has dealt with the vulnerable with considerable sympathy and concern. Your charges to juries were always well crafted. I can say that I appreciated your late evening emails seeking counsel's input to that process (I think there's a typographical error there). You were compassionate, except with rude or condescending counsel.

Your sentencing was balanced and your assessment of human personality was realistic, and despite the grind of 10 years on the bench you never abandoned your optimism. You did and you continue to see the possibilities of redemption.

Your Honour, can I also acknowledge, as other speakers have done, the debt that the profession owes you in relation to the work you've done over the years to encourage and provide leadership to women lawyers in the ACT? As has been noted, you are the patron of the Women Lawyers Association in the ACT and have done much to foster the cause of younger female practitioners. You have done so with great humility.

I was present at the Inaugural ACT Women Lawyers Awards in 2016 and, as noted, you sat on the panel to determine the winners of those awards, one of whom is at the bar table as I speak. You spoke that night, along with Fiona McLeod, who was then president of the LCA, and the political commentator, Annabel Crabb. It was a great night and it was obvious to me, as to everybody, the high regard in which you were held.

Many young and indeed older practitioners will be forever in your debt.

I hope your involvement with the profession continues after your work here is done. I should add that I think your idea of the raspberries, which I understand to be the legal award equivalent of Rotten Tomatoes, is an idea worth pursuing.

5

Can I end by saying, and with great respect, that your Honour is a pretty decent human being? Your quirky and mischievous humour has been enjoyed by everyone both in the courtroom and in the social setting. Your family, and here I acknowledge your husband, Mark, to whom you've been married for 42 years, and your children Jancis and your sons Joshua and Thomas, and your grandchild, is a living testament to your boundless capacity as a mother and a partner.

Your commitment to your family has been unfailing and the manner that you and Mark share the responsibilities for their care is typical of your collective commitment to do things differently but also equally.

I have checked with your associates, or at least one of them, they speak very warmly of you. Caring, nurturing, "normal" is a word that's used, generous and other words that were used to describe you.

I'm sure you will soon have time to travel. We have, when meeting socially, spoken about your place at the coast, and I'm sure that will provide you with a place of beauty and peace from where you can plot your next adventure. I would urge you to stay involved with the local profession because we need you.

The ACT Bar thanks you for your contributions as a judge of this honourable Court and we wish you well in the next chapter of your life.

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If the court pleases.

MURRELL CJ: Thank you, Mr Archer. Ms Avery, President of the Law Society.

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MS AVERY: May it please the court. I would also like to acknowledge the Ngunnawal people on whose land we meet today, and to pay my respects to their elders past and present, and also to all Aboriginal and Torres Strait Islander people who are here today. I am here today on behalf of the ACT legal profession to wish Penfold J all the best for her retirement.

40

Now, as the third speaker today I'm going to be brief, and not least because all of the interesting parts of Penfold J's illustrious career have already been described by my predecessors. I did think fleetingly about telling a couple of jokes, but as her Honour herself has said in a speech to the Commonwealth

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Association of Legislative Counsel:

5 *Thanks to the Internet, there are no new jokes. Jokes seem to hit
the Internet within seconds of their birth and everyone has already
heard everything.*

10 So what can I possibly say about her Honour that has not already been said?
She will be forever immortalised on Wikipedia on the list of the first women
appointed to Australian judicial positions, and I guess that's something that we
can give thanks to the Internet for. As the Chief Justice and the
Attorney-General have already said, her Honour has shone in a traditionally
male-dominated profession, but her Honour's trailblazing has extended beyond
a simple string of firsts.

15 As other speakers have noted, her Honour has raised three children and been,
from all accounts, a wonderful mother, wife and grandmother, but I want to
note that she has done this without sacrificing her work at the Office of
Parliamentary Counsel or indeed anywhere else, and her Honour has led by
example when it comes to balancing work and home life.

20 When she initiated those family-friendly policies for male and female
employees, it was because, as this Court would recognise, these are not
women's issues, they are equity issues, and we are all the poorer when the rich
intellect of women, and indeed all historically oppressed and marginalised
25 groups, are lost from the workforce.

30 Justice Penfold has freely shared her knowledge and expertise with others and,
in particular, it has been said that she has done so with the Women Lawyers
Association of the ACT and also the ACT Law Society's own Young Lawyers
Committee. The ACT legal profession has benefited greatly from her Honour's
integrity and courage on the bench and her encouragement, in particular, of
precision and high professional standards.

35 Your Honour, you have our profound respect. The legal practitioners of the
ACT thank you for your collegiality, your tireless work and courtesy on the
bench over the last 10 years, and we warmly wish you all the best for any role
you pursue in the future.

40 May it please the court.

MURRELL CJ: Thank you, Ms Avery. Justice Penfold.

45 PENFOLD J: Thank you, Chief Justice. First, I would like to acknowledge
the traditional custodians of the land on which we meet and pay my respects to
their elders, past, present and emerging, and to all Aboriginal and Torres Strait

Islander people present here today. A special thanks, of course, to Auntie Tina Brown; it's a shame she's not still here.

5 Thank you, Chief Justice, Mr Attorney, Mr President (Ken), and Ms President (Sarah). I generally prefer to heckle speeches rather than to respond sensibly, and I've made a real effort to control myself today. But I have also decided to restrain myself from reverting to my third speaker role in school debates and going through a list of responses to all the things that have been said, some of them because I have no recollection at all of things that have been referred to.

10 The only thing I will say, and I'm not going to let this pass, I certainly didn't use the expression "suck it up", and the reason I can assure you of that is because I had never heard of that expression until my husband started working in the Department of Defence, where it is apparently a regular part of
15 everyone's daily discourse. I'll leave some of the other responses for another day.

I have a lot to be thankful for and there are a lot of people who need to be thanked today. Instead of just listing them as it were reading out of the phone
20 book, I'll try to mention them all in the context of some other comments about my experiences in the court. We have only got 45 minutes before morning tea is packed away and court sitting is resumed, so I won't go any further back, despite all the interesting history that you've heard, and indeed that I've heard, this morning.

25 I won't go back any further than when I was appointed to the court in early 2008. Ken has already mentioned the Bar's rather odd reaction to my appointment. It was odd partly because it seemed to involve a fight between two bits of the Bar Association but with me in the middle, but, anyway, I don't
30 need to go any further into that.

What that did mean is that I had a slightly difficult time when I started here, and I was very grateful for what happened on my first day in court. I was given, fortunately, an unopposed bail application on that occasion, so I didn't
35 take 400 paragraphs to deal with it, and then another very odd matter, an alleged contractual dispute which would never have got to court if the parties hadn't have had more money than sense.

40 But I walked into the courtroom shaking like a leaf and I discovered that John Purnell had pulled rank over the bail application - he was in the contracts dispute - and with the agreement of Rob Clynes, who was appearing for the other party, he made a very kind speech welcoming me to the court and promising assistance from the profession.

45 I won't read out what he said, because we have heard enough of that stuff

5 already this morning, but I have always remembered, and been grateful for, that speech. It's fair to say, I think, that on occasions since then Purnell might not have felt that his generosity was properly rewarded, but I guess that's what it means to take the judicial oath to do justice without fear or favour, affection or ill will.

10 There were other people who were particularly helpful in those early days, including, especially, Malcolm Gray, but I'll have more to say about that on another occasion too. Another group of people I should thank, although without naming names mostly, are the various judges from other courts who have at the beginning and since passed on bits of useful advice.

15 One of the most useful bits of advice, of course, was the reminder that as the judge you have the right, and sometimes the duty, to ask the lawyers before you to explain the basis on which they are asking you to do what they want you to do. That advice was particularly useful, even when the lawyers themselves had no idea on what basis they wanted it, but especially when they did manage to identify their grounds, because almost always it was legislation, and once we got the legislation open, I was on pretty firm ground.

20 Another very useful piece of advice came from Justice John Byrne, formerly of the Queensland Supreme Court, not to be confused with Justice John Burns currently of the ACT Supreme Court. But the Queensland Justice John Byrne told me that he found it comforting to remember that Courts of Appeal had as much right to be wrong as he did. I have found that comforting sometimes too.

30 Finally, while I'm thanking judges outside this Court, I must mention Mary Finn, who has been not only a great support and mentor over the last 10 years, but who lent me her wig to wear at the swearing-in 10 years ago, a wig that in fact had its own connection with the Queensland Supreme Court, having once belonged to Mary's stepfather-in-law, Justice Sheahan, of that court.

Not long now, Ollie.

35 The other people to thank in this context are the members of the legal profession who have appeared before me. I have enjoyed dealing with all of you, mostly because of your constructive contributions to the work of the court and to my decision making, and in a few cases because of your contribution to my conversations with colleagues or at the dinner table, which often began with, "Can you believe what so and so said in court today?"

45 Especially, I thank those who in the early days helped me over a tricky spot by saying something like, "Perhaps your Honour would like to make the usual orders for access to the documents". Whether they had realised the significance of my expectant silence, being that I didn't have a clue what to do

next, or whether it was simply that, being barristers, they abhorred silence in all its forms, I don't know.

5 One of the joys and terrors of the ACT Supreme Court is that there is an enormous variety in our work, and even in the last few months I have found myself faced with things that I have never come across before, but over time there were fortunately an increasing number of issues in which I knew as much as the practitioners involved, and sometimes more.

10 Which brings me to one of the more serious things I want to say today about this Court, especially in the context of recent comments from the professional associations, which is that the ACT courts need to accept a significant role in training up the local profession to provide the next generation of ACT judges. By that I don't mean presenting the odd professional development seminar, and
15 I certainly don't mean bullying or humiliating the local profession, especially the younger members, but I do mean having high expectations, applying an appropriate degree of intellectual rigor (perhaps not as much as we have heard about today but an appropriate degree), and pushing the members of the local profession especially to think about what they're doing and what they're saying,
20 so that at the end of every day in court, they have observed the proper and thoughtful practice of the law and have learned a bit more than they knew when they walked in.

25 Two other things at this point that I should say in relation to the Court and the community that aren't perhaps said enough, because it's always more fun in these contexts to criticise.

30 First, we in the ACT are very lucky with our jury system, partly perhaps because we're lucky with our jury pool, but I think we should be very careful about any suggestion of narrowing its scope. Sure, it's a bit cumbersome, but so is democracy and any other kind of community involvement, and the jury system is a vital part of community involvement in the legal system. I could talk until lunch time about the beauty of the jury system, but I won't, just for today.

35 Secondly, we in the ACT are lucky with our media. They're not perfect, a bit like the rest of us, really, but in my experience the individuals whose pitch is the ACT justice system have been and are routinely competent, thoughtful and honourable, and their editors and owners have at least allowed them to operate
40 that way. You only have to look at a tabloid newspaper or the equivalent Internet site from another jurisdiction to realise just how lucky we are.

45 I turn now to what might be some of the highlights of my career or perhaps the things that I'm proud of as I look back, and it may not necessarily be the same things.

I'm proud to have been the first woman appointed as a resident judge of this Court, although obviously there were female additional judges from the Federal Court before that. I believe that I was far from the first woman ever
5 approached about an appointment to this Court, but I was just the first one brave enough, or stupid enough, to accept. And clearly I was, as Mr Eastman once shouted at me as he was leaving my court, "a gender appointment." But I'm also proud of the fact that it seems to have worked. There may be people who thought, "Never again," but obviously they weren't the people making
10 subsequent judicial appointments, and equally obviously they weren't the many talented women, including but not only those actually appointed, who have since then been not just willing but in some cases keen to accept appointments to this Court. So that, in the 10 years since I was appointed, the Supreme Court has gone from a court with no female members to a court with equal numbers
15 of men and women.

Another thing I'm proud of, especially given my theoretical engagement with the practice of law before this, is that when I got my High Court moment (that's the one where the High Court upholds your first instance decision and reverses
20 the Court of Appeal's), it was a decision to the effect that when a child witness gives unsworn evidence there is no requirement to direct the jury so as to suggest that the child's evidence may be less reliable than if it had been sworn evidence. It's a decision which is in a small compass, but it may be quite important for child witnesses in general and child complainants in particular.
25

As for the cases in which the High Court hasn't like my conclusions, well, I rely on the Queensland Justice Byrne's advice about other courts having as much right to be wrong.

30 I am also proud, although in a more modest sort of way, if I can put it that way, of having made what was certainly until recently, and may still be, the only surviving declaration of incompatibility under Australian human rights legislation, which Ken has already discussed.

35 The modesty is appropriate partly because there are only two relevant pieces of human rights legislation in Australia anyway, so not a lot of opportunities for making these declarations, and partly because, as I understand it, the then High Court cast some doubt on the status of validity of such declarations anyway when they made the decision that knocked out the first one, the
40 Victorian one.

I also take some comfort (pride I think in this context would be quite dangerous), in the fact that of the several hundred people I have sentenced (I have quite a good memory for their names, having worked through the
45 sentencing remarks), some of them don't seem to have turned up in the court

lists again.

5 Finally, in this list, I'm very proud of what terrific progress the ACT Women
Lawyers Association has made in the several years since I became its patron,
and again Ken has already referred to that as has Sarah. I personally don't take
credit for that process, but I have been thrilled to see how a succession of
energetic, consultative and all-around brilliant women from the local
profession headed by Juliet Behrens, Prue Bindon and now Danielle Mildren
10 have turned the Association into a very active association. It now has 575
members, which is apparently in an Australian context both a high number of
members and a very high proportion of the total number of women lawyers
practicing in the jurisdiction.

15 Next, it's appropriate, since I'm not retiring in a situation in which I can
publicly bemoan the effect of statutory senility, to explain briefly why I am
retiring some years before at least the statutory age of senility, with my fingers
crossed about the actual age at which it might kick in. There are essentially
two main reasons why I'm giving up on the judicial work which I do, and have,
enjoyed so much.

20 First, there are too many other things I want to do in what's left of my life.
None of us is getting any younger, and some of us are not getting any younger
faster than others. There are too many things that can't be fitted in around the
edges of trying, not successfully enough, to keep up with doing that judicial
25 work to what I regard as an appropriate standard. Some of you might have
noticed I've been a bit distracted by Ollie already, and I expect to be more
distracted by him in due course.

30 And, secondly, retiring is the way to turn off the fire-hose gush of new listings,
and give myself a chance to finish all the outstanding judgments for which
people are still waiting.

Moving on to the other vital thank yous.

35 I mention first my immediate judicial colleagues, local and visiting, for their
advice, good humour and shared understanding of the problems of dealing with
certain regular litigants. I especially thank the Hon Richard Refshauge, who
knew a lot more about criminal law than I did when we started, and who
learned a bit more about it through me. Not that I taught him anything in
40 particular, but I knew that if I asked him a question to which he didn't know
the answer, he could be relied on to go and research it. It was just another
excuse to go to the library.

45 I have also enjoyed my role, that again has been mentioned, as the ACT or this
Court's representative on the Judicial Conference of Australia, which is

actually an association which draws its members from all judicial officers in the country, and on the Supreme and Federal Court Judges Conference Committee, which involves all states and territories and the Federal Court and the equivalent New Zealand court. Coming from a relatively small
5 jurisdiction, I have found it educative and personally rewarding to deal with judicial officers from further afield.

Then there are my chambers staff. Trish Jones, the personal assistant I inherited from Crispin J, who taught me almost as much as my judicial
10 colleagues in the early days and, since she deserted me years ago, Kerri-Anne Duval-Stewart, who has provided not just terrific support in the court but also terrific sweet treats on many occasions. And then of course my 10 wonderful associates, most of whom are here today, each of whom has brought their own particular strengths to the job and all of whom, in contrast at times in the past
15 to my real children, all of my associates have felt some obligation to remain basically polite and agreeable. And I'm very touched to see also a couple of former associates from other chambers who have made an effort to be here today.

20 I prepared that bit about my associates remaining polite and agreeable throughout our time together earlier in the week, and then they all turned up this morning in my room with a book that they have put together which is a collection of extracts from some of my judgments, and I'm not sure that they have been entirely respectful, but I will read it with great amusement and
25 enjoyment.

Next I must thank the Registrar, Annie Glover, and her several offsiders over the years, including the very special Deputy Registrar whom one of my ongoing litigants refers to as Honourable Kennealy, for very good reason, I
30 might say; and the many registry staff who have provided technical support, correction of bench sheets on occasion, and also occasionally some good gossip over the years. And where would we be without the sheriffs?

I can't name all of you, and I won't name a couple of them, not necessarily
35 current ones, who have had to be gently woken up from time to time, but I have appreciated especially Rose Oliver's background insights (Rose is not here today, she got a better offer from her daughter), and Terry's unsolicited advice on appropriate sentencing ranges. Someone needs to give Terry a copy of *Barbaro*.

40 I should also spread the thank-you net a bit more widely and record my debt of gratitude to the Commonwealth Office of Parliamentary Counsel, represented here today by Second Parliamentary Counsel, Meredith Leigh - thank you, Meredith - which gave me my start in the law and then 25 years later released
45 me into the wider world with a slightly unusual but valuable set of legal skills.

And also to Roxanne Missingham, who is here today, one of my offsidiers in the Department of Parliamentary Services who helped keep me something approaching sane during the four years I was there. And the Department of
5 Parliamentary Services itself, I suppose, which in the course of those four years made the Supreme Court look like an easy option.

Almost finally, I thank my family. It's a very large family, especially once I
10 add in my husband's family, and I'm so glad that it's represented here today by an assortment of siblings, cousins and several of the next generation, including my husband's niece, Tess, who was here when I was sworn in 10 years ago and who has managed - the rest of you can't see this, but she's very heavily
pregnant - to stay in one piece for today and be here. Thank you, Tess.

15 And, of course, there's my own immediate family. In the middle generation, my three very polite and agreeable children and their three equally polite and agreeable partners, topped and tailed, or perhaps the other way around, by my
darling little grandson, Ollie, whose capacity for non-stop talking nonsense probably means he's headed to be a lawyer one day, and his grandfather, my
20 beloved husband, Mark, who also talks a bit of nonsense from time to time. But he is a lawyer, so that's not a surprise. I think the expression is, "I love
youse all." I'm so grateful to you and I couldn't have done it without you.

Sitting on a court like this, especially with such a varied jurisdiction, has been a
25 confronting and also a humbling experience in many ways, especially for me perhaps given my somewhat clinical experience of the law before this. In the courts we see a broad cross-section of humanity, but not very many of them, whether they're offenders or victims, plaintiffs or defendants, are people to whom life has been good (except possibly if they're insurance companies).

30 Instead we see people who have never really had a chance at a decent life from the day they were born, people who were unlucky to be in the wrong place at the wrong time, people who made one wrong or stupid decision and, of course, plenty of people who keep making wrong and stupid decisions, and the few
35 who just keep making deliberately wicked decisions. But more commonly, we see people whose route to the court has been steered by domestic violence, child sexual abuse, mental illness (often unrecognised), whether their own or that of family members, or even by sheer bad luck.

40 And also we see remarkable courage, whether it's the sexual abuse complainant who turns up to give evidence, the person who comes to court to make a victim impact statement about losing a family member, or the people who will have caring responsibilities for the rest of their lives as a result of an injury, criminal
or not, done to a family member.

45

5 The work of the court may sound more like a burden when it's described that way, and it is in one sense, but it's also an honour and a privilege not only to be introduced so intensely to the lives of so many others, but also to be entrusted on behalf of the community with making decisions affecting the futures of those people, and of the community within which they, and we, live, and more generally to serve the people of the ACT as a member of this Court.

10 I have been immensely privileged over the past 10 years and I thank all of you who have supported me and who have shared in that experience in that time.

MURRELL CJ: The Court will now adjourn.

MATTER ADJOURNED AT 10.37 AM ACCORDINGLY