Caxton Legal Centre Inc.
25th Anniversary
ACCESS TO JUSTICE CONFERENCE
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# *"Access to Justice: What are the basic requirements and do we achieve them in Australia?"*

The Hon Paul de Jersey AC, Chief Justice of Queensland

I begin by congratulating the Caxton Legal Centre on its 25th anniversary! Your silver anniversary marks a quarter century of sterling service to the community. You perform a valuable role in enhancing access to justice in this State, and it is fitting that this conference mark such a milestone. In congratulating the Centre, I of course warmly commend the altruism of the many volunteers who facilitate its work.

Enhancing accessibility to justice according to law is of paramount public concern – something the profession acknowledges with predictable but appropriate regularity. It is a goal to which I admonish newly admitted practitioners. The concept of a court system unavailable, for reasons of expense, to many of the taxpayers who fund its operation, is anathema. But my tone will today be moderate! You will note I qualify "justice", recognising the constraints rightly imposed by the law. It is our enviable Australian experience that the expression of this qualification often initially surprises – but moderate expressions of concern about aspects of the law perceived as *unjust*, are accommodated by the security here of the rule of law which we are unfortunately inclined to take for granted – there is a proliferation of regimes in which the rule of law is being or has been compromised, to the fundamental detriment of prevailing justice, as we have seen most recently, and glaringly, in Zimbabwe.

Maintaining the rule of law ensures a just legal system prevails, but the doctrine is premised on public support for its legitimacy, in order for it to survive. Efforts to enhance access to justice serve additionally to increase knowledge of, and faith in, our judicial system and its critical underpinning doctrines.

I have been assigned as my focus this afternoon the basic requirements of access to justice. A simple exhaustive list is difficult to produce. "Access to justice" is a goal with shifting posts – the more we undertake to enhance it, the more we may identify future issues to be addressed. Issues of access to justice are the subject of concerned debate and considered action within the profession throughout Australia, but there is much which may still be done. What I say today will naturally tend toward the experience of my own jurisdiction.

What *are* the basic requirements? One immediately recalls *Dietrich's case*[1], and issues of legal aid funding. The "basics" spread more widely . It may be useful to consider them with respect to three broad notions – the accessibility of legal services, equality of treatment before the law, and the accessibility of the justice *system*.[2]

[1] *Dietrich v the Queen* (1992) 177 CLR 292

[2] The first two broad notions coincide with two of the three objectives pursued by the Federal "Access to Justice Advisory Committee" in its formulating proposals for system reform: see *Access to Justice: An Action Plan*, Access to Justice Advisory Committee, 1994, p 4

As to the first notion, access to legal services, one of the clearest examples of a basic requirement is that of legal representation. This was considered in the criminal context by the High Court in *Dietrich v the Queen*, where the Court noted that the right to a fair trial was fundamental to our legal system[3], and that a defendant would ordinarily be considered disadvantaged if required to appear unrepresented.[4] However it was found that while a right to be represented did exist, as conferred by statute and recognised by the courts, that did not extend to a right to have counsel provided at the expense of the State[5] – there is no such entitlement under Australian law.[6] The High Court noted it would be inappropriate for a Court to extend the law to create a right to publicly funded representation – such a judicial decision would impact too heavily on questions of resource allocation properly within the realm of the Executive.[7] So rather than finding that a right to legal representation existed, the majority[8] held that the approach of "a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation"[9] should be, "in the absence of exceptional circumstances"[10], to grant an adjournment or stay of the trial "until legal representation is available".[11] A refusal of an application to delay a trial when made in

[3] See for example: per Mason CJ and McHugh J at 299, per Deane J at 326-8, per Toohey J at 353, per Gaudron J at 362
[4] See for example per Mason CJ and McHugh J at 301-2, per Deane J at 334-5, per Dawson J at 344-5, per Toohey J at 353-4
[5] See for example per Mason Cj and McHugh J at 302, per Dawson J at 342
[6] See for example per Mason CJ and McHugh J at 311, per Deane J at 330
[7] See for example per Brennan J at 323, per Deane J at 330, per Dawson J at 349-50
[8] Mason CJ, Deane, Toohey, Gaudron and McHugh JJ
[9] per Mason CJ and McHugh J at 315
[10] *Id*
[11] *Id*

such circumstances, if it resulted in an unfair trial, would render necessary quashing the conviction by reason of miscarriage of justice.[12]

This direction has been held to apply to all superior and intermediate court trials[13], and to summary trials in the magistrates court.[14] It has been found not to apply to appeals, applications for leave to appeal, or committal proceedings.[15]

The basic requirement regarding access to a legal representative is, accordingly, that an unrepresented person charged with the commission of a serious offence would ordinarily be entitled to have his or her trial delayed until legal representation may be secured. Ritualistic invocation of the presumption of innocence is mere incantation if those, entitled to its protection but unable to afford representation, are denied that representation.

But this is only one aspect of access to legal services. Even basic access to justice requires more than mere in-court representation in serious criminal matters. What of access to representation in serious civil matters, or access to other forms of legal assistance and advice? In its August 2001 report, "Funding Justice"[16], the Criminal Justice Commission noted that while funding for Legal Aid Queensland had increased since publication of its last report in 1995, it still remained too low to meet all legal aid need. As a result, while Legal Aid meets its obligation to provide funding in

[12] *Id*
[13] See for example *R v Fuller*(1997) 92 A Crim R 151, *R v Perre* (unrep, 18/4/1997, Dist Ct David J)
[14] *Weinel v Fedcheshen* (1995) 65 SASR 156, per Perry J at 160-1
[15] *New South Wales v Canellis* (1994) 181 CLR 309

specified serious matters, it less frequently provides services in non-specified matters.[17] It receives no funding for providing representation during pre-court stages such as interviews with police, often rendering hollow the right conferred by the *Police Powers and Responsibilities Act*[18] to speak with a lawyer before interview.[19]

Access to representation in a broader range of criminal and civil matters, and during some serious pre-court procedures, while not a guaranteed right, is nonetheless a basic requirement of access to justice. The Access to Justice Advisory Committee stretched *its* view to paralegal assistance and telephone advice in cases involving individuals' rights and interests.[20]

An important additional sub-consideration is the *quality* of legal assistance provided – ensuring sufficient access to legal services is worth little unless they are of a quality comparable with that of private legal services. The quality of legal assistance provided by Legal Aid was of concern to the CJC, as expressed in that recent report.[21] In particular, the Commission doubted Legal Aid's "preferred supplier scheme" as well as the current tender system for the duty lawyer scheme, which it perceived was being manipulated by some firms as a means of self-referral.[22] Finally, it recorded the view of some private practitioners that the quality of Legal Aid work was suffering, where poor remuneration for Legal Aid-briefed private counsel resulted in less experienced

[16] Queensland Criminal Justice Commission, *Funding Justice: Legal Aid and Public Prosecutions in Queensland*, August 2001
[17] *Ibid*, p 100
[18] *Police Powers and Responsibilities Act* 2000 s 249
[19] CJC, *Funding Justice*, p 101
[20] Access to Justice Advisory Committee, 1994, p 8
[21] CJC, 2001, pp ix, 101

lawyers doing the majority of available work. [23] I hesitate to dwell too long on this criticism lest I diminish the important role that Legal Aid, its employees and the counsel it briefs play in our justice system – a role discharged to the benefit of the public, notwithstanding crippling funding limitations.

Within the civil sphere, there are a number of factors critical to the adequate provision of legal services. Access to justice requires the provision of sufficient legal assistance, and that legal representatives, where retained, act in the best interests of the client – particularly within an expensive civil litigation system. Addressing the "Legal Aid Forum – Towards 2010" in April 1999, my colleague Justice Davies identified certain changes to the civil litigation system then considered fundamentally necessary in order to ensure it operated fairly for future citizens.[24] He identified first simplification and acceleration of the present civil system – addressed in part by the *Uniform Civil Procedure Rules* 1999 (Qld), which render more efficient, and simpler, the procedures to be followed in Queensland Courts. Second, he advocated the increased use of Alternative Dispute Resolution – noting these mechanisms have already been exploited to great public benefit in this State, providing efficient, cost-effective alternatives for litigants.

[22] *Id*
[23] *Id*
[24] The Hon Justice GL Davies, "The foundations of a fair justice system in 2010; what the Judiciary and the legal profession can do", *Legal Aid Forum – Towards 2010,* April 1999, Canberra

Finally he advocated a more predictable and reasonable system of cost assessment, and the encouragement of a new legal mindset – from a competitive, adversarial approach to a more problem-focused approach, concentrating on resolving disputes in a manner best suited to the client's needs. I agree with His Honour's views, noting that there has since been progressive movement in all those areas.

The legislature has done its best to foster a professional mind-set directed towards early resolution of disputes – hopefully saving angst and expense. The WorkCover and Motor Accident legislation focuses on the early settlement of claims, and their effective, early resolution has substantially relieved court lists, leaving the facility of the courts more readily available for the cases which must run through to judicial adjudication – although it must be observed the WorkCover procedures harbour a host of potential traps for practitioners, and the complexity of the legislation has spawned far more court skirmishes than well drafted modern legislation should.

There has over the last 15-20 years been a quite remarkable shift in judicial approach. It was in the mid 1980s that courts – and executive governments – became greatly concerned about delay in the disposition of cases, and alarmed that congestion was compelling litigants and prospective litigants to bypass the court system and go elsewhere for assistance in the resolution of their claims. With hindsight, we see how the court systems could pro-actively have stemmed that attrition by providing more comprehensive dispute resolution services, including an embrace of court annexed

mediation, for example. While there is nothing wrong with courts confined to their traditional core function, adjudication, a more comprehensive in-house service may have been publicly beneficial. At the moment, with the mediation the court encourages and sometimes directs, the parties must meet the mediator's fees, whereas the cost of maintaining the judiciary is borne by the executive. In an ideal world, accessibility to justice would extend to a state sponsored, comprehensive dispute resolution service within the courthouse. But we do not live in an ideal world, and never will, so we must strive to do our best with available resources. I mentioned earlier the absurdity of a court system to which persons who, as taxpayers, may be taken to contribute funding, cannot gain access – indeed, all members of the public, taxpayers or not, should have reasonable access to such a public facility. The glib dismissal that "the doors of the courts, like the Ritz Hotel, are open to all", has no legitimacy these days, if it ever did – in times, for example, when legal aid had not been thought of.

The civil justice system is continually monitored and refined. I believe the major recent initiative, the Uniform Civil Procedure Rules, has done a lot to simplify procedures – doubly important in this day and age where the self-represented litigant more frequently appears. The Rules Committee is tireless in its dedication to the continual further improvement of the Rules. All the Judges continually do their best, cooperatively with the profession, to streamline and refine our processes further – all with a view to optimal expedition and efficiency, and the reduction of cost.

I will touch only briefly on the second broad notion – equal treatment before the law. In our modern, anti-discrimination oriented society it seems a basic requirement indeed, but its roots penetrate more deeply, to fundamental doctrines underpinning our judicial system – the independence of the judiciary and the rule of law. These time-hallowed stipulations have in recent times been more vigorously proclaimed – our courts are increasingly alive to the requirements of the traditionally disadvantaged. Witness as one example, Queensland's sentencing regime, providing statutorily for the reception, upon the sentencing of Aboriginal and Torres Strait Islander persons, of submissions by appropriate community justice group representatives.[25] The needs of other traditionally disadvantaged groups – women, non-English speakers, the disabled, complainant children, are increasingly addressed by the courts. The self-represented litigant can pose a particular challenge for a court in this respect. To an extent, the Judge must actively assist the self-represented litigant to ensure he or she understands the procedure and has a reasonable opportunity to present a case. Where the other party is represented, that party may, in such a case, perceive that differential treatment is being accorded. Judges are conscious of the need to be careful about this.

The issue of equal treatment before the law, of such fundamental importance to the maintenance of the public confidence on which the authority of the courts depends, sometimes provokes disturbing criticisms. I read some such criticism recently in relation to the treatment of a former high-level public servant, and a recent North Queensland case has apparently raised the question whether differential treatment as between different groupings within our broad community is happening, or could be

[25] *Penalties and Sentences Act* 1992 s 9(2)(o), *Juvenile Justice Act* 1992 s 109(1)(g)

justified. Courts operate almost always under the potential glare of probing publicity. It is very much in the public interest that any such concerns be ventilated. It must however be said that the courts do their conscientious best to ensure the "equal treatment" which is, as I have said, of basal significance to the maintenance of a just system.

I turn now, finally, to the notion of the accessibility of the justice system. Traditionally, certain barriers – financial, geographical, cultural and even fear of the system – have prevented members of the public from enforcing their legal rights.[26] A fundamental requirement of acceptable access to justice is that the system be approachable to the average citizen – although never enticing. One of my particular directions as Chief Justice has been to seek to "de-mystify" the judicial system to the extent that the Courts are able – through the presentation of the courthouses themselves, an increased focus on public education, and encouraging the use of court rooms and facilities by community groups; though it must be recognised some distance is ultimately warranted, to ensure recognition of the judicial officer as the authority figure he or she must be.

One interesting measure of increased accessibility to our system is the greater prevalence these days of self represented litigants – although no doubt this also reflects the restricted availability of free legal assistance. But measures such as the provision of free-online access to all Australian courts' judgments, the recent focus on the use of plain English and the widespread publication of legal information on the

Internet, have enhanced public access to, and involvement in, a previously rather closed legal world.

It could no longer be fairly described as 'closed'. It is open, in the sense of visible, to an unprecedented degree. The expansion of that openness, achieved through technology, carries added responsibility for the judiciary. Fully open public access via the web to court files would raise a number of very disturbing spectres – paedophile downloading of evidence of otherwise pornographic character; the loss of competitive advantage through free access to evidence about otherwise confidential commercial processes; thwarting, through advance notice, of Anton Pillar orders and the like. But Judges can guard against these risks, and the stipulation of open justice need not be compromised by the introduction of safeguards in the technology.

A final factor regularly linked with fundamentally enhancing access to the justice system is increasing the system's efficiency[27] – an issue of concern across Australian jurisdictions. The introduction of case management, increasing automation of registry and listing procedures, creative use of technology in the courtroom – these are some of the areas all Australian courts are exploiting in order to enhance efficiency, reducing the time and cost of litigation and enhancing accessibility.

[26] Access to Justice Advisory Committee, 1994, p xxxvii

Now these initiatives cost money, and executive government is aware of that. Take the matter of receiving evidence by video. Two years ago, hearing a murder trial in Longreach, I took the evidence of a doctor in Brisbane by telephone. Ideally, the jury should have been able to see him, by video-link. His evidence was in the end not controversial, so there was no adverse consequence, but our system should offer the re-assurance which flows from the results of fully-integrated State-wide technology always available, in place, to support the work of the courts. That criminal trial was State-sponsored financially – for both sides. The litigation of many civil disputes would be assisted were such capacities more widespread. In Brisbane we presently boast only two courtrooms in which evidence may be received by video from a remote location, though more are proposed.

Within the courts, attention to ensuring the greatest accessibility to legal services has rested mainly on streamlining our procedures. Notably, reference may be made to the initiative of the Uniform Civil Procedure Rules, and the increasingly managerial approach on the part of the judiciary, to be seen in courts' encouragement of ADR approaches, and active use of practice directions. On the criminal side, the courts, with the co-operation of the profession, are more strongly encouraging resort to pre-trial directions hearings.

[27] see for example the recommendations contained in the New South Wales Law Society's *Access to Justice Discussion Paper* published September 1998.

There is one relevant aspect falling primarily within the province of the executive, and that is the rational distribution of jurisdiction among the courts. This has been the subject of substantial submission by the courts on the criminal side. In relation to civil jurisdiction, it is important that the executive periodically re-assess the appropriateness of monetary jurisdictional limits: presently $250,000 for the District Court, and $50,000 for the Magistrates Court (increased in July 1997 from $40,000). I make no comment on the delineation of jurisdiction by reference to subject matter, beyond pointing out the effectiveness with which over recent years the District Court has exercised its comparatively recently acquired equitable jurisdiction. With the increasingly professional approach of the Magistracy, there would seem no need to peg the monetary limit of the civil jurisdiction of the Magistrates Court at any particularly low level. I am conscious that litigating in that court is less expensive than in the others, and the accessibility of judicial services may be assisted if that court's monetary civil limit is kept at an appropriate level.

While I am not suggesting any particular changes, I emphasise the desirability of periodic reviews of these monetary limits, and the need for an independent determination not unduly affected by the urgings of pressure groups with particular agendas not necessarily directed towards the broader public interest.

What is clear is that all our current measures, aimed at providing basic access to justice, nevertheless fall short of full effectiveness. Executive government accepts that, I believe, and is certainly regularly reminded of it. Particularly in the face of

insufficient legal aid, but also within a legal environment only recently becoming more accessible and open, the efforts of community justice groups such as the Caxton Legal Centre, and the generosity of the talented individuals who donate their time to work in them, should be acknowledged and applauded. There is throughout the legal community, a willingness to provide pro bono services. The Court of Appeal pro bono scheme is a recent entrant to the field. The Caxton Legal Centre is a long-standing, much respected contributor.

The Centre provides much more than the mere basics – it offers both referrals to private solicitors and free legal assistance, in areas ranging from immigration to commercial law. It provides free social work, and represents clients in court in special circumstances. It travels to nursing homes and senior citizens clubs, to provide legal assistance and education for their residents, as well as running community education programs. It provides assistance for parents. It engages actively in law reform processes. It provides a forum for students' clinical legal training and enhances accessibility to the law through various publications.

And importantly, it fires the consciences of over 200 volunteers – lawyers, social workers and students – providing them an opportunity to play an active part in enhancing access to justice. I of course acknowledge the centre's State and Federal Government and Legal Aid funding, and its substantial support by the Queensland Law Society Grants Committee. The Centre and all those who are involved with it have much of which to be proud.

In conclusion may I note, if not originally, the huge benefit of addressing access to justice by means of an integrated approach, across the legal profession and all relevant agencies. As I say, this suggestion is not new, and it is well supported throughout the profession. As with most measures, we now need to take it a little further. As one committed, ex officio and otherwise, to the availability of a court system which delivers justice according to law as efficiently as possible, optimally, I have been greatly encouraged and reassured by the ready cooperation of all branches of the legal profession. The profession is a treasurehouse of useful suggestions borne of long-term experience and expertise.

I should similarly make particular mention, on the criminal side, to the Queensland Police Service, which has in my experience always stood ready to do its best to facilitate the timely disposition of our work.

And so I congratulate the organisers of this conference for providing a forum in which the various "players" in the system can work together for what is a joint, ultimate goal, one of such fundamental significance to the good government of the people – enhancing access to justice.