SUPREME COURT OF QUEENSLAND

National Access to Justice and Pro Bono Conference 2010
Sebel Citigate, Brisbane
Friday 27 August 2010, 9:25am

The Hon Paul de Jersey AC
Chief Justice

I am very pleased to welcome you to this third national Access to Justice and Pro Bono Conference, and our visitors to Queensland.

I at once congratulate and commend the co-hosts of the conference, the National Pro Bono Resource Centre, the Law Council of Australia and the Queensland Law Society. It is an obviously important conference, with a key role in promoting pro bono initiatives and also drawing attention to the inaccessibility of justice in certain areas: how to address that deficit?

The conference's theme, "Access to justice at the crossroads- where to now?", assumes we have reached a stage at which a vital decision is to be made. I think we have been there for quite some time. The question of how we enhance access to justice is a running question. The pro bono response is by no means a complete solution. Despite the often substantial commitment of firms, barristers and various legal associations to pro bono work, there remains substantial unmet legal need within the community, particularly in relation to civil justice. I have on other occasions termed limitations on access to the civil courts as the greatest albatross besetting our court system.

In this civil arena, legal aid is generally not available, and allowing for other competing demands on the public purse, it is unlikely government sponsored legal assistance will ever become generally available for civil disputants. While in Queensland courts, "court costs" are comparatively low, it is the cost of legal representation which guarantees an increasing band of unrepresented litigants, and the real prospect that worthwhile claims will not be identified and pursued.

It is not my objective today to inveigh against the cost of legal representation. Merit and training should be rewarded, and market forces will prevail. I will however at least voice my concern, shared with others, about the time-based calculation of remuneration in the profession, which it has been said rewards inefficiency. It is the level of fees, and the way they are calculated, which dissuades many, I expect, from even seeking legal advice, let alone actively pursuing a legal claim. But I offer no alternative today, and what I am going on to say works from current realities.

Fortunately access to the criminal justice process is reasonably assured because of the availability of legal aid. No doubt a government inclined to reduce the availability of legal aid in criminal cases would reconsider, if reminded of *Dietrich v R* (1992) 177 CLR 292. The High Court there disavowed any right under the common law to legal representation in the criminal court. But it affirmed the existence of a powerful weapon in a court's own armoury when confronted with an unrepresented accused facing an unfair trial. That is the power to stay the proceeding.

When I speak of access to justice, I am not simply referring to access to Courts. Access to justice is of broader import, embracing the provision of legal services which offer early, targeted advice aimed at forestalling disputes, and if they crystallize, their early inexpensive and just resolution before any court door need be opened. For justice to be accessible, information about the legal system must be easily accessible to the general public, as should alternative dispute resolution services. After all, only a very small percentage of disputes, particularly in the civil arena, ever find their way to a courtroom.

There are some very practical aspects to which attention should be given as we seek to increase accessibility:

- Statute law and subordinate legislation should be readily comprehensible, whether it be the *Dividing Fences Act* or the *Income Tax Assessment Act*: the concise use of plain English would be a good start. Fortunately, parliamentary drafters are nowadays astute to this imperative, though one could not be sanguine about eradicating the Byzantine complexity of the tax legislation.

- In our pluralistic society, citizens may need the services of an interpreter, in the exploration of their legal position. In this State, the Department of Justice has capacity in that regard.
- The perplexed disputant devoid of substantial support needs to know where to go for advice. That is where the profile of bodies like QPILCH, and the citizens' advice bureau at the Supreme Court, is important. So, here, is the circumstance that all tribunals are co-located, at QCAT.
- For accessibility, legal advice must be affordable, and gratis for the indigent, and provided expeditiously.
- Court and tribunal procedures should be readily comprehensible and navigable: our Uniform Civil Procedure Rules provide a worthwhile model in that respect.
- Court adjudication must be reserved only for cases needing it, hence the contemporary focus on mediation.
- Also, trials must be kept within manageable proportions: courts are increasingly acknowledging that and seeking to identify new ways of rising to that challenge. Optimal technology helps contain trials, as we saw in this jurisdiction recently with the trial of Dr Patel, where the documents were computerized. So can sensible limits on disclosure. Queensland's direct relevance test for the disclosure of documents has worked well in limiting disclosure, bringing it within manageable limits. We dropped the *Peruvian Guano* test in this jurisdiction more than a decade ago. But there remain cases where the scope of disclosure is still mammoth. That must justify early judicial intervention to impose limits, and to supervise the presentation of the necessary documentation: filing the documents electronically, for example, and in a way which will facilitate rather than hinder their being analysed. And where judgment is reserved, justice cannot be denied or postponed by delay in its delivery, hence time protocols adopted and monitored by the judiciary.
- More broadly, accessibility is enhanced by educative programs, court open days, informed public discussion of Court initiatives and processes, and so on.

We must be careful to keep our eyes on those sorts of practical measures when addressing this topic, and not resort to abstractions, let alone platitudes, but that does not exclude acknowledgment that promotion of access to justice, with all that entails, is one of the most important issues facing the legal profession.

In the 2009 report on the federal civil justice system released by the federal Attorney-General, access to justice was described as "central to the rule of law and integral to the enjoyment of basic human rights… an essential precondition to social inclusion and a critical element of a well-functioning democracy."[1]

The point was also emphasised by the Law Council of Australia in its 2008-09 Annual Report:

> Ensuring access to justice for all Australians has been a goal of the Law Council for decades…The provision of justice to the Australian community is fundamental to the acceptance of the rule of law and to the stability of the community at large.[2]

Legal philosophers from Aristotle to John Rawls have long recognised the crucial importance of access to justice. Central to their writings is the notion that "the administration of justice should be accessible to those involved in conflict."[3]

Access to justice is increasingly being recognised as a fundamental right.

In his recent Civil Litigation Costs Review Preliminary Report, Lord Justice Jackson noted that "the accessibility of civil courts… is implicit in all human rights jurisprudence." This is made explicit in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.[4] For an example closer to home and on the criminal side of the equation, the Australian Capital Territory Court of Appeal

[1] Australian Government, Attorney-General's Department, "A Strategic Framework for Access to Justice in the Federal Civil Justice System: A guide for future action", Access to Justice Taskforce, September 2009, 1.
[2] Law Council of Australia, *Annual Report 2008-09*, p.9.
[3] Lord Justice Jackson, 2009. *Preliminary Report- Civil Litigation Costs Review*, 40.

has held that section 21 of the Human Rights Act 2004 (ACT) is the source, under Territory law, of the right to a fair trial and means "that there is now a **positive right to a fair trial** rather than the right not to be tried unfairly as the common law provides."[5]

There is indeed a presumption that legislatures will uphold a citizen's access to the courts of law, so that legislation will be construed, so far as possible, so as not to limit that access (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 493). Chief Justice Gleeson said as much in 2003, as had Dixon J in 1932 (*McGrath v Goldsborough Mort and Co Ltd* (1932) 47 CLR 121, 134).

Financial unpredictability, as experienced over the last 12 to 18 months, generally means more people need legal assistance, and an increasing band of self-represented claimants and litigants. Over the last year in the Queensland Court of Appeal, at least one party was unrepresented in 39% of all civil matters and 37% of criminal matters. Of those litigants, 24% of self-represented criminal appellants and 8% of self-represented civil appellants were successful in their appeals. Overall, 18.3% of self-represented litigants were successful. One wonders how many potentially good cases were lost through lack of expert representation.

Legal aid and community legal centres are at the forefront in providing legal assistance to those otherwise unable to afford it. The adequacy of their available resources will be discussed at the conference. In the last periodic survey of the legal services industry in 2008, the Australian Bureau of Statistics reported that qualified legal staff spent an estimated 2,142,400 hours on matters referred by legal aid commissions. To put this into perspective, a person who worked 40 hours a week, 52 weeks a year, would have to work for 1030 years to reach that point.

[4] Lord Justice Jackson, 2009. *Preliminary Report- Civil Litigation Costs Review*, 40.
[5] *R v Griffin* [2007] ACTCA 6 [at 4].

Most of that assistance is devoted to criminal work. As I have acknowledged, there is no real prospect of legal aid, State sponsored, for civil work. That is where the profession has commendably come to the party.

Barristers, sole practitioners and law firms of all sizes contribute invaluably to providing access to justice on a pro bono basis. As former Chief Justice Gleeson mentioned in his opening address at the first of these conferences, "issues of … pro bono resources go to the heart of the perennial problem of access to justice."

The essence of a lawyer's professionalism is public service and a prime illustration of a worthy lawyer's true dedication to that fundamental public service, is a commitment to pro bono work.

Actually taking on a client, with all the travail that may involve, in the expectation of no financial recompense, but with the assurance the client's legal position will be properly explored and presented is, I think, the ultimate expression of the true commitment of the profession to that ideal of public service.

It is a commitment willingly undertaken by many practitioners, in some cases organised nationally within firms, with partners dedicated to just that stream. In the last financial year Clayton Utz, as but one example, provided over 40 000 hours of pro bono assistance across Australia, a figure which equates to more than 43 hours for each lawyer within that firm. Other major national firms have comparable commitments.

The National Pro Bono Resource Centre has been highly active in the development and promotion of pro bono programs in Australia. In 2009, the Centre played a key role in establishing JusticeNet SA, South Australia's first pro bono clearing house, and was also instrumental in seeing the introduction of the National Pro Bono Professional Indemnity Insurance Scheme, thereby removing one of the key barriers for in-house and government lawyers undertaking pro bono work.

The Centre's National Pro Bono Aspirational Target initiative, where lawyers undertake to complete 35 hours of pro bono work a year, continues to gain strength. Nearly all the Australian "majors" are now signatories and 2009 saw not only a significant increase in the amount of pro bono work undertaken by signatories, but also an almost 100% increase in the number of lawyers subscribing to the Target.[6]

The support the Centre is now receiving from associations like the Law Council and the Queensland Law Society, also deserves mention. That support has greatly facilitated the fulfilment of the Centre's mission of enhancing accessibility to justice through the development of professional pro bono legal services.

The profession's commitment to pro bono work is demonstrated in the ABS survey to which I earlier referred: qualified legal staff spent an estimated 955 400 hours undertaking pro bono work during the 2007-8 financial year. The estimated value of that work is $238.2 million.

The conference's theme of "where to now" challenges all participants, and the profession, from novice junior to judge, to think laterally to meet these challenges.

When I was appointed Chief Justice in 1998, a recently published survey of attitudes to the courts presented them in a decidedly negative light. In similar vein, the reported perceptions of the profession were then of an inward looking profession unduly focused on material gain. I believe the last decade has witnessed something of a turnaround: to courts anxious to explain their processes, and garnering higher public esteem for that preparedness; and to a profession more adequately acknowledged for the public service it actually renders, epitomized especially in the pro bono thrust.

Over coming days, the conference's five plenary and four concurrent sessions will explore a broad range of topics including criminal justice, civil and family law, pro bono work, the

[6] National Pro Bono Resource Centre, 2009. "Director's report- 2008/9 Annual Report", 3.

need for professional collaboration and emerging issues. The conference also presents an opportunity to celebrate substantial achievements to date.

As a profession we must continue to strive for a fair, affordable and accessible justice system. This conference represents yet another step towards achieving that goal.

I am delighted now formally to open the third National Access to Justice and Pro Bono Conference and to wish you well.