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ACCESS TO JUSTICE: TOWARDS AN INTEGRATED APPROACH

BY

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My professional way of life, as Shakespeare said in Macbeth, "*Is fall'n into the sere, the yellow leaf*".[1] I know this because I have been transformed by retirement from a judicial rooster to a forensic feather duster.[2] More particularly, I know this because the invitation from the President of the Law Council of Australia to speak at this plenary session entitled "*Reflections and Directions*" kindly referred to my "*long history of involvement with access to justice*". The invitation eschewed any suggestion of a worthwhile or effective involvement: merely a long one.

The President is right. I have had a long, if sporadic, involvement with access to justice issues. While the President, judging from his letter, is apparently just old enough to remember the 1994 report of the Access to Justice Advisory Committee,[3] he is clearly much too youthful to remember the work of the Commission of Inquiry into Poverty two decades earlier.

The Law and Poverty Report

The Poverty Commission's Second Main Report, *Law and Poverty in Australia,* was presented in October 1975,[4] shortly before the dismissal of the Whitlam Government.[5] The *Law and Poverty Report* addressed the role of the legal system in contributing to the perpetuation of poverty in Australia. In language that is by no means wholly outdated, it sought to demonstrate that:[6]

> "some people, simply because they are too poor, too ignorant or too frightened, do not have access to the courts nor do they obtain the legal assistance they need to enforce their basic rights and to protect themselves against grievous injustice. [The Report] also shows that there are areas of substantive law of considerable importance to the everyday lives of poor people that are heavily weighted against their

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1 Macbeth, *Act v,* sc 3.
2 Non-Shakespearean Australian slang.
3 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994).
4 Australian Government Commission of Inquiry, *Law and Poverty in Australia* (Second Main Report, October 1975). (Professor R Sackville, Commissioner for Law and Poverty) ("*Law and Poverty Report*").
5 The presentation of the Second Main Report was not the sole cause of the dismissal.
6 *Law and Poverty Report*, 1.

> interests. Certain disadvantaged groups find that the legal system has been slow to adapt to their special requirements, so that for them the law sometimes reinforces inequalities rather than redresses them."

The *Law and Poverty Report* built on both empirical research and what might be described as reform-oriented academic studies.[7] These studies investigated the impact of the legal system on much neglected disadvantaged groups, such as lower income residential tenants, homeless people and those burdened with consumer debt. The *Report* also examined the inadequate attempts to improve access to the legal system, such as the inadequate and under-resourced legal aid schemes in operation in the mid 1970s. The research studies, conducted at little cost to the Australian taxpayer, provided the bases for the *Report's* recommendations, many of which required action by the States rather than by the Commonwealth.

Reforms

Recent commentaries on the state of access to justice, not surprisingly, tend to concentrate on the deficiencies in the legal system and, in particular, on the expense and delay involved in the enforcement or protection of rights through the courts. Commentaries of this kind should not obscure the very great changes that have occurred in the legal system since the *Law and Poverty Report* was presented in 1975. These changes include:

- sweeping reforms to the laws governing the rights and duties of disadvantaged groups and individuals;
- enforcement by domestic legislation of internationally recognised human rights;
- the codification and extension of judicial and merits review of administrative action;

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[7] The studies included R Sackville, *Legal Aid in Australia* (AGPS, 1975); M Cass and R Sackville, *Legal Needs of the Poor* (AGPS, 1975); A J Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (AGPS, 1975); D St L Kelly, *Debt Recovery in Australia* (AGPS, 1976); A Jakubowicz and B Buckley, *Migrants and the Legal System* (AGPS, 1975); R Sackville, *Homeless People and the Law* (AGPS, 1976).

- the intervention of the Commonwealth in the funding and provision of legal aid services;
- the restructuring of the legal profession, including the formalisation of *pro bono* activities;
- the advent of managerial justice as a characteristic of a much enlarged Australian judiciary; and
- the exponential growth of alternatives to the judicial determination of disputes.

Many of the injustices to disadvantaged people identified in the *Law and Poverty Report* flowed from legal principles or doctrines firmly rooted in nineteenth century laissez-faire notions. State and Commonwealth Parliaments addressed, albeit in their own time, the injustices identified in the *Report* and in other critical assessments of the legal system. Legislation was introduced to protect the most vulnerable groups in the community against exploitation, unfairness and unnecessary hardship. For example, the laws governing residential tenancy agreements, consumer credit, enforcement of debts and consumer transactions have been reformed to shift the balance in favour of less powerful groups. The law has moved decisively away from the common law's enthusiasm for freedom of contract and the maxim of *caveat emptor*. The "*holy grail*" of individualised justice[8] is now pursued with as much legislative and judicial zeal as was once devoted to the enforcement of strict contractual entitlements. Indeed, the pervasive concepts of unconscionability, unfair contracts and misleading and deceptive conduct seem to have taken over the role of the common law, in Oliver Wendell Holmes' sceptical phrase, as the "*brooding omnipresence in the sky*".[9]

Legislation now prohibits discrimination on a variety of grounds including race, ethnic origin, sex, marital status, social orientation, and age. Although some States were at the forefront of the legislative anti-discrimination drive, the role of the Commonwealth has become central. By ratifying international human rights

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[8] A M Gleeson, "*Individualised Justice – the Holy Grail*" (1995) 69 ALJ 421.

[9] *Southern Pacific Co v Jensen* 244 US 205, 222 (1917), per Holmes J.

conventions,[10] the Commonwealth has been able to invoke the external affairs power[11] to give effect to its international obligations. In consequence, national legislation has extended protection to minorities in ways that could never have been foreseen by the framers of the Australian *Constitution*, even though the Parliament retains the power to suspend the operation of legislation such as the *Racial Discrimination Act* 1975 (Cth). [12] While the Commonwealth has shown no enthusiasm for the adoption of a statutory charter of rights, Victoria and the Australian Capital Territory have not been so inhibited.[13] Consequently, all legislation in those two jurisdictions is to be interpreted, so far as it is possible to do so, consistently with its purpose, in a manner that is compatible with the human rights protected by the charters.[14]

It is no doubt true that changes in community attitudes towards gender equality, the injustices inflicted on indigenous Australians and the invidious discrimination for so long practised against ethnic, religious and social minorities cannot be ascribed simply to the enactment of legislation creating new legal remedies for discriminatory or exploitative conduct. It is also true that community attitudes towards minorities have not become as tolerant or supportive as many would wish and Governments sometimes take backward steps in the face of real or perceived dangers to the wider community. Nonetheless, the availability of legal remedies in cases of unlawful discrimination or breaches of internationally recognised human rights has played an important part in shaping community attitudes and expectations.

The reforms of federal administrative law incorporated an independent system of merits review of administrative decisions and a codification and expansion of the

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10 Such as the *International Covenant on Civil and Political Rights* 1966, the *International Covenant on the Elimination of All Forms of Racial Discrimination* 1966 and the *Convention on the Elimination of all Forms of Discrimination Against Women* 1979.

11 *Constitution*, s 51(xxix).

12 As it has done, for example, by s 132 of the *Northern Territory National Emergency Response Act* 2007 (Cth), although that particular provision is repealed by the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act*) *Act* 2010, sch 1, cl 2 (as from 31 December 2010).

13 *Charter of Human Rights and Responsibilities Act* 2006 (Vic); *Human Rights Act* 2005 (ACT).

14 See *R v Momcilovic* (2010) 265 ALR 751 (Vic CA), construing s 32(1) of the Victorian *Charter*; R Sackville, "*Bills of Rights: Chapter III of the Constitution and State Charters*" AJAL (forthcoming).

grounds of judicial review of administrative action.[15] Both of these measures were introduced in the mid-1970s. Since then the reach of administrative law has widened greatly, a process reinforced by the High Court's insistence that judicial review of administrative decisions, both federal and State, is constitutionally entrenched.[16] In consequence, the balance of power in Australia between individuals and governmental decision-makers has been altered fundamentally. For example, people reliant on social security benefits have review mechanisms available to them if they wish to challenge unfavourable decisions affecting their entitlements. Subject to the vagaries of offshore processing requirements for so-called "*boat people*",[17] unsuccessful applicants for refugee status can seek merits review from the Refugee Review Tribunal and can invoke the entrenched jurisdiction of the High Court to grant the constitutional writs.[18]

The reforms of federal administrative law and the more modest changes to State counterparts are not self-executing. They cannot ensure that administrative decision-makers are immune from error nor that all injustices inflicted by erroneous decisions will be readily cured. Nonetheless, there is little doubt that the reforms have contributed to better quality decision-making and a greater likelihood that errors or abuses of power will be corrected through a process of external review. Similarly, the now usual, if not universal obligation of decision-makers to give reasons for adverse administrative decisions[19] has increased the accountability of public officials and the transparency of the decision-making process. It has also made merits and judicial review of administrative action a more effective process.

The Commonwealth took the first tentative steps towards a substantial involvement in the provision of legal aid services during the short but hectic life of the Whitlam Government. Since then the pathway to more extensive and better

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15 *Administrative Appeals Tribunal Act* 1975 (Cth); *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

16 *Plaintiff S157/2002 v The* Commonwealth (2003) 211 CLR 476; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

17 Presently subject to a challenge in the High Court: *Plaintiff M61/2010 v Commonwealth* [2010] HCA Trans 218.

18 Pursuant to s 75(v) of the *Constitution*.

19 See, for example, *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13; *Administrative Appeals Tribunal Act* 1975 (Cth), s 28.

funded legal aid services has been anything but smooth and uninterrupted and expectations of ever-increasing Commonwealth contributions have not been met. The contest between the private profession and salaried public agencies as to which was the more effective and efficient provider of legal aid services seems to have been replaced by disputes between the States and the Commonwealth as to which level of government should bear the major burden of funding legal aid services.[20]

Despite more or less stagnant levels of Commonwealth funding in recent years, the fact remains that the Commonwealth has clearly recognised that it has a continuing responsibility to provide or fund legal services to people unable to afford legal advice and representation. This responsibility includes supporting, albeit relatively modestly, community legal centres that have played such an important role in providing advice to members of local communities or to particular groups not catered for by the established legal aid schemes.[21] The significance of this development should not be under-estimated.

Legislatures and the courts themselves have introduced important procedural changes in the name of enhancing access to justice or reducing the expense and delays associated with judicial decision-making. Among the more important are statutory procedures facilitating the hearing and determination of representative proceedings or class actions. While there is nothing new about the concept of a representative action, Commonwealth and State legislation and rules of court have paved the way for claims to be pursued on behalf of large groups, the individual members of which might not have been able to institute their own legal proceedings. Legislation of this kind has allowed claims to be brought on behalf of such diverse groups as consumers of defective or sub-standard goods and services, patients who have been fitted with potentially malfunctioning medical devices, investors who have been misled into making poor investments and small businesses complaining of anti-competitive conduct by large corporations.

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[20] The funding contributions of State, Territory and Commonwealth Governments are summarised in Legal and Constitutional Affairs Reference Committee, *Access to Justice* (December 2009), ch 3. In 2009-2010, the Commonwealth provided $168 million to State and Territory Legal Aid Commissions. The combined contributions of the State and Territories in the same period amounted to approximately $220 million.

[21] See, for example, *Federal Court of Australia Act* 1976, Part IVA.

Another important development has been the relaxation of the rules of standing, sometimes by the courts and sometimes by legislators.[22] The relaxation of standing requirements has benefited community organisations or interest groups, such as environmental organisations or anti-smoking bodies, wishing to challenge actions of government or large corporations thought to be environmentally unsound or inimical to community well-being. More recently, the emergence of litigation funders and the legitimisation of their activities by the High Court[23] has promoted litigation that might otherwise have foundered. Whether the benefits of entrepreneurial litigation outweigh the social and economic costs is yet to be determined. But litigation funders undoubtedly make it more likely that wrongdoers will be held accountable for their actions through the civil justice system. The opportunities for pursuing claims in the courts on behalf of poorer or disadvantaged groups have been further enhanced by the creation of a multitude of regulatory agencies empowered to institute legal proceedings in the public interest.

The legal profession, like the judiciary, has a well-deserved reputation for conservatism. Even so, since the mid-1970s the legal profession has experienced far-reaching changes. In 1975, a debate was just beginning about the privileges enjoyed by the legal profession, such as the conveyancing monopoly and the enforcement of fee scales. The separate Bars resolutely insisted on maintaining restrictive practices, such as the two-counsel rule and prohibition on appearing with solicitor advocates, in the guise of preserving ethical standards. Individual States jealously guarded their own legal practitioners against the depredations of interstate rivals. The professional associations, membership of which was compulsory for practitioners, regulated the conduct of their members and exercised disciplinary powers over them, sometimes in order to maintain and enforce what would now be regarded as unjustifiable anti-competitive practices.

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22 See, for example, *Environment Planning and Assessment Act* 1979 (NSW), s 123; *Trade Practices Act* 1974 (Cth), s 80.

23 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

Since that time, the bracing winds of competition policy have blown into the musty corners of the legal profession. Many of the restrictive practices that sustained the traditional legal profession have been discarded, often under pressure from regulators and reformers[24] and even the courts.[25] The legal profession, like almost all of the many occupational groups now claiming the status of a "*profession*", is no longer entirely self-regulating. As in other common law countries, the largest law firms have grown ever larger and the regime of the billable hour has become ever more tyrannical. Law firms have not only become national, but international entities. Competition among law firms has intensified. Long-term loyalty by a partner to his or her firm often seems to have gone the same way as the ephemeral loyalty of sportsmen to their clubs at the end of their contracts.

The commercialisation of the legal profession has been the subject of much lamentation.[26] However, commercialisation has not proved to be incompatible with continuation of the profession's role in providing legal representation and advice to people unable to afford to engage a lawyer and who, for one reason or other, are excluded from legal aid schemes. In the past, the contributions of the profession were seen essentially as charitable work by individual practitioners, often motivated by the recognition that the privileges enjoyed by a self-regulated and ancient profession demanded a *quid pro quo* from the beneficiaries of those privileges. The voluntary contributions of professional services to needy recipients were largely unco-ordinated, undocumented and unmeasured. For these reasons, the 1994 *AJAC Report* did not refer in any detail to the legal profession's pro bono activities.

The provision of pro bono services, at least by the larger law firms, has now become more been systematised, a process stimulated by the work of the Pro Bono Task Force[27] which was established following the First National Pro Bono Conference in August 2000. The Task Force pointed out that much pro bono

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24 *Access to Justice*, Ch 3 ("*Regulation of the Legal Services Market*").

25 *Street v Queensland Bar Association* (1989) 168 CLR 461 (holding unconstitutional Queensland's Bar Admission Rules which discriminated against interstate residents).

26 See, for example, A Kronman, *The Lost Lawyer* (1993).

27 *Report of the National Pro Bono Task Force to the Commonwealth Attorney-General* (2001).

work had been carried out "*in an unstructured – even disorganised manner*". It also observed that legal practitioners and firms disagreed as to what kinds of voluntary contributions should be regarded as true pro bono activities, reflecting different practices among firms.[28]

The Task Force proposed a series of principles which heavily relied on "*the legal professions service ideal*" and the lawyers' "*professional/ethical obligation to do pro bono work*". The guiding principles were to be that:

- pro bono work is not to be a substitute for legal aid;
- the design and provision of pro bono services should be driven by client needs, rather than by what lawyers are prepared to offer;
- pro bono clients should receive the same quality of service as all other clients; and
- pro bono practice should be a voluntary activity.

The reports of the pro bono practices of larger law firms published by the National Pro Bono Resource Centre suggest that participating firms take seriously the principle that pro bono work should be driven by client needs, although each firm determines its own priorities, making a more co-ordinated overall approach more difficult. Nonetheless, bodies such as the Public Interest Clearing Houses and community legal centres assist in directing the available services to areas of particular need. The Pro Bono Resource Centre itself plays a planning and co-ordinating role which includes compiling and publishing valuable empirical information. One consequence of this more structured approach to pro bono work has been a better targeted response to areas of demonstrated need, such as the legal problems experienced by homeless people and by claimants for refugee status.

Just as the legal profession has undergone a substantial transformation, so have the courts. At the time of the *Law and Poverty Report*, plans were afoot for the creation of the Federal Court and the Family Court, but no system of federal

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[28] See now the discussion of the definition of "*pro bono*" work in National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007), section 1.2.

courts below the High Court had yet been put in place.[29] There is now a well-established system of federal courts, including the Federal Magistrates Court.[30] Partly because of the emergence of federal courts alongside State courts, the size of the Australian judiciary has increased substantially and now comprises nearly 1100 judicial officers. This increase in size reflects (along with many other influences) a willingness by individuals and groups to resort to litigation to protect or enforce their rights and suggests that such individuals and groups are better able to reach sources of advice and assistance.

The composition of the judiciary has been transformed over the last quarter of a century. Virtually all judicial officers are now selected on merit, in contrast to the earlier long-standing practice of appointing magistrates, the "*front line*" of the judiciary, almost exclusively from the public service. The judiciary, while not yet in a state of gender balance, is far from the male preserve that it once was. The process of appointment of judicial officers is gradually, but inexorably, becoming more rigorous and transparent. Generally speaking, judicial appointments are no longer the exclusive province of the incumbent Attorney-General and his or her close circle of advisers.

Over the same period, Australian courts have reinvented themselves as proponents and practitioners of managerial justice. The pure adversary model of litigation has been abandoned as courts have insisted on managing litigation in an endeavour to ensure that disputes are heard and determined within a reasonable period and at a cost proportionate to the matters in contest. Reforms initiated by the courts themselves have received the imprimatur of legislatures which have resoundingly endorsed the proposition that the overriding purpose of rules of court, in their application to civil proceedings, is "*to facilitate the just, quick and cheap resolution of the real issues in the proceedings*".[31] The advent of managerial justice has been justified by the recognition that court time is a scarce resource that needs to be utilised effectively in the interests of all potential litigants.

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29 There was a Federal Court of Bankruptcy, which was effectively subsumed into the Federal Court when it commenced sitting in 1977.

30 Although it may soon face absorption into the other federal courts.

31 See, for example, *Civil Procedure Act* 2005 (NSW), s 56(1).

It is no coincidence that courts have transformed their procedures at the same time as perceived shortcomings in the court system have stimulated the growth of alternatives to traditional litigation. Mediation and other forms of alternative dispute resolution ("*ADR*") have emerged as a response to what are seen as the excessive delays, disproportionate expense and intimidating formality of courts. ADR is promoted as offering options other than the winner-take-all outcomes that characterise the judicial process.

The perceived shortcomings of the litigious process have also encouraged Parliaments, particularly of the States, to create specialist tribunals designed to provide speedier and less expensive outcomes than courts can offer. While such tribunals are by no means always an unmitigated blessing,[32] they can provide redress to people without the costs and risks associated with traditional litigation. Industry and government sponsored schemes have provided consumers with even less formal schemes for the swift resolution of complaints. Dissatisfied consumers of banking, insurance and telecommunications services can now resort, if they wish, to industry dispute resolution schemes and avoid courts and tribunals altogether.

The Continuing Emphasis on Access to Justice

Many of the developments I have outlined have been expressly designed to improve access to justice for ordinary people seeking to vindicate or protect their rights. It may seem odd, therefore, that over the years there has been a steady stream of official inquiries and reports examining access to justice. It may seem equally odd that an almost universal theme of official reports is the apparent inability of the legal system to overcome effectively the barriers to access to justice and the consequential need for remedial action by governments, legal aid agencies and the profession.

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[32] Compare the remarks of Heydon J about specialist courts and tribunals in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, at 589 [122].

At almost any given time in Australia, there is an inquiry under way into access to justice or consideration is being given to the latest report on the subject. A recent Senate Committee report, for example, not only bears the familiar title of "*Access to Justice*",[33] but its terms of reference are dispiritingly familiar. The Committee was required to address:

> "(a) the ability of people to access legal representation;
> (b) the adequacy of legal aid;
> (c) the cost of delivering justice;
> (d) measures to reduce the length and complexity of litigation and improve efficiency;
> (e) alternative means of delivering justice;
> (f) the adequacy of funding and resource arrangements for community legal centres; and
> (g) the ability of Indigenous people to access justice."

The Senate Committee noted that since the *Law and Poverty Report* there had been at least eleven reports from Parliamentary Committees on access to justice or on the related topics of legal aid and the costs of justice. In addition, the Committee identified ten reports on the same topics prepared by the Commonwealth Attorney-General's Department and "*public agencies*" such as the Access to Justice Advisory Committee and the Australian Law Reform Commission.[34] The output of reports on access to justice is such that the Senate Committee apparently overlooked the report of 177 pages published just three months earlier by the Access to Justice Taskforce of the Attorney-General's Department.[35] Nor did the Senate Committee's list include the many reports or studies on access to justice prepared by research institutes, professional bodies and the like.[36]

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[33] Legal and Constitutional Affairs Reference Committee, *Access to Justice* (December 2009).

[34] *Id*, para 2.2.

[35] Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009).

[36] See in particular the series of publications resulting from the *Access to Justice and Legal Needs* research program conducted by the Law and Justice Foundation of New South Wales.

The volume of reports on access to justice is partly explained by the need to develop specific policies and practices in response to changing social, political and economic circumstances. Those circumstances can change very quickly, for example when a newly elected Commonwealth Government takes a very different, perhaps ideologically driven, approach to the provision of legal aid services than that adopted by its predecessor. But there is more to the phenomenon than this.

The concept of "*access to justice*" has become a catchphrase that is ubiquitous in modern legal and political discourse. The expression "*access to justice*" generates enthusiasm because it represents an ideal that is fundamental to a society based on the rule of law and contains an implicit promise that the ideal is achievable. It is no accident, for example, that recent Commonwealth legislation conferring greater case management powers on federal courts is entitled the *Access to Justice (Civil Litigation Reforms) Amendment Act* 2009 (Cth).

I have tried to explain the power of the catchphrase this way:[37]

> "The ideal embodied in the concept of access to justice embraces (though it is not necessarily limited to) the proposition that each person should have effective means of protecting his or her rights or entitlements under the substantive law. This ideal is often seen as an element of the fundamental principle that all people should enjoy equality before the law. That principle in turn derives from the notion that the very foundations of justice rest on recognition by the state of the values of human dignity and political equality.
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> The implicit promise contained in the catchphrase is that the law and the legal system are capable of achieving the goal of access to justice, if not in the short term then ultimately. The implication is that a just society will be prepared to find the resources required to achieve the goal of access to justice. The catchphrase also suggests that it is feasible to establish mechanisms that will effectively break down the barriers that prevent disadvantaged individuals and groups from utilising the legal system to enforce their rights and protect their interests. Accordingly, the principle of access to justice carries with it a promise that there is a realistic prospect of ameliorating the unjust legal consequences of inequality in society.

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[37] R Sackville, "*Some Thoughts on Access to Justice*" (2004) 2 NZJPIL 85, 86. (Citations omitted.)

> Viewed this way, it is not surprising that the expression 'access to justice' occupies a virtually unchallenged place in the political and legal lexicon. Few people are prepared to oppose, at least overtly, an ideal that appears to lie at the heart of a just society. But like other catchphrases, such as 'fairness' or even 'democracy' itself, part of the attraction of 'access to justice' is that it is capable of bearing different meanings, depending on the perspectives or values of the commentator."

It is fair to say that thinking about access to justice has been more nuanced in recent times as commentators have recognised that the core responsibility of courts to decide cases justly and in accordance with law is necessarily a time consuming and therefore often expensive process. Despite the procedural and administrative reforms of the last several decades more observers are prepared to acknowledge that:

> "the notion that all civil disputes, regardless of the complexity of the issues at stake, can be conducted both expeditiously and cheaply is as unrealistic as the notion that all criminal trials can be conducted in a summary but scrupulously fair manner."[38]

There has also been a greater willingness to acknowledge that there will always be a substantial gap between the ideals implicit in the concept of access to justice and the ability to realise those ideals, given the limitations on available resources.

Even so, there remains a fundamental problem confronting inquiries and research into access to justice issues. The problem is that there has never been, and it is unlikely that there ever will be, a measurable baseline against which to determine success or failure in eliminating or reducing the well-documented barriers to access to justice. An outline of the changes that have occurred since 1975 suggests that there have been great improvements. But many questions remain unanswered. Is it possible to assess the extent of the improvements? Can "*legal needs*" ever be fully satisfied? Given that resources are limited, what should be the priorities? Who should determine the priorities?

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[38] *Id*, 100.

We live in an age in which quantitative measurements are accorded very great weight in formulating and evaluating social policies. In part, this reflects the pervasive influence of economics, the lifeblood of which is statistical information and forecasts no matter how spurious the underlying assumptions. The predilection for quantitative data also reflects an understandable preference by policy-makers for the measurable and observable over the impressionistic and intangible.

One reason for the success of the Poverty Commission in focussing attention on the extent of poverty in Australia's apparently affluent society of the 1970s was the meticulous work of the Chairman, Professor Ronald Henderson, in formulating a poverty line that could be presented as a minimum weekly income in dollar terms.[39] The poverty line was calculated by reference to family size, housing status and other measurable needs and could readily be adjusted over time according to movements in consumer prices and average earnings. More recently, bodies such as the Productivity Commission have sought to apply what the Chief Justice of New South Wales has described as the "*one size fits all*" approach to public management to the court system.[40] For example, a recent report on the justice system uses "*clearance indicators*" as a measure of whether court administration services are provided "*in an efficient manner*".[41] Simplistic quantitative measurements of this kind cannot adequately assess the "*performance*" of courts responsible for doing justice to all people according to law.

This is not to say that quantitative surveys do not have a place in assessing whether the legal system is responding adequately to the needs and expectations of disadvantaged groups and individuals. Indeed, the first quantitative survey of the legal needs of the poor in Australia was conducted under the auspices of the

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[39] Australian Government Commission of Inquiry into Poverty, *Poverty in Australia* (AGPS, 1975).

[40] JJ Spigelman, "*The 'New Public Management' and the Courts*" (2001) 75 ALJ 748, 750-752.

[41] Steering Committee for the Review of Government Service Provision, *Report on Government Services,* vol 1, 7.37. The clearance indicator is measured by dividing the number of finalisations in the reporting period by the number of lodgements in the same period.

Poverty Commission.[42] A much more ambitious project is now under way under the auspices of the Law Foundation of New South Wales,[43] although it is apparently proceeding without financial support from the Commonwealth despite recommendations that such support be made available.[44] Surveys of legal needs present significant methodological problems, but they can be very valuable in identifying areas of unmet need and in determining priorities in the allocation of scarce legal and on pro bono resources. Nonetheless they cannot accurately or completely measure the extent to which ever-shifting areas of legal need are being satisfied by existing services.

Since quantitative surveys, valuable as they might be, will not of themselves resolve the policy issues presented by the access to justice ideal, it is necessary to have more informative qualitative assessments. The principal difficulty here is that analyses of access to justice issues tend to be fragmented. Inquiries or research studies, understandably enough, tend to concentrate on particular features of a much broader and more complex landscape. Many studies and reports have examined the provision of legal aid services, the efficacy of pro bono schemes, the impact of judicial case management in litigation, the benefits of alternative dispute resolution, the role of the legal in exacerbating indigenous disadvantage, the protections affected by anti-discrimination and human rights legislation or the role of law reform in remedying injustices inflicted on poorer groups in the community. It is much rarer – and much more difficult – for a public agency or research body to attempt to fit the various parts of the access to justice jigsaw together.[45]

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42 R M Cass and R Sackville, *Legal Needs of the Poor* (AGPS, 1975).

43 The Access to Justice and Legal Needs research program is designed to

> "*provide a rigorous and sustained assessment of the legal needs of the community, especially disadvantaged people, and their ability to access justice":*

A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of New South Wales, 2008), iii.

44 Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (June 2004), para 3.23, Recommendation 11.

45 The 2009 report of the Access to Justice Taskforce of the Attorney-General's Department (note 35 above) makes an attempt to do something of this kind, although the report is limited to the federal court justice system and in any event does not purport to be comprehensive.

Policy makers in Australia need guidance on how each component of the jigsaw fits with the others. They also need empirical information that enables them to assess the effect of new programs over time. Better co-ordination of pro bono programs is a good theory, but how can they be better co-ordinated with legal aid schemes to achieve mutually agreed and attainable outcomes? If the substantive law is amended, for example to provide additional remedies for unconscionable conduct or unlawful discrimination, to what extent are the remedies actually available to those intended to benefit? What has been the economic impact of measures designed to protect relatively uninformed borrowers or consumers on the provision of goods and services and on the courts and tribunals responsible for resolving disputes? Answers to these questions require the crossing of notional boundaries in a manner not often attempted in Australia.

There is no simple solution to the problem of fragmentation, certainly not without the injection of substantial resources. If the problem is to be effectively addressed, it will require the establishment and long-term funding of a research and policy institute devoted to the integrated study of the disparate elements of "*access to justice*" issues. Such a centre has the potential, in co-operation with the courts and the legal profession, to provide the continuity and co-ordination that is presently lacking. However, to fulfil that potential, the centre will need to take a multi-disciplinary approach and to have the capacity to undertake large scale research projects. Without a centre of this kind, preferably associated with a University, Tennyson's description of the common law as a "*wilderness of single instances*" [46] will continue to apply to policy-making on "*access to justice*" issues.

Australia has had too many ad hoc, repetitive and ineffectual inquiries into access to justice. There have been too few rigorous empirical studies evaluating programs and charting their progress over time. Too few studies have attempted to cross boundaries and derive lessons from studies or experiments on service delivery conducted largely in isolation from each other. Too many good ideas have been lost for want of an informed and independent institutional advocate.

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[46] Alfred Tennyson, *Aylmer's Field* (1793).

Now would be a good time to take to heart some of the lessons of the last three and a half decades.