ACCESS TO JUSTICE

Access to Justice is a favourite topic of lawyers and politicians. We draw such pleasure and pride from its aspirational sound. When a disgruntled member of the public flings Jack Cade's imprecation – "the first thing we do, let's kill all the lawyers" – we reach for that comforting phrase as we reach for garlic to ward off vampires or fridge magnets for terrorists. And when the danger passes, we settle back into our comfortable ways.

When politicians face elections, they do the same thing, for much the same reasons.

Access to justice is commonly treated as a single, compound idea. It is useful to remember that it has several components, all indispensable. They include: access to lawyers, access to courts, litigation processes which produce justice, and – let us not forget – laws which are just.

I am convinced that a growing number of lawyers are serious about access to justice, but there are practical limits to what lawyers can do about it.

One thing we can do, is to look honestly at the way things are and suggest improvements. This is not always a popular thing.

Let me advance a few modest proposals of my own. They are not as brutal as eating Irish babies, but no more popular than Jonathan Swift's modest proposal. Consider the photocopier – one of the most profitable integers in large litigation – productive of great complexity and expense. No document is too trivial to escape being copied over and over: a copy for every lawyer and for the court and for the witnesses. Lengthy agreements, whose relevant content does not go beyond a single clause, will be reproduced a dozen times, filling folders and crowding shelves and decimating forests; gathering dust and never read but charged out per page at a healthy margin. I propose a filing fee for court books set at (say) $5.00 per page. This exceeds the permissible charge out rate for photocopies. The filing fee would be recoverable on taxation only to the extent certified as proper by the trial Judge. This would very likely reduce the size of court books over night. With the increased revenue to the courts generated by the filing fees, courts could make available high speed high quality photocopiers which would be available quickly and conveniently so that documents could be copied efficiently during trial if the need arises.

Written submissions are now a common feature of the litigation landscape. The thousand page barrier was broken some time ago; the hundred page mark seems to be an

indication of sincerity. I propose that written submissions should, unless otherwise directed, be in Counsels' own handwriting. They will be shorter. Court staff could be provided who would type them up for the Judge, to avoid needless judicial suffering. Vice-Chancellor Bacon once said:

> "This case bristles with simplicity. The facts are admitted to me: the law is plain; and yet it has taken seven days to try – one day longer than God Almighty required to make the world."[1]

How things have changed: what is touching about that heartfelt plea from the Vice-Chancellor is that a seven day trial was regarded with such despair. Keeping cases down to seven days now seems like a noble objective!

The two simple steps I have suggested have the potential to reduce the length and complexity of litigation by simply hosing out the excesses which are the product of careless use of technology.

But these things aside, and not withstanding the Woolf report, lawyers alone cannot do a great deal. If access to justice is to become a reality, it is essential that Governments get serious about it.

Governments of all political persuasions are inclined to say comforting things about access to justice, but their actions do not match their rhetoric. Most practitioners, I suspect, will recognize the symptoms:

- Courts are under-resourced
- Legal aid is grossly under-funded
- Pro bono work is encouraged, but only equivocally
- As litigants, Governments too often betray the standards of the model litigant
- As legislators, Governments are apt to pass laws which are calculated to produce injustice.

<u>Legal Aid</u>

Inadequate funding of legal aid represents political cynicism at its worst. By providing legal aid, the misleading appearance is created that Governments are serious about access

[1] See Megarry: Miscellany-at-Law p.244.

to justice. The reality is that legal aid is only available to the very poor and those with inadequate means to defend themselves against serious criminal charges. For those of modest means, a brush with litigation is little short of catastrophic. In cases worth $50,000 or less, a client may be better advised to cut their losses and abandon unassailable rights. That such advice can be responsibly given in any case at all is an indictment of the legal aid system. I once did some calculations to see what the world would look like if I was involved as a litigant in a case of the sort that required someone like me as Counsel. I decided that I could not afford it! This means either that something has gone profoundly wrong in the way the system works, or else that I'm redundant to my own life.

The reality is that only the very rich and the very poor can afford litigation. The middle ground ought to be addressed by legal aid.

Pro bono

Pro bono work has become a de facto substitute for legal aid. Pro bono lawyers step in, in cases of obvious injustice where legal aid is unavailable. Governments occasionally murmur comforting words about the contribution of pro bono lawyers, and well they might because pro bono lawyers help compensate for the inadequacies of Government funding of legal aid.

The profession is much more generous in providing pro bono work than the public or for that matter Governments, are aware. It is a pity then that Governments are not entirely unambiguous about pro bono work. In recent years, a significant number of lawyers have done huge amounts of unpaid work for asylum seekers trying to vindicate their rights in a hostile legal and political environment. Without that contribution, the courts would have had a much greater number of unrepresented litigants, mostly with an inadequate grasp of English, crowding their lists and forcing Judges to try and find whether the papers disclose any reviewable error. The Government introduced legislation specifically targeted at refugee cases which enabled the courts to make adverse costs orders against lawyers for running cases which had insufficient prospects of success. Putting to one side the fact that the test for such orders is inscrutable, it is difficult to see why it is necessary to make special provision for one class of case where many lawyers act for no fee when the courts have always had the power to make adverse costs orders in appropriate circumstances. The net result is to produce a chilling effect on the willingness of people to undertake unpaid work for fear that they will end up not only unpaid but also out of pocket.

Several years ago I was contacted by a junior employee solicitor from the Sydney office of a national firm. The firm does a significant amount of Government work, as do many of the major law firms in this country. The solicitor wanted to interview me for a Law

Society journal article about Spare Lawyers for Refugees – a group of pro bono lawyers which I organized some years ago to help carry the load of refugee cases. The article was not about my views or about Government policy: it was about the way in which a group of lawyers from across the country co-operated to provide free help for the defenceless. When the article was ultimately published, the author's name was not disclosed. He sent me a copy of the journal which contained the article and a covering note which explained that a partner in the firm had suggested it was not advisable for his name (and the firm's name) to be associated with an article that mentioned me. After all, as he pointed out, the firm does a lot of Government work.

Litigants

Governments have formulated a model litigant policy. Counsel who receive briefs from Government agencies will generally find a copy of the model litigant policy enclosed in the brief. Speaking for myself, I think the model litigant policy is extremely important and should be strictly observed at all times, not least for the reason that Governments are always better resourced than private litigants. When there is such disparity between the forces of attack and defence, it is essential that Government exercise some restraint. It is disappointing to see that the model litigant policy sometimes takes a backseat in litigation where the Government's political interests are at stake. I have only my own experience and anecdotal evidence on this subject. Perhaps my experience has been abnormal. I was recently involved in a stolen generation case. Briefly stated, the facts were that the Plaintiff at the age of 13 months fell ill with gastroenteritis. His family lived about an hour's drive from Adelaide. They didn't have a car. Some people in a nearby town drove the infant to the Adelaide Children's Hospital where he was admitted. His gastro cleared up within a week. A week later the Aborigines Department gave him away to a white family who had responded to an advertisement in the newspaper offering aboriginal babies for fostering. There were no formalities associated with this: they came to the hospital pointed out the child they wanted and took him home. They thought he was a girl until they changed his nappy. When the child's mother wrote in and asked how he was doing and when he was coming home, they wrote back saying that he was doing quite well but that the doctors considered he was not yet well enough to come home. For the next seven years they prevented the mother from finding out where he was. All of this occurred after the Department had received advice from the Crown Solicitor that the Department did not have legal power to take children from their parents. The first recorded sign that the child was suffering problems, was when at age three, he was admitted to hospital because he was tearing his own hair out. By the age of eight he was on tranquillizers and antidepressants. He had a catastrophic childhood and adolescence. His life has been a series of disasters. The State fought the case on every conceivable point. No point was small enough to escape their attention. Confronted with the Crown Solicitor's opinion that they did not have legal power to take children from their parents, the State argued that it had not taken him from his parents: it had taken him from the hospital. They ran very strongly the proposition that taking a child from his or her parents causes no psychological harm of any sort. In advancing that proposition, they contradicted 60 years of psychiatric literature. During the trial, we sought to tender a

document which noted that during the 1950s and 60s hundreds of Aboriginal children were taken from their parents in South Australia, and that this had profoundly damaging consequences for the parents and for the children. It listed the forms of psychiatric harm suffered by children removed from their parents: the list could have been a checklist of my client's proven injuries. The State objected to the document being received in evidence on the grounds that it was irrelevant and this notwithstanding that it was a publication commissioned and published by South Australia itself.

The case has not yet been decided, and I say nothing about the likely result. Furthermore, I make no criticism of the way Counsel for the State conducted the hearing. What is regrettable is that the State – any State – should adopt such a bellicose stance which in my estimation doubled the length and difficulty of the trial.

Similarly, anyone who has studied the tactics adopted by the Commonwealth Government in the earlier Stolen Generation case of Cabillo and Gunner would have difficulty reconciling that stance with the model litigant policy.

Let me give another, more recent, example. Most people will remember the case of Scott Parkin, the American tourist who was arrested and jailed in September 2005 and was later removed from Australia. He was arrested because his visa had been cancelled. His visa was cancelled because ASIO informed the Department of Immigration that it had produced an adverse security assessment of him. He was jailed for five days and was flown back to America in the company of two officers of the Department. On arriving in America, he received a bill for his five days in detention and the airfares of all concerned. The Government refuses to let him see what is in the adverse security assessment. So long as the position remains uncorrected, he will be unlikely to get a visa to travel to any country.

At the same time, two Iraqis remain stranded on Nauru pursuant to the Pacific Solution. They have both been assessed by Australia as refugees. They have been refused visas because the Department of Immigration has been informed by ASIO that it has made adverse security assessments in relation to them. So long as the impasse remains, they are stuck on Nauru with virtually no hope of getting a visa to any country in the world because the Department can say that they have been adversely assessed but is not able to say why. The Government refuses to tell the men or their lawyers the basis on which the adverse assessments were made.

Both cases involve profound interference with the basic liberties of individuals. Judicial review proceedings were brought and we sought discovery. The Commonwealth Government chose to resist an order for discovery on the grounds that – since the applicants did not know why they had been adversely assessed, an application for discovery was mere fishing. This Kafkaesque argument involves the Government

asserting the right to destroy basic liberties and remain unaccountable. The question remains unresolved and I do not wish to pre-empt the outcome. The fact remains that the Government had a choice to give discovery and regulate disclosure by reference to demonstrated public interest considerations. It chose instead to adopt the line which it did which, in my opinion, is not compatible with the conduct of a model litigant.

Legislators

If the law is unjust, then access to law is not access to justice. In recent years, the Australian parliament has seen fit to pass laws which practically guarantee injustice.

I believe indefinite mandatory detention is wrong. The essential feature of Australia's system of mandatory detention is that we take innocent human beings and we lock them up and treat them harshly. This, according to government rhetoric, is done to deter other people from following in their footsteps.

Infliction of harm on innocent human beings to influence the conduct of others is morally wrong. It is not improved by branding the victims as 'illegals', when in fact they have committed no offence at all.

Next, consider the case of Mr Al-Kateb, a stateless Palestinian, a person who has no country he can go to. He arrived in Australia a few years ago, sought asylum, was refused refugee status and then remained in detention. Why? Section 196 of the Act says that an 'unlawful non-citizen' who is detained must remain in detention until (a) they are given a visa or (b) they are removed from Australia. There was a problem removing him from Australia, because there is nowhere to remove him to. The government argued that, if necessary, they could keep him in detention for the rest of his life. Or until the state of Palestine is brought into existence. By a majority of 4 to 3, the High Court accepted the government's argument. It is legally possible and constitutionally valid to detain an innocent person for life.

Less visible, the laws which govern judicial review of decisions in refugee cases are so restrictive as to produce demonstrably unjust results in many cases: a fact which provoked Justice Hill to say that when he took his oath of office he swore to do 'Justice according to Law', but that in refugee cases he could do one or other but not both.

The recent laws permitting control orders and preventative detention also present serious challenges. Both are directed at the worthwhile aim of minimising the risk of a terrorist attack. But both involve the making of secret orders on secret evidence. Until we eliminate the capacity for human error, this is a recipe for serious abuses of human rights, including the wrongful gaoling of innocent people. The hard-won principles of the justice system should not be sacrificed lightly. They are the principles which emerged as we freed ourselves from tyranny; they should not be thrown away in the fight *against* tyranny. It is not obvious that thos e laws will improve the quality of Justice.

Similarly, ASIO has been given power to hold people incommunicado for up to a week at a time, and require them to answer questions on pain of 5 years' gaol. They face 2 years gaol if they disclose that they have been held and interrogated by ASIO. This law applies

to people who are *not* suspected of any offence. A law which allows undoubtedly innocent people can be legally 'disappeared' for a week at a time is not an ornament of Justice.

Access to justice requires all of us to think clearly about the laws we are helping administer. We can no longer afford the luxurious assumption that we do justice by applying the law.

The Indian writer and activist, Arundhati Roy, once wrote: "A thing, once seen, cannot be unseen; and when you have seen a great moral crime, to remain silent is as much a political act as to speak against it." A moral crime is all the worse when it is sanctioned by law. We can never forget that the worst excesses of the Nazi regime were carried out under colour of the Nuremberg laws. Those laws were constitutionally valid laws administered by conscientious judges and practitioners, most of whom were doubtless attracted to study Law because they had an instinct for Justice. In their pursuit of Law, they failed Justice terribly.

The practice of law offers many rewards. At its best, it plays a profoundly important role in achieving real justice. But there comes a time when to uphold the law is to betray Justice. Any society which legitimises the mistreatment of a defenceless group poses a great challenge for lawyers. We face a stark choice: we can lend ourselves to the enforcement of immoral laws, or help to resist them and perhaps change them. As lawyers, we cannot urge others to break the law, but we can speak out against those laws; we can help ameliorate their operation, and we can seek to invalidate them.

If Justice is the lawyer's vocation, we must not ignore its call when Justice is most threatened. If we, who understand the law, cannot recognise a bad law for what it is, then who can? If we do not take a stand, access to Law will be meaningless and access to Justice impossible.