CIVIL JUSTICE COUNCIL

Law Council of Australia and Australian Legal Assistance

Forum

National Access to Justice and Pro Bono Conference

The Agenda for Civil Justice Reform – The English Experience

- Evolution of an Improved Justice System,

or Disguising a Curate's Egg?

I am most grateful to the Law Council of Australia and to John Corker for providing me with an opportunity to speak to you today. I am also grateful to Baker and Mackenzie for making this possible.

I see from the agenda that my slot is entitled “The Agenda for Civil Justice Reform - The English Experience”. That perhaps sounds a little staid, and so I have decided to add the subtitle:

Evolution of an improved justice system, or disguising a Curate’s Egg?

I have done so as I consider that the term “Curate’s Egg” sums up quite succinctly my personal view of the English civil justice system. Before I came here I asked John Corker, whether the phrase had any meaning in Australia, and he told me no. So this then provides me with the opportunity to tell you about it. At the end of my thirty or so minutes, you can be the judge as to whether it is apt.

The origin of this delightful phrase is not particularly highbrow. It comes from the humorous British magazine *Punch,* and a cartoon drawn by George du Maurier in 1895. The cartoon shows a timid curate having breakfast in his bishop's home. The bishop is saying "I'm afraid you've got a bad egg, Mr Jones", to which the curate replies, trying not to give offence to his senior, and his employer:

"Oh, no, my Lord, I assure you that parts of it are excellent!".

This cartoon led in turn to the phrase "good in parts"., which is in more common use.

This morning, I hope to provide you with an English perspective on a number of the issues you will be covering in much more depth in sessions either today or tomorrow. In particular I intend to focus on; a brief overview of English access to justice reforms, a personal view of what has gone well, what has gone less well, and a taster of the latest developments on the other side of the world. I will look at whether reforms to state funding, and the development of private funding alternatives have promoted access to justice in England.

I will provide a flavour of the compensation culture debate in England, and consider whether we are on the precipice of tort reform. [And] I will mention the latest developments in meeting unmet legal need through pro bono.

After that, I am more than happy to take any questions that you may have.

I would like to start by providing a short overview of where we are today, following the implementation of Lord Woolf's Access to Justice reviews in the late 1990's.

Lord Woolf identified five main problems with the civil justice system. It took **too long**; It **cost** too much; It suffered undue **complexity**; It provided too much **uncertainty** over the amount of time and money it took to bring a case; and it was **unfairly** weighted in favour of the financially stronger party who was able to exploit the system to win.

The pace of litigation was almost entirely in the hands of the parties and there was little incentive for them to act with either efficiency or speed. This created delays in many cases, and meant that cases could take years to resolve

Complexity in the rules and procedures made it very difficult for the lay person, and even some lawyers, to navigate the system, and this was frustrating. Unduly difficult rules gave way to excessive technical argument, and in some cases the use of aggressive adversarial behaviour. None of this was healthy or in the interests of justice.

A combination of delay and complexity contributed to the fourth weakness, and that was uncertainty. Legal representatives found it difficult to provide their best advice on how likely a case was to succeed, how long it would take to be concluded. This uncertainty deterred some people who had potentially good cases from coming to court to resolve their dispute.

Uncertainty lead to unfairness. Parties with greater stamina and money had an advantage, and sometimes they were able to simply exhaust the other party into giving up.

All these weaknesses contributed to the final weakness, which was excessive cost.

I doubt that any of these “Woolf evils” come as a surprise to you here in Australia, and I am sure they reflect to some degree the “evils” in your own systems, as they seem to do in all our sister common law and commonwealth jurisdictions.

Following Lord Woolf’s Access to Justice Reports, a radical new set of procedural rules were put in place in 1999. These introduced for the first time an over-arching test of proportionality, to be applied on a case by case basis, and at every advancing stage in the proceedings.

This replaced the strict adherence to procedure that was such a strong feature of the English legal system for arguably its entire history, and abandoned the exclusive principles of a **merits based approach** to how the courts exercised their procedural powers.

The first Civil Procedure Rule set out the ethos to this new procedural philosophy.

It provided an "overriding objective" that should be considered in the conduct of all litigation. [And} I quote directly from the Rule:

> Dealing with a case justly includes, so far as is practicable -
>
> (a) ensuring that the parties are on an **equal footing**;
>
> (b) **saving** expense;
>
> (c) dealing with the case in ways which are **proportionate**
>
> (i) to the amount of **money** involved;
>
> (ii) to the **importance** of the case;
>
> (iii) to the **complexity** of the issues; and
>
> (iv) to the **financial position** of each party;
>
> (d) ensuring that it [and by that it means the case] is dealt with **expeditiously** and fairly; and

(e) allotting to it an appropriate **share of the court's resources**, while taking into account the need to allot resources to other cases.

The main procedural changes

Let us turn briefly to look at the main procedural reforms.

Pre Action Protocols

Pre-action protocols were developed to:

- Encourage the **exchange** of early and full information about the prospective legal claim,
- Enable parties to **avoid litigation** by agreeing a settlement of the claim before the commencement of proceedings,
- Support the **efficient management of proceedings** where litigation cannot be avoided

Parties are encouraged to come together before bringing a case to court to consider whether court action is appropriate, or whether the mutual disclosure of the issues of the dispute mean that an agreement or settlement can be achieved.

Offers of Settlement

Both parties to an action may make formal offers of settlement. These offers may be made either before or after issuing proceedings. The courts regulatory role comes into play in its ability to impose costs sanctions if a party makes an unrealistic offer.

Alternative Dispute Resolution

As I mentioned, the protocols encourage parties to consider non-court ways of resolving their disputes. Unlike in some Australian states, **mediation is not mandatory**, but courts are able to "**encourage firmly**" and penalise in costs parties who have unreasonably refused to mediate.

Judicial Case Management

Where litigation cannot be avoided, Lord Woolf's solution was to wrest the control of that litigation from the hands of the lawyers, who had limited incentives to act with efficiency and speed and none at all to save legal costs, and place it in the hands of the court.

Judges would take charge of the progress of litigation. They would allocate cases to different tracks depending upon their complexity. Discovery would be restricted. So would expert evidence, with a joint expert being used wherever possible. Interlocutory infighting would be discouraged and cost sanctions applied to lawyers who did not obey the courts powers. The principles of judicial case management were in the main learned from Australia, in this Lord Woolf was very much influenced by Justice Martin Moynihan, the Senior Administrative Judge of the Supreme Court of Queensland.

Standard Disclosure

The new rules introduce standard disclosure. This requires a party to disclose not only the documents on which he will rely, but also the documents that **adversely affect his own case** or the other party's case, or that support the other party's case.

A party is required to make a **reasonable search** for the documents that are requested to be disclosed, and then they disclose them by **declaring** that the documents **exist or have existed**. The other party then has the right to **inspect** the documents unless they are no longer in the disclosing party's possession. The party has a right in law **not to disclose** them, or to claim that disclosure would be **disproportionate** to the issues of the case. Here you see the overriding objective surfacing again.

Assignment to Case Tracks

Three tracks were introduced for dealing with cases of different complexity and value. The different approaches ensure that the

court procedures are proportionate to the issues at stake.

The **small claims track** is justice at its most simple. Citizens, who often represent themselves, may bring claims quickly to an arbitration style hearing, where a District Judge hears their case without the necessity for some of the more formal protocols of court. Hearsay evidence is sometimes accepted, expert witnesses strongly discouraged, other witnesses limited usually to no more than one. The District Judge makes effectively a “common sense” adjudication to resolve the dispute. Costs are strictly limited, if awarded at all.

The **Fast-track** is the level where active case management commences. There is a clear standard timetable for preparation, limited procedures, and fixed trial costs. There is standard disclosure limited to what the court thinks is proportionate, and the presumption of a single joint agreed expert. Hearsay is increasingly creeping into evidence, as the Civil Evidence Act now permits the serving of a notice to permit hearsay in agreed circumstances.

The **Multi-track** is for the more expensive and complex cases, many of which were formerly heard in the High Court. There is no rigid timetable from start to disposal, but the procedural judge provides directions specific to that case, and sets a reasonable timetable for preparation, disclosure, and opportunities to settle.

Expert Evidence

Lord Woolf proposed that there be a **single joint expert** where possible and that the duty of the expert be to the court. He wrote:

> *"As a general principle, single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions"*

Single joint experts are the norm for fast track cases, and the claimant is required to serve on the defendant a list of three, from which he may select one. Experts in the multi-track are controlled strictly by applying the over-riding objective. The court

determines how many experts there will be for each case or issue.

Costs

The new Civil Procedure Rules introduced a “pay as you go” approach to the accumulation of costs.

In interlocutory hearings a judge is expected to make a summary assessment of costs after the application, payable in 14 days. A detailed assessment of costs takes place at the end of the trial.

As an encouragement to settle litigation pre issue, a provision was introduced to allow parties to settle liability and quantum, but to issue a claim to dispute costs only. The intention was to avoid cases not being compromised for the sake of arguing how much each lawyer was to be paid.

That in a nutshell - or maybe more appropriately to the tile of my speech, an eggshell - is civil procedure in England and Wales,

Now I would like to highlight a few key findings from the various pieces of research conducted into the civil Procedure Reforms, to test whether they have been a success.

The Effects of Woolf

[Firstly] Volume of Litigation

Perhaps the most tangible impact of the Woolf reforms was on the volume of litigation being set down and tried in the courts. Litigation in the High Court has reduced by about by around **80%**, and litigation in the county courts by over **20%**. With the re-alignment of work between the High Court and county courts, brought about by the new tracks, the overall decrease in general litigation has been between 25 and 30%.

Research has shown us that over **85% of all cases are now settled** at the protocol stage without the case even being issued at court. Of the **15%** where claims are **issued** only about **3%** make it to **trial**. “Door of the court” settlements are still there, but are decreasing.

From the courts perspective, judges have been able to cope with the increased burdens of case management, without a significant increase in their numbers, due in the main to this substantial drop in cases.

Some early robust decisions from the Court of Appeal, supporting procedural judges decisions have meant that very few case management decisions are appealed, and co-operation in areas such as disclosure and experts has significantly reduced the interlocutory in-fighting associated with the pre Woolf system. In particular, the “hired gun” expert appears to have ridden out of town.

Pre Action Protocols.

The Pre Action Protocols have been **very effective in promoting settlement**, although they have **increased the costs of litigation** through "front-ending" the process. Recent research has suggested that the costs of fast track personal injury cases have increased by around 25%.

The practitioner's view is that the protocols have promoted much better informed settlements, and more of them, but at a price.

A fundamental review of protocols has just commenced, which will attempt to bring the development of protocols under one body (CJC), develop best practice from those already developed, and consider what can be done to ameliorate the "front-loading" problem.

In my view there is likely to be a two tier protocol developed, reducing the burden and attendant costs of the fully fledged protocol to a level where co-operative behaviour is still maintained, but the demands are less burdensome.

Offers to Settle (Part 36)

Both party offers to settle have resulted in the number of cases settling before trial increasing by 20% and a number settling at the door of the court diminishing by 10%. They are working well, and the Government has recently issued a consultation paper seeking to refine the process further. In particular,

whether payments into court are really necessary, where the party is “good for the money”.

Expert Evidence

The experts duty to the court, and the presumption of a single joint expert in fast track cases have been successful in terms of proportionality, cost, and driving out the "hired gun" expert.

Statistics show joint expert witnesses are being used in 41% of cases involving any expert witness. Parties appear generally happy to accept the report of a joint expert in the smaller cases.

The court appears to have good control over the number of experts in larger cases, and determines how many experts will be instructed, and on what issues.

On a slightly less positive note, there is some anecdotal evidence that where a lot of money is involved solicitors on each side are likely to appoint their own expert to shadow the joint expert appointed by order of the court.

Judicial Case Management

Judicial case management has been a success, and lawyers are comfortable with it. It has resulted in the saving of time in litigation. Statistics show that the average length of time for a case to come on for trial has reduced from around **600** to some **370** days. For larger claims in the High Court the reduction is from about **1250** to **680** days. These figures are from issue of claim to trial.

As I mentioned earlier, some very early robust decisions of the Court of Appeal (mainly by Lord Woolf) have meant that judge's administrative decisions are infrequently challenged.

ADR

The promotion of mediation has certainly helped to take away cases from the courts. Mediation and Early Neutral Evaluation are particularly effective in resolving commercial disputes (as they are in Australia, and for similar reasons), and court-annexed mediation schemes are beginning to be established.

The advancement of ADR, though, by mandatory referral has been inhibited by a judgment of the Court of Appeal [**Halsey**] which states that mediation cannot be made mandatory. It also states that cost sanctions cannot be sought for refusal unless that refusal was unreasonable.

Quite understandably, this has had the effect of stopping any further advancement of ADR in mainstream litigation. Leading up to Halsey, success rates for mediation, outside the commercial sphere had not been outstanding, in some areas dropping below the 50% mark. In injury litigation it is barely used.

There are also many judges who are not convinced that ADR is a good thing. They perceive it as less adequate than legal remedy, and potentially stifling to the development of the Common Law. ADR has strong Government backing, and they are encouraging court-annexed schemes. These are generally good, but suffer from regional variations in scope and finesse.

For the future, I predict that ADR will continue to wax and wane in popularity. Community ADR schemes are starting to develop

addressing hitherto unmet need in socially excluded communities. Links are gradually being formed between the provision of advice services, public education, pro bono, and ADR.

So in the main, the basic civil procedure is working. There is however one major area where access to justice is suffering a considerable impairment. In terms of the theme of my speech

This is where the curate's eggshell starts to crack!

The fundamental impairment to access to justice in England is funding.

In many ways funding has had a greater effect on access to justice than any of the Woolf reforms. In all fairness to Lord Woolf, funding reforms were not featured in his recommendations they were borne of Government policy, in particular the removal of legal aid for most injury cases.

English litigation has always been based on lawyers being paid by hourly rate, and has always been expensive and unpredictable.

Professor Adrian Zuckerman, an eminent academic,
and critic of civil justice in England has called this “the English Disease”. He says:

“The cost of litigation in England has been persistently high and unpredictable and has rightly deserved the label “the English disease”. Costs can be out of all proportion to the value of the subject matter in dispute….A further symptom of the “English Disease” is an excessive preoccupation with costs which would deserve only modest attention in a well-balanced system.”

Our own Lord Chief Justice has repeatedly described this as “the Achilles heal of our civil justice system.

There is a session tomorrow, called “The high price of litigation”, so I would suggest that the control of legal costs is also a key access to justice issue here in Australia too. I will be speaking at that session, and will go into considerably more detail on funding issues there.

I will however spend just a little time today talking about the effect funding reform has had on access to justice in England.

I believe it is a realism that modern day access to justice depends on the dextrous balancing of public funding, private funding, and where neither is readily available and there is need, lawyers simply giving their time for free.

I will intend to look at each of these three areas individually, and I will start with the one that I confess is on the edge of my expertise.

Public Funding and Legal Aid

In the 1960s 80% of households qualified for civil legal aid.

Because of the ever growing, and largely uncontrolled demands of legal aid for crime, which in England is effectively available to any person facing a criminal charge, regardless of means. [And] In the face of exponential growth areas of political societal concern such as family law and immigration, the civil budget has eroded over the years. Today, legal aid is only available only for those with a disposable income of less than £632 (A$1500) per month. This should be compared to an average national salary of somewhere in the region of over A$4,000 per month.

Recent years have seen a huge rise in demand for public funding. Over 40 new criminal offences have been brought in by the current Government, and policies to protect vulnerable families and in particular children have created considerable extra demand. “very high cost cases”, such as Serious fraud, serial child abuse, and multi party drug liability cases, have also taken a disproportionate share.

In the relatively short period of time between 1997 and 2004, the overall size of the legal aid budget has risen from A$3.5bn to A$5bn. This has been estimated by Government to cost the taxpayer an estimated A$230 per person per year each. That makes it the highest in the world.

Unlike Australia, England has no “top up” legal assistance schemes, or supplemental legal aid schemes to cover the ever growing shortfall. These are however now being development, and I intend to speak more about these in tomorrow’s session.

Legal Aid has been reviewed many times in recent years, attempting to address the ever increasing burden on the state.

Recent reforms have moved away from paying ex post facto hourly rates to lawyers, toward what are called “tailored rates” or “graduated rates” for the more complex cases.

Three weeks ago, a Government Review headed by Lord Carter of Coles has taken a considerable step closer to controlling, and by that I mean reducing, the legal aid budget.

Not surprisingly its main focus was on criminal legal aid, and area where Carter estimates that his recommendations could save 20% by 2010.

The basic proposals on crime are aimed at introducing what Lord Carter terms “a procurement driven restructuring” of legal aid. By this he means fixed prices for work done, reducing the number of firms that undertake criminal work, increasing the are likely to be in the longer term set against each other in competitive tendering for criminal contracts. The theory is that market forces will ensure that only the most efficient - and for that you may read cheaper - firms will continue in the market, and these will grow in size to take advantage of economies of scale to make better profits.

There may also be some sub-contracting permitted from these super firms to smaller outfits. The report does maintain that the client will still have choice of advocate, although it does use the term "**managed choice**".

In some ways this mirrors what has happened naturally in the civil justice field, since the removal of legal aid for personal injury cases at the end of the 20th century. In this area of law, there have emerged large "litigation factories" in the cheaper regional areas, delivering bulk nationwide legal services through de-skilling, greater reliance on IT, working for fixed fees, as well as "no win, no fee" arrangements with their paymasters in the insurance industry, and most recently competitive tendering for bulk business, and paying referral fees to secure a large workload.

Lord Carter has left the civil side pretty much alone for now.

Reforms of a few years ago introduced what was called the Community Legal Service. It placed emphasis on greater specialism by lawyers providing services that were more geared to the legal needs of their respective communities.

The demand for specialisation in bidding for legal aid contracts, together with more burdensome contract and audit requirements rather inevitably lead to a number of High Street generalist practitioners ceasing to undertake legal aid work.

The Community Legal Service was reviewed last year by a Parliamentary Select Committee after calls from consumer groups that it had created "advice deserts". They claimed that there were areas of the country where communities had no access at all to certain types of legal services.

Steps have been taken to address this issue, and recently Community Legal Service Direct was launched, a free legal helpline which operates a legal triage type approach.

Carter promotes the further development on the Community Legal Service Networks and Centres. The former is intended to be a group of law firms with different specialisms, doing publicly funded work, and operating individually as local clearing houses and referral agencies for the work they are unable to do.

The latter is an attempt to bring these people under one roof, together with other advice services, often funded by local authorities or other Government Departments.

Although perhaps generous to Australian eyes, civil legal aid is pretty much now reserved now to citizen versus state disputes, with the bulk being immigration and housing. Against a decrease of around 45% in the overall non-family civil legal aid budget in the past en years, for example immigration has demonstrated an increase of greater than 600% due mainly to asylum cases.

Early views on the Carter Review have inevitably been mixed.

The Civil Justice Council opened the debate on the implications for civil work a few weeks ago. The debate expressed concern that the move to reducing the number of criminal contracts could have a serious effect on family and civil work. 60% of criminal legal aid firms also do family work, and over 40% do civil. A reduction in the number of criminal firms, will inevitably lead to a reduction in the number of civil firms, and it is argued that the advice deserts debated by the Parliamentary Select Committee may only grow.

These concerns were mirrored by the senior judiciary who recently wrote in connection to proposals for new procurement standards -

"This seems to be a bit of a non-sequitur, so far as civil legal aid is concerned. The present, severely restricted, scope of civil legal aid has just survived a rigorous [LSC] consultation process, and the [LSC's] new strategies [and the DCA's new strategies] are already focused on controlling expenditure in areas identified as potential weaknesses.

The judiciary would be anxious if any further upheaval meant that those who are entitled to civil legal aid did not receive appropriately skilled assistance from suppliers close to their homes because of the vagaries of competitive market-based tendering in which quality of provision (and accessibility to such provision) was not rated very highly. In recent years a number of high quality providers have abandoned legal aid work, to the overall detriment of justice."

The proposals for fixed and graduated fees also, and perhaps inevitably attract comment from lawyers.

A friend of mine who is a mental health lawyer provided me with an example of the pressures faced by lawyers. She told me that under the graduated fee scheme, she would receive a fixed initial A$200 fee for the first stage of a mental health act case. For this sum she would be expected to visit the client, advise the client on their legal options, review the clients papers, take instructions, and hold a care planning meeting…and she would have to pay her travel costs as well.

From my perspective a drive toward fixed or predictable fee charging, and market competitive procurement was the only real option available to Government. Hourly rates are becoming slowly an anathema in the less complex areas of the civil law, and the creation of internal legal markets have proved reasonably successful in the short term.

The control of criminal legal aid may ultimately bring benefits to civil provision, especially if a legal assistance scheme is implemented successfully, and is able to make a profit.

On Carter's civil proposals, I suggest the devil is in the detail, and if lawyers are able to change their business practices to accommodate fixed rates, and if those rates are sufficient to allow them to make money, then access to justice will continue to be served.

Although England is not yet quite in the position of Australia with regard to civil legal aid funding, we have certainly been moving that way.

In 1999 legal aid was withdrawn from a number of categories of civil work and, in particular, claims for personal injuries. To fill the gap, Parliament has made lawful certain practices that were previously forbidden.

[I now turn to]

Private Funding

Abolishing legal aid for personal injury gave Government a

considerable dilemma.

The two fundamental questions were:

- How do you transfer the funding away from the state, without removing the incentives on lawyers to take cases of reasonable risk? And

- If an individual is entitled to damages, on the basis of restitution. How do you ensure that they receive all of their damages, rather than lose a proportion of them to their lawyers in the event of unrecoverable costs?

The answers the Government found were;

- Introduce a form of contingency fee that passes the risk of litigation to the lawyer, but

- Preserve the English Rule that costs follow the event, and make that contingency fee recoverable from the losing party, and

- Protect the individual from any risk in the litigation by allowing him or her to insure themselves against losing, and then pass on the cost of that insurance to the losing side.

This is a rather English derivative of the contingency fee, and it is called a conditional fee.

I need not go into too much of the principles, as contingency fees operate here. I will however spend a little time talking about the principle of insuring yourself against the costs of losing a claim.

Under a conditional fee agreement the claimant faces a risk of being ordered to pay the defendant's legal costs if the claim fails.

To combat this risk, the insurance industry have developed a special product for claimants who are about to start litigation. This is called 'after the event insurance'. It sounds like a contradiction in terms. Typically, but not always, a solicitor is given authority by the underwriter to issue cover whenever he enters into a conditional fee agreement. This means that the cover will only be issued if the solicitor is fairly confident that the claim is likely to succeed.

What is interesting is that the premium for after the event insurance cover can be recovered from the defendant as an item of costs if the claim succeeds, and in 90% of cases it does.

Thus the unsuccessful defendant has to pay;

- The winner's costs

- A success fee of up to 100%, and

- The claimant's after the event insurance premium

These three features have created virtually risk free litigation for the claimant – you don't pay if you wine, you don't pay if you lose.

The prospect of risk free litigation did not go unnoticed for very long.

Unregulated intermediaries, known to us as Claims Managers, who were unfettered by the heavy regulation of lawyers, in particular in relation to advertising their services, started procuring

potential claimants.

They hung around shopping centres and approaching anyone limping, bandaged, or showing signs of an injury. They advertised heavily on cable television for people who may have been mis-sold mortgages or pensions, or had a dispute with their landlords, or felt that they had been discriminated against through under disability legislation. Some have been said to offer cash sums for claims, some even television sets as incentives.

Once procured, the claim is sold on to a law firm for a not inconsiderable referral fee, and the lawyer runs the case under a conditional fee agreement.

Conditional fee agreements passed on the cost of litigation from the state to the tortfeasor's insurer. Government figures have assessed the net saving to the legal aid budget at less than A$90m a year. The insurance industry in its latest report on legal services, has assessed the cost of injury litigation at A$10**bn** a year, with legal costs contributing 40% of that figure (about A$4 billion).

This has lead to the insurance industry lobbying that there was a highly unhealthy compensation culture emerging, that would lead England down the road into a perceived US style litigation system, where people were claiming thousands for spurious claims.

The Compensation Culture and Tort Reform

Calls for tort reform in England came initially from the media. There were numerous stories of school playgrounds being closed for fear of accident. Trees being cut down for fear of someone climbing them and having an accident.

The Government took notice, and commissioned a body called the Better Regulation Task Force, and off shoot of the Cabinet Office to conduct an investigation. The Task Force duly reported that the compensation culture was a myth, and in fact claims were decreasing. But this did not turn the tide.

A Select Committee of Parliament was then convened to debate the issue. In the background the calls for tort reform grew louder,

and an number of influential bodies, my own included, published reports on how the tort system should be radically changed, to stop the claimed excesses. The debate still rages, and nine ministers, from six separate Government ministries are working together to find the solution. Such co-operation may well reflect the fact that even the Prime Minister has a personal interest in the matter.

The situation is now ripe for a classic British compromise, and currently lawyers and insurers, are working very hard with Government in developing what is called a “lower transactional cost scheme”, which is an attempt to remove all the duplicated administrative tasks that are currently being done by both insurers and lawyers, and looks for ways to stop lawyers and insurers picking arguments with each other on issues of liability, contributory negligence, and damages.

For example, there are discussions concerning the possible introduction of a public tariff of damages for the hundreds of thousands of straightforward claims.

This is not **full blown tort reform**, although I anticipate this

scheme that will encompass the vast majority of tort litigation.

The other main contributor to the calls for tort reform have most certainly been the claims management companies. In some sense, the practices of some of these have brought the compensation system into such disrepute, that Government are finally bringing in legislating to regulate their activities.

The other main concern about developing a US style compensation culture relates to the fear of US style class actions. I am aware that this is an area equally exercising the Australian public and courts.

Class actions are an emotive subject. We all shares concerns over the bringing of ridiculous torts for the ultimate benefit of the lawyers, and we all look at the US with suspicion in this area. But in terms of access to justice, it may be the case that many of our citizens in particular are subject to illegal cartel and price fixing activities, with no clear line of redress.

Certainly in England, actions for mass consumer redress, are

virtually non existent. Legal aid simply will not fund them, and there are no incentives for lawyers to bring cases. In the past year alone, there have been around 250 antitrust findings in the European courts, and I believe that not one has resulted in successful consumer litigation in England.

I would contend that as much as injuries, and service and contract disputes affect individuals detrimentally, so too does the effects of anti competitive behaviour.

The European Union seems to agree, and in December of last year, they produced a Green Paper aimed at stimulating private enforcement in mass consumer redress cases. Rather controversially that paper suggested that double damages, in similar vein to US punitive damages, might be the answer.

I believe England is on the verge of opening its gates to mass consumer redress in this area, and indeed my body, the Civil Justice Council, have recommended to Government that this is a fruitful area to pilot contingency fees, third party funding, and a Contingency Legal Aid Fund, similar to your legal assistance funds. Who knows, if successful this might be the answer to the

seemingly insurmountable problems we are facing with conditional fees?

The final part of my speech relates to the vitally important third sector as it is becoming known in England - pro bono.

Access to Justice and Unmet legal need

Every country has unmet legal need - it is a fact. No matter how encompassing and accessible private or state funding mechanisms are, there is always a gap.

Government research has estimated that unmet legal need in England exceeds a million people, and growing.

This may be for a number of reasons;

- a lack of education on how to address the problems individuals face

- that funding mechanisms do not allow enough people through the lawyers door

- that lawyers are growing ever more risk averse in the cases they take; and

- that some groups of people simply choose not to become involved in the establishment, whether through cultural choice or historical fear of state mechanisms

It is also a recognised fact, that when already disadvantaged individuals have an emerging justiciable problem, they are likely to experience subsequently a cluster of them, if they don't address the initial cause quickly.

In as recent report on unmet legal need, prepared for the Legal Services Commission, Professor Pascoe Pleasance, one of our countries two leading experts in this field, has for the first time been able to get Government economists to estimate how much this costs the state. That figure is a staggering A$30bn per year.

Whilst better public legal education programmes are being developed, to help vulnerable or disadvantaged individuals recognise when they have a legal problem, and learn where to go

to obtain good advice, there remains a safety net in the legal system, which is lawyers helping people with their problems for free.

Our respective legal systems share a long history of this kind of help, but in recent years this kind of help, a basic part of why people become lawyers, has emerged with a name. We all know that name, it is **pro bono**.

Pro bono has reached a stage of development in England whereby its public promotion by large city firms, and the increase in both supply and demand in free legal services, has meant that to be successful and sustainable for the long term, pro bono needs to be co-ordinated on a more professional, and less charitable footing.

To continue to grow pro bono and to take on that vast quantity of unmet legal need, there will inevitably, and maybe for some unpalatably, need to be an injection of commercial reality.

This is my way of leading into my final topic for this morning. Something I can claim to be **a uniquely British invention**. That is

the Pro Bono Conditional Fee Agreement.

The Pro Bono CFA

The Law Society Regulations now provide that where a solicitor represents a client on a pro bono basis, they may enter into a Conditional Fee Agreements with that client.

The case may be conducted on a “no win, no fee“ basis, whereby if the case fails, the pro bono client will not be liable for his solicitor’s fees. Where the case succeeds costs may be recoverable from the other party under the established costs shifting rule (the “English Rule”). The solicitor is permitted to recover disbursements from the recovery, where that is prescribed in the pro bono CFA, or may act completely free of charge, and cover any costs outlaid himself.

The pro bono CFA does not however provide protection from liability for paying the other sides costs should the case be lost. Conventional commercial CFA’s rely on the claimant being

protected from incurring costs if they lose, by taking out “after the event” or “legal expenses” insurance, or relying on existing “before the event” or “legal liability” insurance.

To date, the insurance market has not yet developed a pro bono legal expenses policy to protect claimants who are represented pro bono, but that is not to say that it is not thinking about it.

[So] **Where does the money go?**

Under the Law Society Regulations any costs that may be recovered by the solicitor, whether they be net or gross of disbursements, may be paid over by them to a charity, (as defined in the Charities Act 1993).

Interestingly, there is no requirement that the recipient charity be involved in the provision of legal services, advice, or legal education.

The Foundation

In parallel to the development of the pro bono CFA, the Attorney-General's Pro Bono Committee is looking into possible ways of distributing the money recovered from pro bono CFA's.

Steps are being taken to develop a charitable foundation, effectively a legal trust that will receive all the monies recovered under pro bono CFA's, and distribute them through a national network to advice and pro bono legal service providers.

This is the brainchild of Michael Napier, the Attorney-General's Pro Bono Envoy, and although starting small, it is hoped that the foundation will have the architecture to ultimately expand into a significant funding provider for pro bono, advice, and public legal education services. The very recently appointed Civil Justice Commissioner for Victoria, Peter Cashman has provided some expansive thought in this area, and it is not beyond the bounds of possibility, that this foundation will receive not only pro bono recoveries, but also interest on lawyers accounts (not yet permissible in England), lawyers unclaimed trust monies, and even recoveries from any future legal assistance fund or contingency legal aid fund - possibly structured on a contingency basis.

But this is for the near future.

For the now, I would just wish to say thank you. Our legal systems are inextricably intertwined.

We share the same fundamental problems, and enjoy the most effective civil justice systems in the world. Australian and English judges, academics and lawyers share a regular dialogue and we learn from this jurisdiction, as much as we are able to teach it.

I am happy to take your questions now.