Notre Dame University

Eminent Speakers' Series

Inaugural Lecture

Access to Justice

by

The Honourable Wayne Martin AC
Chief Justice of Western Australia

Fremantle Campus
Wednesday, 26 February 2014

I would like to commence by acknowledging the traditional owners of the land on which we meet, the Wadjuk people who form part of the great Nyungar clan of south-western Australia, and to pay my respects to their Elders past and present. As many of you will be aware, this particular area of land is of special importance to the Wadjuk people because it is the point at which the river known to them as Derbyl Yerrigan, and which we call the Swan River, enters the sea. It was a particularly important place for the Wadjuk in terms of ceremonial gatherings and meeting points. It is important that we acknowledge their continuing custodianship of the land and I am pleased to do so.

The topic which I have been called upon to address is access to justice. It is appropriate for me to commence by explaining to you what I mean by that topic and by segregating it into two components which reflect the two discrete groups to whom access is important. The first group is those who are users of the justice system. For that group, access means the capacity to effectively utilise the legal system. The second group, no less important, is the public. What I mean by access for the public is the capacity of members of the public to obtain the information which they need to evaluate the performance of the legal system which operates for them and on their behalf. I will differentiate between those two groups and deal with the principles of access which apply to each of them separately.

Court User Access

Starting with what I called "users of the justice system", again I would like to split consideration of access into the two primary areas in which the legal profession operates: litigation and transactional work. I am a litigator, of course, and have always been a litigator and I will

not tonight be addressing the question of users' access to that part of the legal profession which provides assistance to those engaged in transactions or the provision of advice independent of the litigation process. Tonight my remarks are concerned only with users' access to court.

In relation to court access, it is desirable to split the functions performed by the courts into the two main areas, civil jurisdiction and criminal jurisdiction, because the issues of access are quite different in those two areas. Many who are engaged in the criminal jurisdiction of the courts might wish they had less access to the courts – victims of crime and offenders both.

It is also clear that the problems of access to justice are greatest in the civil side of the court's work and they are profound and significant. It is I think the pretention of every generation to assume that the problems it confronts are novel and that that generation is confronting them for the first time. So it is with access to justice. We tend to think that this is a new problem with which we are confronted and that legal costs have all of a sudden got out of hand and placed the courts beyond people's reach. Lest anyone think that, I refer to the seminal paper presented by the Dean of Harvard Law School, Roscoe Pound, in 1906, more than 100 years ago, entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*. The opening sentence of Dean Pound's treatise was that "Dissatisfaction with the administration of justice is as old as law itself". So these are not novel problems and we are by no means the first generation to confront them.

In contemporary terms, the major issues of access to justice are the triumvirate of evil – cost, delay and complexity. They are the three main barriers to access. Of course, there is nothing new about that. They were precisely the three barriers which Roscoe Pound identified in 1906 – cost, delay and complexity. I will address each of them in turn.

In addition I want to make reference to particular groups within our community who have special problems of access to our justice system. They are the cultural and linguistically diverse who are a significant portion of our community, and also the disadvantaged. By disadvantaged I include all aspects of social and economic disadvantage, including physical and mental disability, and those disadvantaged by the tyranny of geography.

Civil Jurisdiction

Cost

It has often been observed that the Australian civil justice system is generally available to those who are very poor or very rich. If you are very poor, you have some chance of obtaining legal aid and accessing the system by that means.[1] If you are very rich, you can afford your own legal representation. That has resulted in a large group in the middle, neither very poor nor very rich, being described as the sandwich class; that is, the group in the middle which cannot access the system. I do not think that analogy is quite accurate unless you

[1] But not much. For example, in 2012-13 there were just 405 civil and 3,139 family law applications for legal representation granted by Legal Aid WA for the whole of Western Australia, compared to 5,391 criminal law grants law grants. In addition, of those represented by Legal Aid WA duty lawyers in 2011-12, just 3.8 per cent were represented in civil cases (Legal Aid Western Australia, *Annual Report 2012-13* pp 12, 13, 24).

call it "the club sandwich class" because the group in the middle is a very large proportion of the community. The sad reality is that the cost of civil justice puts it out of the reach of the overwhelming majority of ordinary Australians.

When I was appointed to the court in 2006 I used a Rolls Royce as an analogy for our justice system.[2] I observed then that we have a terrific justice system, the best that money can buy, a lot of money. It is a bit like owning a Rolls Royce; you can be proud to own it; you can polish it; you can leave it in the garage and you can take people around to see it and you can sit in it, but unless you can afford to put fuel in it, it will not perform its basic function of taking you where you want to go. I think a lot of people see our justice system rather like that, and I think it is an apt analogy.

The legal profession – do the facts match the image?

A lot of preliminary work was done in analysing the gaps in legal services in Australia by the Centre of Innovative Justice at RMIT University in Melbourne. It published a report in October 2013 which I would like to draw upon quite significantly and it is a publication which I would commend to you all if you are interested in this area.[3] The report started by looking at the structure of the legal profession and I think wisely so, because many apprehend that the cost of justice is the consequence of outrageously high prices charged by mega firms in opulent offices with marble foyers, panoramic views from here to Africa or New Zealand if you are on the other side of the country,

[2] In my address 'Bridging the Gap' to the National Access to Justice and Pro Bono Conference (12 August 2006).
[3] Centre for Innovative Justice, *Affordable Justice – a pragmatic path to greater flexibility and access in the private legal services market* (October 2013).

white-coated baristas offering quality coffee to all the clients, or the product of the high-flying commercial barrister receiving $10,000 per day for a day in court. The authors of the RMIT report analysed how closely those images correspond to reality. They found that of the lawyers working today in Australia, those employed in large firms or who were partners in large firms represent 20% of the private profession; those working in partnerships with two to four partners, another 20%; sole practitioners 37%; barristers 5% and of the barristers, Senior Counsel are about 20% of the bar or 1% of the legal profession. So the reality is a long way from the public impression. The reality is that more than half of the lawyers working in Australia today operate in practices the size of which suggests that they are aiming at providing services for that "club sandwich class" or what I might call middle Australia. The reality is that the cost of their services still places them out of reach to a lot of people within that class.

The other reality is that a majority of lawyers are not actually making vast sums of money. I do not suggest that lawyers are on the breadline, but I do not think they are making the sort of incomes that are commonly reported in the financial press attributed to the partners in major corporate national and multinational firms or commercial senior barristers. The reality is different to the public image.

Areas of Unmet Legal Need

What are the main areas of unmet legal need in the civil area? The authors of the RMIT and other reports have identified a number of

areas including some areas in which needs are partially being met.[4] A main area of unmet legal need is in relation to family law. There is limited legal aid available through the federal funding of legal aid in that area, but the majority of people participating in family law disputes do not get access to legal aid.

Employment law is another large of unmet legal need. Some have the assistance of their union and pro bono lawyers, but again that is a minority and a very significant number of employees engage in disputes with legal implications without the benefit of assistance from lawyers.

Migration is another area of significant unmet legal need. There are pro bono groups working in the refugee area and who sometimes attracts a high public profile but the need for legal assistance in the migration area is by no means limited to asylum seekers and there are significant groups within our community who do not have legal assistance in negotiating the complex labyrinth that is contemporary migration law.

Personal injury is another area of significant unmet legal need - with some exceptions where there are statutory insurance schemes such as injuries arising from motor vehicle use and employment injuries. In those cases there will usually be lawyers who are prepared to offer services on a no win no fee basis because of the prospect of recovering substantial damage. However, in the other areas of personal injury, there are significant gaps in the provision of legal services.

[4] See also National Pro Bono Resource Centre, *Pro-bono legal services in family law and family violence: Understanding the limitations and opportunities* (October 2013); National Pro Bono Resource Centre, *National Law Firm Pro-Bono Survey* (January 2013); Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia* (August 2012).

Consumer rights is another area of significant unmet legal need. Although there are government agencies providing assistance, again their coverage is limited.

Welfare law can be another area of significant unmet legal need. The community law centres do their best to provide assistance in these areas but again there is a big gap between the services they can provide and demand.

Housing and tenancy is another significant area of unmet need. There are community law centres. The Street Law Centre in Perth also provides valuable assistance in this area but its resources are very limited.

You can see from those examples that they are areas of unmet legal need that impact upon the lives of a lot of ordinary Australians – what I might again call "the club sandwich class". The legal system for them is simply inaccessible because they do not have the resources to afford the legal representation needed to negotiate the complexities.

The drivers of legal cost

What then are the drivers of cost? Why are these costs so prohibitive? The first is the labour-intensive nature of the work. Practising law is very labour intensive and human resources in Australia are expensive. The second is the adversarial nature of the process which we inherited from our colonial forebears. That results in a lot of duplication of work. Any issue in a case is prepared by all the parties to the case. It is researched and prepared by all of them so that if there are three parties, there are three sets of lawyers doing the same work.

The adversarial process promotes a desperate clamour for forensic advantage. Lawyers will search for any topic or issue in which they can see the prospect of winning the case on behalf of their client. That focuses effort and energy and expenditure on topics that may not actually correspond to the real issue as between the parties.

Another driver of cost is the unpredictability of litigation. No-one quite knows where a case will turn and no-one knows how long it will take. It is very difficult to estimate the amount of legal time that will be required to bring that case to a conclusion, and therefore to estimate costs in advance.

Another significant source of cost is the fact that most lawyers charge by reference to input costs rather than the value of outcomes. That is a polite way of referring to time billing. People are charged by reference to the cost to the law firm of providing the service, not by reference to the value of the service to them. That is a significant driver of cost. It creates an economic incentive for lawyers to do more legal work and thereby generate more revenue. More lawyers tend to be involved than strictly necessary and they tend to do more work which takes longer. This process is exacerbated by setting fee targets by which employee and partner performance is measured. That in turn contributes to a significant level of lawyer burn-out within the profession. The attrition rate within our profession is high, and exit interviews suggest that economic pressures are a significant contributor to that rate of attrition.

Another driver of cost is duplication of work arising from the structure of the profession. If you have a solicitor and a barrister, sometimes they will both be doing the same thing. In Western Australia we avoid

that to a significant extent by what we call a fused profession, but in other States and in some areas of work where two lawyers are involved, they can be duplicating the work. Duplication also occurs where there are teams of lawyers engaged, each doing the same work, and also through the process of file churning. Every time a file moves from one lawyer in an office to another lawyer in the office, that lawyer has to familiarise himself/herself with the file and if, as I suspect many do, they charge the time spent in doing so to the client, the client ends up paying for the way in which the firm chooses to conduct its business.

Market regulation is another contributor to cost because it reduces competition and market entry. That in turn tends to drive price levels up.

Another contributor to increasing cost is what the economists call "information asymmetry" as between the consumer of a service and the provider of the service.[5] That occurs when the person acquiring the service does not have the level of information, knowledge and experience that they need to adequately negotiate with the provider of the service as to its real cost. If you are going to buy a fridge, you can go to the various retailers and look at the fridge, compare the cost of that fridge in one store as compared to another store and compare the features of one model of fridge with those of another model or brand. It is very hard for consumers of legal services undertake such a process of evaluation because they do not know what the legal services are like; they do not know the quality of the services; and they do not know the size of the job that they want done. That places

[5] See the Hon JJ Spigelman AC, 'Are Lawyers Lemons? Completion Principles and Professional Regulation' (The 2002 Lawyer's Lecture, St James Ethic Centre, 22 October 2002).

them at a very significant negotiating disadvantage when trying to agree upon price.

Other contributors to cost include high overhead costs for legal practices. Wages are significant expenses for law offices and, of course, the ubiquitous information technology can be an expensive resource. Rent is a significant expense, even if you are not in a marble-foyered glamorous office. All these things contribute to significant levels of costs without necessarily resulting in high levels of income for practising lawyers.

How do we address these problems? There are a few things I think we can do, in particular utilising contemporary technology. The first is to provide information to prospective clients to enable them to identify the nature of the issue. Very often people do not actually understand what their problem is, or, indeed, whether they have a legal problem at all. There is a ready capacity to use the internet to provide information in a user-friendly way which will enable people to better assess exactly what their problem is.

The next thing people need is advice in respect of the means that they can use to resolve their problem – whether they need to go to court; whether they can utilise alternative dispute resolution mechanisms such as mediation – in order to get their dispute resolved; whether there is a government agency that will assist them; whether there is a pre-court service or other process that they can utilise; or an industry ombudsman that they can access in order to ventilate their problem. It is easy to see how that sort of information could be provided in a user-friendly way on the internet. Of course, there are some government agencies and a number of community legal centres which

provide a good first point of reference for those people who want to know the nature of their problem and how they might resolve it, but more information could be disseminated more widely using the internet.

The next thing someone with a legal problem might need is early advice on the merits of their position. I do not mean detailed legal advice, but early advice on the merits. One way that can be provided is with a fee-capped serviced, so that for a relatively modest fee early advice can be given on just how strong their case is – not definitive advice, but a general indication as to whether their case is worth pursuing, provided at a fee that is affordable. The client can then assess whether they will take the matter any further. This could supplement the already valuable services being offered by the Citizens Advice Bureau with its 20 minute/$35 appointments.

Another way in which the problem of cost might be addressed is by moving away from what I call input costing, and moving towards outcome value costing, so that the price charged reflects the value of the service to the consumer. There are different fee structures within that system that can and are being utilised. No win, no fee is one structure that I have already mentioned. A fixed fee for service is another structure that is becoming increasingly popular.

Another way we can address these problems is by providing better consumer information to reduce the problem of information asymmetry to which I referred. TripAdvisor is a website we are all familiar with. You can see what other people say about a hotel or restaurant you might be considering. Why do we not have the same for law firms? Why do we not enable people to swap information?

Defamation is certainly an issue that would have to be addressed, but if there is a reasonable basis for the view expressed, should not be an insurmountable hurdle. TripAdvisor seem to have got around defamation in relation to restaurants and hotels. We need better information about the nature of the services provided by law firms – the nature of their charging and what people's experience of the firm has been. I think it is not beyond our wit and ingenuity to think of better ways of making such information more readily available.

Another mechanism that has recently emerged involves enabling the lawyers to come to the client. There are online systems out there, one of which is a website called Rocket Legal. What happens is that you post your problem on the internet and then lawyers respond to your posting and offer to provide you with a service in response to your problem, and you can then evaluate the responses. That is another way of using contemporary means of communication to improve the negotiating process between clients and their lawyers.

Another way of reducing cost would be greater utilisation of ADR, that is, alternative dispute resolution. The vast majority of cases in Western Australia in the civil area are resolved without a trial. In the Supreme Court of Western Australia more than 97% of the cases lodged are resolved without trial, often as a result of court-based mediation. We could reduce costs and increase access to justice by making ADR, specifically mediation, more readily available. At the moment you cannot get a court-based mediation unless you go to court. You have to issue a writ and start suing someone. Of course, that immediately places you in the adversarial process making allegations about the other parties, preparing for a battle, when

actually you may want to arrive at a consensus. The adversarial process is fundamentally opposed to arriving at a consensus. One of the things we need to look at is whether we should be providing State-resourced mediation services independent of the court system at a modest fee. Such services could result in very substantial savings within the court system.

Reducing overheads for law firms is another fertile area for cost reduction. Again I refer to the potential provided by the internet. Legal advice is a service that can often be provided through a virtual practice. There are other countries in the world in which there are significant legal practices that operate virtually. All the information required can be provided by internet communication and the advice provided in the same way. That reduces the cost of rent significantly and enables people to work at home, for which they might take a wage reduction.

E-filing is another way of significantly reducing costs of service. If firms or self-represented litigants can lodge documents with the court from their computers without having to send people down to court, costs are reduced. This also helps overcome the tyranny of distance, which is very significant in a State like Western Australia, where a significant number of residents live very large distances from the capital city. Of course systems that depend on computers will leave a significant group disadvantaged. We should not forget that there are still significant numbers of people in our community who are not regular users of computers and do not have access to computers. We should not forget them when we are looking at these systems.

Another suggestion which was made by Chief Justice John Doyle, former Chief Justice of South Australia, was that perhaps lawyers should start thinking about reducing their incomes. Good luck with that. In a two-horse race, back self-interest every time. Another difficulty with this suggestion is that it presumes that lawyers' incomes are the problem. For the reasons I have tried to identify earlier, in relation to a significant percentage of the legal profession, excessive incomes are not the prime cause of high legal costs.

There are other more innovative techniques that we might use to address these problems. There is one in the USA called the Justice Bridge. For those of you who are law students, I do not want you to take this badly, but this system emerged as a response to the large number of unemployed law graduates in the United States. It was realised that there was a well of talent there that could be utilised. The way this system works is that those unemployed law graduates were linked to mentors who were partners in law firms who would provide a supervisory service. The graduates then offer low fee services to people who would otherwise represent themselves in court. The proposition is that instead of someone representing themselves, they get the assistance of a relatively young, inexperienced law graduate supervised by the mentor. The reports seem to be positive. I have some concerns about this process and in particular the need to maintain appropriate standards of professional advice and assistance, but it is a model worth considering, building on the successes of similar models using law students adopted by various Western Australian universities including Notre Dame.

Other ways of addressing these problems include what has been termed "limited scope representation". This is a process whereby lawyers can provide assistance in relation to discrete tasks - for example, the preparation of a statement of claim, or the preparation of advice on evidence. This would enable a self-represented litigant to ascertain evidence they need to lead to give themselves a chance of winning the case without actually conducting the case themselves, or provide him or her with a statement of claim that provides a road map for the course to be followed by that litigant in pursuing their case. That is something the Queensland Public Interest Law Clearing House is promoting throughout Queensland and in other States. For a fee they will organise a lawyer to provide a limited service – providing advice with respect to a specific aspect of the case.

An obvious way of addressing the problem of excessive cost is by improving funding assistance for indigent litigants. However, the reality in contemporary Australia is that we can forget about significant increases in the resources available to any of the legal aid agencies. That is not likely to happen in the foreseeable future.

Private litigation funding provides another source of legal assistance; that is, the commercial operators which sponsor litigation for profit, but there is only a particular area of the market in which they are interested and they do not provide a significant solution for the big areas of unmet legal need. There are legal assistance schemes including one in Western Australia run by the Law Society but again its scope is limited as are its resources. There are also litigation insurance schemes that are very popular and quite effective in Europe and to an extent in the UK. In Europe these insurers operate in a legal

system in which legal costs are much more predictable than in the adversarial system which we have inherited. The reality is that there is limited scope for further financial assistance from these sources.

Another way of addressing this problem is by endeavouring to increase pro bono assistance provided by the legal profession. In the figures available for the period ended June 2012, 8000 lawyers around Australia provided 340,000 hours of pro bono service during that 12-month period.[6] If you apply a charge-out rate of, conservatively, $300 or $400 an hour to those hours, that is more than $100,000,000 worth of pro bono legal services.

One of the recurring problems with pro bono legal work has been the difficulty of matching the pro bono service provider to the client - most clients do not know how to find a pro bono service provider. We need referral schemes that match the service provided to the clients and hopefully identify the clients who are more in need of the pro bono service than those who are not.

Salvos Legal is such a referral service which operates more significantly in other States than in Western Australia, and has achieved success in connecting potential clients with pro bono service providers. Law Access in Western Australia undertakes the same service but it has limited resources and it is unrealistic to think that services of this kind will ever make a dramatic inroad in the gap of unmet legal need.

Another suggestion made by the RMIT report was to consider tax deductibility for legal fees. Of course, corporations or individuals

[6] Attorney-General's Department, 'Submission Productivity Commission Inquiry into Access to Justice Arrangements' (November 2013) p 41.

engaged in litigation as part of their business already can deduct legal fees from their taxable income. The proposition is that this could be extended to non-business expenses. I would be very surprised if this ever happened because the reality of it is that you would be calling upon the Commonwealth government to subsidise the provision of legal services through reduced tax revenue rather than through the legal aid system.

The problems of excessive cost is significant but there are some solutions and I think we can be more innovative about using the internet to address some of the problems that are identified.

The last one I would like to mention in relation to costs also relates to the question of delay and that concerns judicial case management. Increasingly over the last 20 years most courts in Australia, including most courts in Western Australia, have focused much more resources and attention upon the active management of cases by the judges of the court. For the purpose of reducing costs, one of the ways in which that is achieved is by identifying the issues in a case as early as possible and focusing on the real issues in a case so that money and time is not wasted on peripheral issues. That has the capacity to significantly reduce costs provided it does not become a cost magnifier itself by producing unnecessary appearances in the court.

Delay

Delay is the second of the evils to which I referred. Judicial case management is a significant step forward in relation to protracted delay and certainly in Western Australia we have seen significant

improvement in time to resolution as a result of the introduction of proactive judicial case management.

The other significant driver of earlier resolution is ADR, in particular court-based alternative dispute resolution, which at least in the Supreme Court we now provide as early as possible within the court process. The resolution rate is high.[7] ADR and case management themselves are making major inroads in delay, but that is not to say that the timeframe corresponds with the expectations of the litigants. I am sure for them, the time taken to resolve disputes is still too long.

Complexity

The third of the evils which I mentioned is complexity – the complexity of the law and the procedure utilised by the court. We can split that into two areas; one concerning substantive law and the other concerning procedural law.

In the area of substantive law the volume of statute law is now many, many times greater than it was when I was in the position of a new student studying law – I will not mention the year because it will embarrass me, but there is just so much more law written by parliaments. For some reason, parliaments seem to think that they should legislate for every conceivable contingency rather than legislating principles. That I think is a significant problem, and inevitably increases the complexity of the system. But again, it is a problem which can be addressed using contemporary technology. The written law is readily available to the public now, and if presented in a

[7] For example, internal Supreme Court data for the 12 months ending February 2014 show that 63% of finalised mediations were successful.

simplified form over the internet, it can be made more accessible to ordinary members of the community. Comprehensibility is the key.

Procedural law – that is, the law of procedure adopted by the courts needs to be simplified. We have made some progress in this area but there is more to be done. Forms can be significantly simplified. We do not need nearly as many forms as we have and they should be much simpler and expressed in plain English. At the moment in the Supreme Court we have different forms of originating process. We have motions, summonses, writs and applications. We could simplify all that into one form of initiating process and make that process more readily available online for people to utilise for themselves.

Unfortunately, a project that was initiated almost eight years ago to simplify the procedure of the court through new rules and new legislation has effectively floundered because of lack of government interest over the last five or six years. This is most unfortunate, but we are doing as much as we can within the existing rules of court to try to simplify our processes and procedures.[8]

Special Disadvantage

I mentioned earlier particular groups within our community who have special access problems. The first group I would like to mention is those who have a culture or language which is diverse from mainstream culture or language. In Western Australia indigenous people represent between 3% and 4% of the general population. Those born overseas represent 33% of the population of Western

[8] See, for example, *Supreme Court Amendment Rules (No 3) 2013*.

Australia.[9] Interestingly, that is the highest percentage of people born overseas in Australia. There are quite wide variations. It compares, for example, to only 13% of those in Tasmania who were born overseas.

When migration to Australia, in particular Western Australia, was mainly from European countries, although there were language problems, there were no significant cultural problems because the legal systems in Australia are broadly similar to those with which European migrants were experienced. Now that we are recruiting from more diverse cultural backgrounds, particularly in Africa and Asia, there are significant cultural problems for a lot of people who now proudly and rightly regard themselves as an integral part of our Australian community.

There are many disadvantages for people who have come from different cultures or who have different languages. The first is in identifying the fact that they have a legal problem at all and then identifying the nature of that problem. Then there is the problem of access to legal information. Such people have a reduced prospect of knowing where to go to talk to someone about that problem, or to obtain information about their problem, or knowing where to go to get assistance in relation to it. They do not know the government agencies that are likely to be able to assist them; they do not know about legal aid; although they might stumble across a community legal centre if they are lucky. Then there is the problem of negotiating a very complex legal system in a different culture in a different language. I think it is difficult to overstate the significance of the

[9] Australian Bureau of Statistics, *3412.0 Migrations, Australia, 2011-12 and 2012-13* (18 December 2013).

disadvantages suffered by people from cultural or linguistically diverse communities when negotiating our legal system.

Indigenous people have particular needs and suffer particular disadvantages in relation to our legal system. The issues have been identified well in a project called the Indigenous Legal Needs Project which is analysing unmet legal needs for indigenous people around various Australian States starting with New South Wales, then the Northern Territory and most recently Victoria.[10] I think a survey is being finalised for Western Australia.

The report covering Victoria identified that the priority areas of unmet legal needs for Aboriginal people in that State were housing, credit and debit problems, discrimination, disputes with neighbours, child protection and Centrelink issues[11] – obviously issues of very significant importance to the people affected by them.

In a submission to the Productivity Commission Inquiry into Access to Legal Services,[12] the Aboriginal Legal Service of Western Australia identified a number of additional areas of unmet legal need in Western Australia for Aboriginal people in addition to those identified in the Victorian report. They include assistance with driving licences and in particular extraordinary driver's licences. The sad reality is that there are far too many Aboriginal people in prison in Western Australia for driving offences that are only unlicensed driving offences. Because they have been unable to get an extraordinary driver's licence, they

[10] The Indigenous Legal Needs Project website is at http://www.jcu.edu.au/ilnp/ (accessed 6 March 2014).
[11] Melanie Schwartz, Fiona Allison, Chris Cunneen, *The civil and family law needs of Indigenous people in Victoria* (26 November 2013).
[12] Aboriginal Legal Service of Western Australia, 'Submission to the Productivity Commission Inquiry into Access to Justice Arrangements' (November 2013).

have suffered a number of convictions for driving without a licence and have ultimately been imprisoned as a consequence.

Fine management is another area where there is limited assistance for Aboriginal people and which contributes to the growth of over-representation of Aboriginal people in our prisons. Again, there are far too many Aboriginal people in our prisons who are there simply because of fine defaults, not because of a substantive offence.[13]

Guardianship is another significant area for Aboriginal people. There are problems in relation to the possibility of the abuse of Elders, and in particular, financial abuse of Elders in Aboriginal communities[14] where there is a very limited amount of legal assistance available.

Negotiating the parole system has become an issue over the last few years as parole has become a lot harder to obtain and there is very limited legal assistance available in this area.

Aboriginal people are over-represented in the mental health system and receive limited legal assistance within that system.[15] There are significant areas of unmet legal need in employment law, consumer law, responding to applications for violence restraining orders, negotiating the coronial system and representation at coronial hearings. There is also a great difficulty for Aboriginal people obtaining access to legal services for wills.

---

[13] For example, of the 700 sentences served by adult females in WA in 2012-13, 31% were for unpaid fines only (Department of Corrective Services, Answers to Questions Taken on Notice (18 December 2013 p 15), Estimates and Financial Operations Committee 2012/13 Agency Annual Report Hearings, on 22 November 2013).

[14] See for example, 'Newslines Radio: Elder abuse – time to speak up' (23 July 2012), available at: http://www.indigenous.gov.au/newslines-radio-elder-abuse-time-to-speak-up/ (accessed 6 March 2014).

[15] The Honourable Wayne Martin AC, 'At the crossroads of criminal justice and mental illness: where to from here?' (Address to Rural and Remote Mental Health Conference 2013, 18 September 2013).

So the problems of access to justice for Aboriginal people in this State are multi-faceted. They are compounded by poor levels of education and literacy and made a lot worse by a high level of disengagement between Aboriginal people and the legal system

There is a large unmet need for interpreters in many remote parts of our State. In those areas English is not well spoken by a lot of Aboriginal people and interpreter services are almost non-existent. Aboriginal people are also over-represented in those who are disabled by geography from accessing legal services. I think it is still the case that there is no private lawyer between Geraldton and Broome, a very large area of our State.

With a view to addressing some of these problems for the cultural and linguistically diverse, the Council of Chief Justices has recently created a group called the Judicial Council on Cultural Diversity which will contain representatives of the judiciary from all jurisdictions and at all levels. I have been asked to chair that council. Its task will be to try to address some of those areas of disadvantage which are obviously of great significance.[16]

I do not overlook barriers to access created by geography and I do not overlook disability, especially mental disability and homelessness, but they are big issues in themselves and time does not permit me to address them in detail this evening.

[16] A submission has already been made on behalf of the Council to the Productivity Commission's Inquiry into Access to Justice Arrangements. It is available at: http://www.pc.gov.au/__data/assets/pdf_file/0018/130617/sub120-access-justice.pdf (accessed 6 March 2014).

Criminal Law

Cost

Moving now to access to justice in the criminal area. As I suggested earlier, many people within that jurisdiction probably think there is too much access and would prefer a little less involvement for them.

The over-representation of Aboriginal people within the criminal justice system of this State is, as I have said many times, the biggest single issue which confronts the judicial system of this State. Tragically, it is getting worse rather than better. The extent of over-representation is deteriorating significantly every year despite the efforts that we are taking to address it. There is also the significant over-representation of Aboriginal people, in particular women and children, as victims of crime. These issues are big problems for another day and I cannot really address those complex and multi-faceted problems meaningfully within the time allowed tonight.

In the criminal justice system, by access to justice, I mean the access to legal representation to enable people to utilise the system fairly and to achieve a just outcome. For defendants, we can distinguish between those cases in which a custodial outcome is a real possibility and those cases in which it is not. The reason we can do so is that in those cases in which a custodial outcome is not a real possibility there is virtually no prospect of legal assistance and very limited affordability of legal services. Many people confronting such a charge simply cannot afford legal representation and have to attend to the matter themselves.

The situation of those who are charged with an offence which could likely result in their imprisonment is a little better because of the provision of legal aid. If your means are such that you are eligible for legal aid, then very often it will be provided if you have a prospect of being imprisoned. If your means do not entitle you to legal aid, and the means test is very strict, then you are faced with either funding the cost of your own representation or representing yourself. The cost of funding your own representation can be prohibitive, and if you are in the superior courts you have no prospect of recovering that money even if acquitted. That poses a very real dilemma for many. The legal aid resources of this State are very stretched and, as I suggested earlier, there is no sign of relief in sight in terms of increased budget. In fact, all the indications are that the stretching is likely to get tighter.

There are also, of course, concerns about how accessible the criminal justice system is for the victims of crime. This raises a whole raft of other issues, and while there have been some improvements,[17] it too is an area that is unlikely to be fully addressed in the short term.

Delay

We have made some progress in relation to delays in the criminal area, again through utilising active case management by the courts. In the Supreme Court we have introduced a form of ADR to the criminal area called Voluntary Criminal Case Conferencing which is helping to resolve matters a little earlier.

There are two big problems in the criminal justice system in relation to delay. The first is the time taken to provide forensic evidence.

[17] For example, the establishment of the Indigenous Family Violence Prevention Legal Services nationally and, in WA, the establishment of a Commissioner for Victims of Crime.

Everyone has seen CSI. The so-called CSI effect can have a significant impact on delay in our courts because it takes a very long time for that evidence to be collated – not like the TV programme where the actor presses a button on a machine and up comes the photograph of the offender; it actually takes quite a lot longer than that. Gathering that material takes time, slowing the whole process down.

Another significant source of delay is prosecutorial disclosure. Very often cases are held up because of the difficulties which police and the DPP face in disclosing all the material which they have gathered to an accused person.

Those are the two main problems that we are confronting when trying to speed up criminal trials; another is limited judicial resources. Over the last 18 months our court has had one less judge than we had 10 years ago. It is very hard to maintain appropriate time standards with increasing jurisdiction and reduced resources.

Complexity

Complexity is a problem in the criminal law area as well. Jury directions are becoming increasingly complex and the risk of a retrial as a consequence of misdirection increases nearly every time the appellate courts provide further instruction to trial judges on how they should direct juries.

Another problem of complexity in the criminal area is the tandem system that has now emerged – two systems of criminal justice, Federal and State, running alongside each other; two different systems

of criminal law; two different systems of sentencing and perhaps, ultimately, even two different court systems.

Public Access to the Courts

So far I have spent time talking about what I call user access to the courts. I would like to now just make a few remarks about public access to the courts because that is very important as well.

The open justice principle is centuries old and is a fundamental pillar of the systems that courts utilise to ensure community confidence. People rightly do not trust things that are not done in public; things that are not transparent. This was recognised hundreds of years ago by our colonial forebears who adopted an open justice principle which is now very well entrenched within our system. Of course, those principles evolved long before the development of mass media, in a more leisurely time when people could actually attend and sit in court. Plainly, not everyone in a community as big as ours can be in the back of the court and see what is going on. We therefore need to use the means of access to information that people use today – that is, the modern media.

Another problem of more recent origin is the increased reliance by courts on written materials. Many of you who have sat in a court will realise that very often both in the civil and criminal jurisdiction there is a lot of reference to documents. If you do not have the document that people are talking about, you cannot understand what is going on. We have to get better about providing people with access to the materials that have been used in court so they can understand what is going on and so that the media, who are, after all, the conduit between

the court and the public, can understand what is going on and fairly report it to the people who they serve and who the courts serve.

For that reason in the Supreme Court, we are currently undertaking a review of the principles that govern third-party access or public access to documents on the court records and on court files. We want to look at ways in which we can increase the amount of documentation made available generally to the public. The outcomes of this review will be made available to all WA courts. We have to proceed cautiously because, for example, the *Defamation Act 2005* provides qualified privilege for anyone who provides a fair report of what is called a public document. A public document includes any Australian court document that is open for public inspection. We do not want, ourselves, to become an instrument for scandal by people filing documents at court and then using the fact that a document is filed at court to publish scandalous material under the benefit of qualified privilege. There are privacy concerns that we have to be careful about as well. However, despite these constraints, we believe we can increase the level of access to documents and are looking at ways of doing that.

Technology

The other way in which we can improve public access to our courts significantly is by using the contemporary means by which people gather information, which is using computer technology and multimedia. We have recently changed arrangements relating to the use of electronic devices in court to enable media to post reports in real time which hopefully will improve levels of access.

We regularly use audio visual systems within the court itself to communicate with other places and to enable witnesses to appear without having to come to court. We have increased the occasions upon which we allow electronic media into the courtroom. There have been TV programmes which some of you may have seen where the TV cameras have been allowed in to court in WA. It is perhaps not as common as I would like and as some would be aware, I have for some years now been pressing for the provision of the technical capacity to enable us to web-stream our cases on the internet. This is not a brave new world. There are courts in other countries that have been web-streaming their cases for decades and the High Court of Australia is now web-streaming argument. The Victorian Supreme Court has been web-streaming for some years now, so we are not talking about ground-breaking changes. There are potential advantages in diverse areas of court work. Admission ceremonies – very often we have people who are being admitted to practice who have family overseas unable to travel to Perth for what should be a great family occasion. We could put it up on the web and people in other parts of the world could participate in the ceremony virtually.

There are a number of cases which lend themselves to web-streaming. In Victoria, the litigation involving the bushfires in Victoria was web-streamed. That would obviously be of advantage to the many plaintiffs in those cases who are resident outside Melbourne and who do not want to travel to Melbourne to watch their case. The recent trial conducted in our Supreme Court involving the allegations concerning genetically modified crops attracted a great deal of attention all around the world. There would have been opportunities,

for example, to web-stream the opening addresses of counsel. There may have been issues in relation to web-streaming the evidence in that case having regard to the fact that there was an order for witnesses out of court, but those issues can be addressed if necessary by delaying the webcast. At least if we have got the technology, we can look at ways of improving access that way. In the GM case, what we have done is posted the transcript of the opening addresses on our website and once the evidence is complete, the transcript of the entire trial will be placed on the website for people to read.[18] Better still would have been a web-streaming facility to enable people to watch proceedings, not quite in real time because there would probably need to be a 10-minute delay for the unexpected, but in almost real time.

Of course, the main area of jurisdiction in which the public would be interested in looking at what we do is in the criminal area. That is the area in which there is the greatest difficulty in providing almost real time web-streaming because there are diverse interests which must be protected, including the possibility that a witness might be affected by seeing what the previous witness has said when an order for witnesses out of court has been made. There is the possibility of witnesses being intimidated by the risk that the evidence is being webcast at large. The identity of the jurors needs to be protected which is required by our juries' legislation and there is the need to protect the privacy of victims. There are lots of important considerations that we would have to look at very carefully before we could go down the road of web-streaming criminal trials. Of course, many of those problems are

[18] *Marsh v Baxter* (CIV 1561 of 2012) transcripts are available at: http://www.supremecourt.wa.gov.au/T/transcripts.aspx?uid=9348-5501-0341-3842 (accessed 6 March 2014).

reduced at the appellate level and there are a number of courts in different parts of the world where appeals are regularly webcast.

That is an area we would like to move into gradually and cautiously. Unfortunately, we currently lack the technical resources. The Attorney General previously decided that the modest funds required would not be made available but I have renewed my application and I am hopeful that at some point or another, the resources will be found to enable us to move down that road gradually and cautiously. Experience in other jurisdictions tells us this is not a question of whether, but when.

In conclusion, this brief review of the barriers to access to justice in contemporary Western Australia shows that they are diverse and multi-faceted. Many have proven to be intractable over time, and it would be naive in the extreme to suppose that the solutions are within our grasp. However, this is not to say that we should stop trying – access to justice is too important. We must utilise the means at our disposal, including information technology, to continue to reduce the magnitude of these barriers.