



*National Legal Aid
Best Practice Conference
Fremantle 2007*

Opening Address

The Hon Wayne Martin
Chief Justice of Western Australia

Tradewinds Hotel, East Fremantle
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I would like to commence by acknowledging the traditional owners of these lands, the Nyoongar people, and paying my respects to their Elders, past and present.

I would like to make particular mention of the Wagyl – a serpentine creature from the dream time which meandered over the coastal plain at the foot of the ranges which we now call the Darling Range, creating what we now call the Canning River and the Swan River over which we look this morning.

It's a great honour and a pleasure for me to open the 2007 National Legal Aid Best Practice Conference being held in Fremantle.

This is a very important conference, given that I expect the combined Legal Aid Commissions of Australia represent the biggest provider of legal services in Australia. Your Commissions employ 2500 full and part-time staff and provide legal assistance to over three-quarters of a million Australians each year. Obviously your achievement of best practice has the capacity to significantly affect the lives of many Australians. And the diversity of the services you provide, and the diversity of your clients is apparent from the broad-ranging programme which the organisers have assembled for this important conference.

The services provided by the Commissions represented at this conference represent the single-most significant initiative which has been taken to confront what is generally recognised as being the greatest problem confronting the Australian justice system, which is the problem of access to justice.

Access to Justice

The problems attending access to justice in Australia have become a recurrent theme of mine since my appointment to the Bench a little over a year ago. The current reality in Australia is that unless one is charged with a serious criminal offence, or is Aboriginal, (or both, as a depressingly large number of people are) or unless you are in business – and a big business at that, or have been seriously injured in circumstances which give rise to a good chance of a claim, or you come within the increasingly stringent guidelines for the provision of legal aid in family law matters, the vast majority of Australians simply cannot afford the legal representation which they need to make utilisation of our complex legal system a practical possibility.

Australians quite properly take pride on living in a country which is subject to the Rule of Law. However, if justice is not accessible to ordinary Australians, for them at least the Rule of Law becomes mythical – a remote ideal without practical content.

Equally, if access to justice is not equal – for example, if the system is biased towards the very rich, or perhaps even if biased towards the very poor, or for or against particular ethnic groups, then any such "justice system" is not worthy of that description.

Your Commissions provide excellent services within the regrettably limited areas in which you predominantly operate – namely, crime and family law. Although the Law Council of Australia has from time to time announced aspirations for the provision of greater legal aid in the area of civil litigation, it seems highly unlikely that those aspirations will ever

come to fruition. The practical reality is that the limitations upon the government funding available for the provision of legal aid are such that it is unlikely that your Commissions will be in a position to devote significant resources to the provision of legal aid in civil litigation in the foreseeable future, unless some dramatic changes occur. I will refer to a few possibilities for change a little later in this address.

The Criminal Justice System

However, I would like to deal firstly with the criminal justice system, as that is the system in which your Commissions predominantly operate, and is invariably the area of the work of the courts that attracts most public interest and attention. As I have already observed, persons charged with serious criminal offences in this country are very well represented through the agency of your Commissions, despite the shoestring budgets upon which you are required to operate. This admirable outcome is, I think, the consequence of the combination of the commitment to hard work and the high standards of performance achieved by your employed professional staff – often in less than optimal professional circumstances, and the willingness of the members of the private profession to undertake this important work for rates of remuneration that are significantly less than competitive market rates.

There are still things that the Courts can do to enable your dollars to stretch a little further. My professional background is mainly in the area of civil litigation, where significant improvements in efficiency have been realised over the last 10 or 20 years as a result of the application of modern case management techniques, which assist in the early identification of the real areas of dispute and the great advent of alternative dispute resolution techniques, particularly mediation.

For my part, I can see no reason why those techniques cannot be applied in the criminal justice system, or why they will not achieve the same efficiencies as have been achieved in the civil justice system. Obviously some modifications will be required to accommodate the different subject matter involved, but it seems to me that the fundamental principles are the same. In each case it is a question of identifying the matters truly in issue as soon as possible, and seeing whether there is common ground in relation to those issues so that either agreement can be reached as to the disposition of the case, or the case can be tried as quickly and as efficiently as possible, by addressing only those matters that are truly in dispute.

The Supreme Court of Western Australia has been utilising a form of mediation or case conferencing in its criminal jurisdiction for more than 6 months now. Although the number of cases that have been referred to this programme remains relatively small, experience is sufficient to enable us to conclude that the programme has been a success in achieving the objectives to which I have referred. We have been very fortunate to have secured the services of Mr Ron Cannon, a very experienced practitioner in the criminal area, who is respected by both prosecution and defence counsel. Appropriate cases are referred to him, but only with the consent of both parties. To date, there has been no difficulty in obtaining that consent. A conference with representatives of the parties is then convened for the purpose of addressing the issues that are truly in contest, and whether there is a prospect of a plea – perhaps to some different or lesser charge to that which has been laid. The occasion of the conference has provided the very real benefit that senior representatives of both parties are required to bring their attention to their briefs perhaps earlier

than they otherwise might have, and enables those representatives to confer, in a meaningful way, on the means by which a trial might be either averted or shortened.

The early success of the programme has been such that we have resolved to continue with it, and Mr Cannon is to be assisted by another highly respected and experienced practitioner. If we can continue to demonstrate the success of this programme, I am hopeful that the resources might be found to extend its operation into the District Court, where the potential savings and efficiencies are even greater.

I am sure there are other means in which the efficiency of the criminal justice system can be improved, so that your limited dollars can be stretched further, and greater assistance provided to your clients. In this State, as a result of recommendations made by the Law Reform Commission in 1999 at a time when I was its Chair, committal hearings have been abolished. Although views on the desirability of this course differ, my own strongly held view, supported by all the members of the judiciary to whom I have spoken on the subject, is to the effect that the sky has not fallen in on the justice system as a consequence of this move. On the contrary, cases are moving forward faster than they otherwise would have, and time is not being wasted in lengthy hearings which were, to a significant extent, largely unnecessary.

This has, however, had the consequence that some of our processes relating to pre-trial disclosure have been found to be less than adequate, with the result that we are at risk of late adjournments when it is discovered that the pre-trial disclosure has been less than satisfactory. This is an ongoing problem which we must continue to address.

A particular problem which bedevils the criminal justice system in Western Australia – quite probably to a greater extent than most other Australian jurisdictions, is the gross over-representation of Aboriginal people in the criminal justice system. This is a topic which has become another theme of mine since my appointment – not least because it is impossible to advance any meaningful assessment of the operation of the criminal justice system in this State without reference to the over-representation of Aboriginal people.

This is a complex topic worthy of a lengthy address in its own right. Some perspective of the size of the problem is provided by the observation that tonight, 42% of the prison population of this State will be Aboriginal people, as compared to 3% of the general population. And the problem is even worse in the juvenile area, where tonight, the population of each of our juvenile detention facilities will comprise more than 80% Aboriginal youths.

The Civil Justice System

I would like to now move to the civil justice system. This is the area in which lack of access to justice is most significant in contemporary Australia. The main difficulty is, of course, that the fees charged by lawyers are beyond the reach of ordinary Australians. In my opinion, the fundamental difficulty in this area is not that lawyers charge too much for the work that they do, but rather that lawyers do too much work in each individual case. Accordingly, it seems to me that the difficulties might be ameliorated, although admittedly never vanquished, by improving the efficiency of our civil justice system. Various steps aimed at improving

efficiency have been taken in all Australian jurisdictions over the last 20 years or so. I will mention just some of them this morning.

In order to set the context for those remarks, I would point out that in the Supreme Court of Western Australia, less than 4% of the civil matters commenced in our Court are resolved by a trial. That means that more than 96% of the civil matters commenced in our Court are resolved by some other means – sometimes a settlement, or sometimes, regrettably, the cases simply expire – perhaps due to the parties' lack of the resources necessary to continue them.

Notwithstanding the very small number of cases, in relative terms, that are resolved by an adversarial trial, almost all of our processes are focused upon preparation for an adversarial trial, and are themselves adversarial in nature. It seems to me that it is time to challenge the assumption of adversariality which underpins most of our processes.

The proposition which underpins our justice system was enunciated as long ago as 1822 by Lord Eldon in the following terms, namely:

"Truth is best assessed by powerful statements on both sides of the question."

However, the fairness and efficacy of the adversarial process as a means of determining the truth presumes that each party will have equal access to legal resources. But that is not a valid assumption in contemporary Australia. If the parties have unequal access to legal resources, the adversarial process can become an instrument of unfairness. Regrettably, that happens all too often in Australia today.

There is, I think, another fundamental difficulty with the adversarial process. The justice system is, after all, in the civil justice area, a system designed to resolve disputes. It seems odd indeed to adopt, in that context, an adversarial process which is inherently likely to exacerbate dispute and push the parties further and further apart.

And the adversarial system is economically inefficient. That is because it requires every party to the litigation to separately and independently prepare for a trial. So in a case in which there are two parties, each party invents the same wheel at great expense. In a case in which there are three or four parties, three or four wheels are created, with much of the work being done three or four times. This is obviously inefficient.

Even without challenging the fundamentally adversarial nature of our processes, there are ways in which efficiency can be improved. For example, production and exchange of documents in electronic form by reference to standard formats and which are electronically searchable, has the capacity to save each of the parties a lot of work in preparation for trial. So, the production of lists of discoverable documents in a standard format and in chronological order will enable document sorting and database assembly to be undertaken much more efficiently. The same approach can be taken to the preparation of witness statements, and their exchange. The Supreme Court of WA is currently developing a protocol covering this area which will shortly be issued to the profession for comment before implementation. There is also much fertile ground for increases in efficiency in the area of expert evidence, although again that is a topic which is worthy of a paper on its own.

Alternative Dispute Resolution

All Australian jurisdictions recognise that alternative dispute resolution is an essential part of any contemporary civil justice system. In Western Australia, the courts have provided mediation services for many years now, to great effect. Because of the reality to which I have already referred – namely, that most cases will be resolved other than by a trial, it is important that greater emphasis be given to alternative dispute resolution within the court process. ADR should be seen as at least as significant – if not more significant – than the processes leading to preparation for an adversarial trial. The assumption that mediation should only occur as the last step prior to an adversarial trial is one that must be challenged. We have abandoned that assumption in the Supreme Court of Western Australia and have found that many cases will resolve if mediated early. The advantages of early mediation include avoidance of the obstacle which the incurring of substantial legal costs often poses to a later settlement, and the effect which the adversarial processes can have in pushing parties further and further apart.

Interlocutory disputes prior to trial are inefficient and often consume quantities of time and money that are totally disproportionate to their contribution to a just resolution. In Western Australia we have unashamedly adopted a policy of active discouragement of those interlocutory disputes. Processes that have in the past been taken for granted, such as pleading, full discovery, and the consequent disputes about compliance with those obligations can no longer be taken for granted in Western Australia. Last year, we created the Commercial and Managed Cases List, which provides docket case management by a Judge or Master along the lines of that provided in the Federal Court. Although that list has been in operation for less than a year, the indications to date

are sufficiently promising to enable it to be declared to be a success, in terms of bringing matters to a resolution – either by mediation or trial – quicker and less expensively.

Litigation Funding

The final topic I would like to address before leaving you to your important endeavours is to draw your attention to the possibilities that have arisen as a result of the important decisions of the High Court last year in the cases relating to litigation funding – namely, *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 and *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42. This is not the occasion to undertake an academic review of the principles established by those decisions. It is sufficient for my purposes this morning to observe that as a result of those decisions, constraints that were previously thought to apply to third parties providing funding for litigation in return for a share in the proceeds of that litigation are no longer applicable.

At first sight, these are important and positive developments for access to justice. Those decisions provide greater opportunities for parties to litigation to obtain access to third-party funding to enable them to pursue a remedy in court. "How could that be bad?" I hear you ask. One possible way in which those decisions could have a detrimental effect is in the opportunities they provide for some lawyers to modify the ways in which they fund speculative cases. In Western Australia, and I suspect most other Australian States, most third-party litigation funding has historically been provided by lawyers acting for personal injury claimants agreeing to carry the costs of disbursements incurred in preparing claims, and their own fees until the claim has been resolved, on either the explicit or implicit basis that those fees and disbursements will only be recovered

if the claim is successful. The economic risk involved in the provision of such funding is usually covered by the adoption of generous fee scales applicable in the event of success (in practical terms a fee that is a multiple - perhaps two or three times the fees that would be charged to a self-funding litigant). Until now it has not been the general practice in Australia for lawyers providing funding in this way to take a share of the proceeds of the claim. That practice is, of course, common in America, in which the usual share taken by the lawyer is between 25% and 40% of the claim proceeds.

Viewed from the perspective of economic efficiency, the American practice is less economically efficient than the Australian practice which I have described. That is because under the American practice, the reward provided to the lawyer is not related to the economic risk borne, but rather to the magnitude of the claim made. Under current Australian practice, the return to the lawyer is proportional to the economic risk taken, in terms of the disbursements incurred and the legal fees at risk.

The decisions of the High Court to which I have referred provide an opportunity for much greater movement towards the American practice, by enabling the creation of captive third party corporate entities, under the control of lawyers or their associates, who can provide litigation funding in return for an assignment of a proportion of the proceeds of the claim. So, instead of the fee arrangements that I have described, it will be possible for lawyers to enter into arrangements with corporate entities with which they may be associated, under which that corporate entity will undertake to pay the lawyer's fees in return for an assignment of a share of the proceeds. This seems to me to be a step away from economic

inefficiency, and has the capacity to result in significantly higher fees ultimately being borne by successful claimants.

These fears might be answered by advancing the proposition that a competitive market will ensure that the returns to such litigation funders are not disproportionate to the risks involved. However, that has not been the experience in America, where despite vigorous competition, returns to lawyers acting under contingency fee arrangements are not uncommonly enormous.

It may well be that I am being unduly alarmist and pessimistic in expressing these fears, and I must confess that I have not seen any evidence to suggest that this is happening. On the other hand, experience suggests that some practitioners might take advantage of opportunities to increase the financial returns from their practice and of course there is nothing inherently improper or untoward about that.

Perhaps all that needs to be done is to monitor the situation to see if there is any need to regulate the relationships between litigation funders and legal practitioners in the protection of the public interest in affordable access to justice.

Conclusion

Finally, I would like to welcome you all to Western Australia, and to our famous port city of Fremantle. I hope you have a very enjoyable time during your stay. The programme which the organisers have compiled looks challenging, and I am sure you will all derive great benefit from the work that has been put into the organisation of this important conference.