



Annual Conference of the Financial Counsellors
Association of Western Australia¹

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Justice for All: is it possible?

by

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¹ I am indebted to Dr Jeannine Purdy for her considerable assistance in the preparation of this paper. However, responsibility for the opinions expressed, and any errors are mine.

Introduction

It is an honour and a privilege to have been invited to give the keynote address at the annual conference of the Financial Counsellors Association of Western Australia, not least because of the vitally important services provided by Financial Counsellors - a topic to which I will shortly return. I would like to particularly welcome to this conference in Perth those who have travelled from other parts of our very large State.

The Traditional Owners

Before doing so, however, I commence by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia, and I pay my respects to their Elders past and present, and express my appreciation for their continuing stewardship of these lands. Given the topics which I will be addressing, which can be loosely grouped around inequality and disadvantage, it is particularly appropriate to acknowledge the culture of generosity and sharing which has been an integral part of Noongar culture for centuries.²

The Role of Financial Counsellors

Your executive officer has advised me that there is a general lack of public awareness of the role actually performed by financial counsellors. That advice has been confirmed by my discussions with friends and family members in preparation for this paper. There is I think considerable confusion between the role played by financial counsellors, and the quite different role played by financial planners or advisers. While obviously many attending here today, being financial

² See for example Kaartdijin Noongar – Noongar Knowledge, 'Martha Borinelli talks about the Noongar culture of sharing' available at: www.noongarculture.org.au/martha-borinelli-talks-about-the-noongar-culture-of-sharing/ (accessed 30 September 2014).

counsellors, would be well aware of the nature of your role, I take this opportunity to elaborate briefly on that distinction.

Financial counsellors provide information, support and advocacy to assist people to deal with immediate financial problems, and to minimise the risk of financial problems in the future. The services provided are free, confidential and independent. Financial counsellors tend to work in community organisations, although some are employed by government. All require a qualification and are accredited by associations like FCAWA. Provided financial counsellors are members of an accredited association and do not charge fees or sell financial products to clients, they are not required to hold financial services or credit licences.

Typically, financial counsellors will help people in financial difficulties, to identify which debts should be given priority, to identify and understand the way in which other factors such as health or emotional or physical abuse might be affecting a person's financial situation. They will also advocate and negotiate so as to reduce, defer or waive payments, obtain concessions or participate in schemes for the resolution of disputes and provide emotional support during this process.

Consumer lawyers and financial counsellors often have complementary roles in helping people who are in financial difficulty. It is not uncommon for consumer lawyers to refer clients to financial counsellors for assistance in the completion of bankruptcy forms, the development of budgets, the negotiation of debt waiver or deferred payment plans, and negotiations with government agencies. Conversely, financial counsellors might refer their clients to a consumer lawyer where there is uncertainty as to the enforceability of a debt, or where assets are at risk and enforcement proceedings have been commenced, or where there may be a defence to a claim brought against the client.

There are relatively few financial counsellors in Australia, and the nature of their remuneration reflects the sector of the community which they serve (unfortunately). There are long waiting lists for those who wish to access the services of financial counsellors and recent reductions in budgetary provision for financial counselling services may extend those waiting times further.

The Financial Counsellors' Association of Western Australia provides a 1800 telephone service to people in regional and remote communities and publishes a raft of publications on a variety of topics including:

- Are you being sued?
- General procedure in the Magistrates Court in Western Australia
- Civil judgment enforcement in Western Australia
- When the repo man comes: a guide to repossession

The inequalities in Boomtown

Over the last two decades or so Western Australia has experienced economic growth and development on a scale and at a rate exceeding almost all other regions of the world. The minerals and resources boom has brought wealth and prosperity to many in the State, particularly to those in Perth. However, almost perversely, the significant increases in living costs and the accommodation pressures generated by our fast-growing population have widened the gap between those who have enjoyed the benefits of our prosperity and those who, for one reason or another, have found themselves in financial stress.

This point is well made in a report recently published by the University of Western Australia and the Committee for Perth which shows that despite overall increases in wealth across the Perth and Peel regions over the last 10 years, there are many areas within those

regions which continue to report significant economic stress.³ The report suggests that, generally speaking, the benefits of our recent economic prosperity have been harvested by those within the inner metropolitan suburbs, and those less well-off have tended to move from inner to outer suburbs, sometimes on the metropolitan fringe - areas characterised by high levels of unemployment and lower incomes, but also lower access to work, education and other amenities, compounded by poor public transport and poor connectivity to Perth's key employment centres in Perth City, Joondalup, Midland, Cannington, Mandurah and Fremantle. Of course, those are precisely the characteristics which make it more difficult for people who are experiencing financial stress to enjoy a decent standard of living.

Justice for all - is it possible?

The theme of your conference, and of my address, is cast in terms of a question. The question posed is whether justice for all is possible. I am afraid that my response to that question will throw up more questions than answers, and I suspect that many of you will think that that is characteristic of lawyers. However, my purpose in posing these questions is to stimulate thought and hopefully debate on ways in which we might improve the delivery of justice to a broader section of our community.

The objective of 'justice for all' has a venerable history in the Judeo Christian tradition. The expression can be found in Psalm 103:

The Lord works righteousness and justice for all who are oppressed.

Interestingly, in some translations from the original Hebrew the word 'justice' is replaced by 'judgment'. The vexed relationship between justice and judgment has been a continuing conundrum for the legal system, as will appear from the balance of this paper.

³ Kirsten Martinus, *Economic Stress in Perth: a matter of geography* (Factbase Bulletin 38, August 2014).

The expression 'justice for all' became a household phrase after it was incorporated into the pledge of allegiance to the United State of America, written in 1892 by a Christian socialist minister, Francis Bellamy.⁴ In its original form the pledge read:

I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all.⁵

Subsequent changes were made to the wording of the salute, although the expression 'liberty and justice for all' has remained constant.

The pledge is customarily accompanied by a salute in the form of a right hand over the heart. Ironically, for some time the salute also involved the extension of the right arm toward the flag, palm down. However, with the advent of World War II, this aspect of the salute was seen as a little too close to that in use in Nazi Germany, and since then the practice has been to leave the right hand on the heart throughout the pledge.⁶

So, from its religious origins the expression 'justice for all' is now associated with the more secular notions of liberty and the rule of law which are associated with democratic forms of government.

More recently, the heavy metal band Metallica released a track entitled 'And justice for all' on an album bearing the same name. The words of the song direct attention to the extent to which justice, and the courts, are the province of the wealthy. The song starts 'Halls of Justice Painted Green, Money Talking' and a later line asserts, 'Their Money Tips Her Scales Again, Make Your Deal.' The extent to which our system of justice discriminates against those who are less well off, and

⁴ UShistory.org 'Historic documents – The Pledge of Allegiance' available at: www.ushistory.org/documents/pledge.htm (accessed 5 October 2014).

⁵ Francis Bellamy, *The Youth's Companion* (1892) quoted in UShistory.org, 'Historic documents – The Pledge of Allegiance' available at: www.ushistory.org/documents/pledge.htm (accessed 5 October 2014).

⁶ UShistory.org 'Historic documents – The Pledge of Allegiance' available at: www.ushistory.org/documents/pledge.htm (accessed 5 October 2014).

the extent to which our system of justice is accessible by those with limited resources are the two themes of the balance of this paper.

Equality before the law

In 2009, in the preface to the bench book published for use by the judges and magistrates of Western Australia entitled 'Equality before the Law', I drew attention to the requirement for all judicial officers in this State to take an oath or affirmation of office at the time of their appointment by which they undertake to:

do right to all manner of people, according to law, without fear or favour, affection or ill will.

By this undertaking, all judicial officers promise to treat everybody equally - to treat the rich and powerful in precisely the same way as we treat the poor and vulnerable. In my foreword I wrote:

I have no doubt that the judicial officers of Western Australia genuinely do their best to fulfil that undertaking. However, our ability to ensure the equal treatment of all those who come into contact with the justice system of Western Australia is constrained by our ability to identify and appreciate the many and varied causes of disadvantage and inequality. Our task is to eliminate or ameliorate disadvantage and inequality without causing prejudice to other participants in the justice process. The best way of doing that is often neither self-evident nor intuitive — it often needs to be informed by specialised knowledge and experience.⁷

Courts steeped in the common law tradition have not been quick to recognise diversity and inequality. One common law tradition is the importation of a single standard against which the reasonableness of behaviour is assessed - namely, the conduct of the generic middle class

⁷ *Equality before the Law Bench Book* (2009) p v (available at: www.supremecourt.wa.gov.au/O/other_publications.aspx?uid=7313-1532-3097-3568 (accessed 22 October 2014)).

male typified as the 'man on the Clapham omnibus'.⁸ The obvious difficulty with the application of a single generic standard to the behaviour of all in a diverse community such as ours is that it produces inequality and injustice. As Justice Michael McHugh observed:

...discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different.⁹

Justice must take account of disadvantage

The same point can be made by reference to the well-known aphorism of the Nobel prize-winning author Anatole France, loosely translated as:

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.¹⁰

The point, of course, is that while, at one level, the law can be said to have a 'majestic equality' by applying equally to the rich and the poor, in practical terms it operates very differently in relation to those classes, because the rich have no need to sleep under bridges, or to beg, or to steal bread. That is why the *Equality before the Law Bench Book* to which I referred earlier provides information to judges and magistrates on various topics associated with economic disadvantage including homelessness and the impact which social and economic disadvantage has upon behaviour which is relevant to the court and to sentences properly imposed.

⁸ First reported legal use by Collins MR in *McQuire v. Western Morning News Company, Ltd* [1903] 2 KB 100, 109. In Australia, see for example, *Gardiner v John Fairfax & Sons Pty Ltd* [1942] NSWStRp 16; (1942) 42 SR (NSW) 171, 182 and.

⁹ *Waters v Public Transport Corporation* [1991] HCA 49 at [10]; (1991) 173 CLR 349 at 402.

¹⁰ The original translation was: 'The poor must work for this, in presence of the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread' (Anatole France, *The Red Lily* (1894, Winifred Stephens trans, 1925) p 91).

Mandatory sentencing

Mandatory sentencing, or laws which require courts to impose mandatory minimum penalties, whatever the circumstances of the offence or of the offender, are not new. Mandatory sentences, often the death penalty, were a significant feature of English criminal law at the time it was imported into Australia by the colonists. However, over time both in England and Australia, courts were given significantly broader discretions with respect to the sentences to be imposed.¹¹ Recent years have seen a resurgence in mandatory sentencing in various Australian jurisdictions, including Western Australia.¹²

At one level, laws which require a court to impose a particular sentence on all offenders convicted of a particular type of offence, whatever its circumstances, can be said to have the 'majestic equality' to which Anatole France referred, because all offenders are treated alike. At another level, however, requiring a court to treat offenders with different characteristics who commit offences in different circumstances exactly the same is to mandate injustice or substantive inequality. As the Hon James Spigelman AC, former Chief Justice of New South Wales, observed:

Centuries of practical experience establish that the assessment of the multiplicity of factors involved in the sentencing task is best served by the exercise of a broad discretion. That same practical experience over centuries has led to the conclusion that this difficult process of weighing and balancing all of the relevant considerations is best done by an independent, impartial, experienced, professional judge. It is not best done on talk-back radio.

The existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstances of the individual case, then, irrespective of

¹¹ Sentencing Advisory Council, *Sentencing Matters: Mandatory Sentencing* (August 2008) p 2.

¹² Lenny Roth, *Mandatory sentencing laws* (NSW Parliamentary Research Service e-brief 1/2014 – January 2014).

how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice.¹³

At the risk of a slight digression, I note that a recent review was conducted of the laws which require Western Australian courts to impose mandatory minimum terms of imprisonment upon those convicted of assaulting and harming public officers. It recommended that consideration be given to amending the law to exempt persons with a mental illness, cognitive impairment or disability from the mandatory minimum term, so that a judge or magistrate would retain the discretion to take account of that disability when imposing a sentence.¹⁴ I strongly support that suggestion. Not only because of the general principles which I have enunciated already, but also because I am well aware that these laws are of great concern to the many Western Australians who assume the difficult responsibility of caring for a mentally ill family member. Those carers may feel that they cannot risk seeking police assistance during times of serious disturbance because it might set in train a sequence of events resulting in a mandatory term of imprisonment.

Fines and infringement notices

Mandatory sentencing is most controversial when the effect of the law is to require a court to impose a minimum term of imprisonment. However, there are a wide range of offences in respect of which a court is required to impose a fine which is equal to or greater than a specified amount,¹⁵ or which are ordinarily dealt with by infringement notices of a specified amount.

¹³ Hon JJ Spigelman AC, Chief Justice of New South Wales, 'Mandatory Sentencing - Rights and Wrongs' (Opening Address, UNSW Symposium 2000, Sydney, 28 October 2000).

¹⁴ Department of the Attorney General, 'Statutory Review: Operation and Effectiveness of the 2009 Amendments to sections 297 and 318 *Criminal Code*' (2014) p 11 - WA Parliament, Legislative Assembly Tabled Paper No 1784, 26 June 2014.

¹⁵ Under the *Sentencing Act 1995* (WA) the courts can, in limited circumstances, allow an offender to complete a 'work and development order' in satisfaction of a fine (s 57A). However this option is rarely used: only 21 such orders were imposed by the WA Magistrates Courts compared to almost 70,000 fines in 2012-13 (Department of the Attorney General, *Report on Criminal Cases in the Magistrates Court of Western Australia 2008/09 to 2012/13* (2013) p 6).

Many traffic offences are of this character, and as instruments of social policy bringing about changes in public behaviour, such provisions have generally worked quite well, particularly when behaviour which was once lawful has been prohibited. Significant minimum fines for not wearing a seatbelt in a moving motor vehicle have contributed to a fundamental change in behaviour during my lifetime, to the point where putting the seatbelt on has become an instinctive part of getting into a car. More recently the penalties imposed upon drivers using mobile phones without hands-free devices are likely to be as effective, although we may have a little way to go before we see the same levels of compliance as with seatbelt laws.

The imposition of a monetary order is by far the most common outcome of a criminal prosecution in Western Australia. During 2012-13, monetary orders were imposed in 83% of the cases in this State in which a conviction was entered.¹⁶ Monetary orders are much easier to impose and enforce than other forms of penalty which require engagement between the offender and the State, such as community service orders or supervision orders, and do not have the adverse social consequences of imprisonment. However, they are not without their difficulties, as noted many years ago by the Supreme Court of Western Australia, and repeated more recently in a judgment by the late Chief Justice David Malcolm AC QC:

There can be a number of difficulties associated with a fine; for example: courts should avoid giving the impression that a rich person can purchase absolution from a crime for cash or that a poor person can do so by instalments. It is also the case that a fine may effectively be a greater punishment upon a poor person than on a rich person.¹⁷

¹⁶ Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2012-13*, Summary Outcomes for all Defendants, Tables 34-36.

¹⁷ *Cobby* (unreported CCA WA, No 19 of 1983, 19 April 1983) per Wickham, Wallace and Pidgeon JJ quoted by Malcolm CJ in *Sgroi* (40 A Crim R 197, 200).

The *Sentencing Act 1995* (WA) requires the court to take an offender's capacity to pay into account when assessing the fine to be imposed,¹⁸ but there are very real practical difficulties in assessing an offender's capacity to pay,¹⁹ and, of course, this requirement is overridden by the many statutes which require the court to impose a mandatory minimum fine.²⁰ Mandatory minimum fines are common for offences related to traffic or vehicle regulation, and in 2012-13, such offences comprised almost 40% of the cases finalised in WA courts.²¹

Non-payment of fines and infringements

I have already referred to the risk of inequality and injustice when fines are imposed because the penalty may have no practical effect at all upon a wealthy person, but cause great hardship to a poor person and their family. These issues become more acute when fines or infringement notices are not paid. In August 2014, in Western Australia, outstanding court fines totalled approximately \$170,000,000, and infringements \$136,000,000, so that the total amount registered with the Fines Enforcement Registry was \$306,000,000,²² made up of almost 842,500 fines and penalties owed by 355,008 individuals and companies.²³ In the preceding 12 months, almost \$100,000,000 was recovered by the Registry²⁴ - a not inconsiderable amount, representing about one-third of 1% of total State revenue.²⁵

¹⁸ *Sentencing Act 1995*, s 53.

¹⁹ Department of the Attorney General, *Statutory Review of the Sentencing Act 1995 (WA)* (October 2013) p 36.

²⁰ See, for example, Legal Aid Western Australia, 'Traffic offence penalties' (available at: <http://www.legalaid.wa.gov.au/InformationAboutTheLaw/CarsandDriving/Trafficoffences/Pages/TrafficOffencePenalties.aspx> accessed 14 October 2014).

²¹ Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2012-13*, Table 32 - summary outcomes for all defendants.

²² Hon Michael Mischin Attorney General, 'New camera targeting fine defaulters hits the streets' (Media Statement – 10 October 2014).

²³ Amanda Banks, 'Camera to spy on fine evaders' *The West Australian*, 10 October 2014.

²⁴ Hon Michael Mischin Attorney General, 'New camera targeting fine defaulters hits the streets' (Media Statement – 10 October 2014).

²⁵ Department of the Attorney General, *Statistical Summary 2008-09 to 2012-13* (2013) p 11.

The numbers involved significantly compound the difficulty of identifying the appropriate response to an unpaid fine in any particular case. If effective enforcement action is not taken against a person who has the capacity to pay the fine but simply chooses not to pay, the penalty is meaningless, justice is thwarted and the law falls into disrepute. On the other hand, over-zealous enforcement action against those who lack the capacity to pay a fine can result in further disadvantage to those already suffering financial strain (by loss of their driver's licence) or imprisonment coming about largely as a consequence of economic disadvantage. The *Sentencing Act* provides that a penalty of imprisonment can only be imposed after all other options have been excluded, so imprisonment for fine default should only occur after all other enforcement possibilities, including commutation of the fine into some other form of order have been exhausted. Otherwise the legislative mandate is undermined, and there is the real spectre of imprisoning those whose only point of difference is that they lack the means to pay a fine or infringement notice.

The opportunity to 'cut out fines' through imprisonment has its own difficulties. If the fine is cut out concurrently with a term of imprisonment imposed for another offence (which is most often the case), the fine is as meaningless as if it is never paid. On the other hand, if the offender serves time in prison attributable only to their fine, not only does the State lose the capacity to recover the fine at the rate of \$250 a day, but it costs around \$300 per day to keep the offender in prison. It is difficult to find precise data upon the number of offenders who fall in the latter category, but data made available by the Minister of Corrective Services indicates that between November 2008 and August 2014 more than 6,300 offenders were incarcerated solely for fine default, on average for 4.24 days.²⁶ Over much the same period, the number of people received into prison solely because of fine default has increased dramatically, from 194 in 2008 to 1,358 in

²⁶ Almost 40% of adult offenders received into prison during that time (16,850) had a sentence including prison time for failure to pay fines ((Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 August 2014, pp 5037d-5038a (Mr JM Francis).

2013, having peaked at 1,613 in 2010. The number of Aboriginal people within this group has also increased, from 101 in 2008 to 590 in 2013, after peaking at 633 in 2010.

Licence suspension as a means of fine enforcement can also be problematic. If the offender lacks the capacity to pay the fine, licence suspension is likely to interfere significantly with employment prospects and further increase financial stress and reduce the likelihood of the fine being paid. The Department of the Attorney General's statistical reports record almost 250,000 licence suspensions for fine default in 2012-13 alone and notes this is almost 14% of the number of drivers' licences in WA.²⁷

Further, because of occasional difficulties in communicating the fact of suspension to fine defaulters, it is not uncommon for people to be apprehended driving whilst under a suspension of which they had no knowledge, which results in a further period of automatic disqualification. This is a particularly significant problem amongst Aboriginal people, who are, of course, already grossly over-represented in Western Australia's prisons. According to a Western Australian report which is admittedly now dated, Aboriginal drivers were disqualified at about 10 times the rate of non-Aboriginal drivers, largely as a result of suspension for non-payment of fines.²⁸ According to the drivers who were consulted in the course of the research which led to that report, the greatest impact of licence disqualification was on employment and on the family. They regarded licence suspension as an unfair act perpetrated against those who could least afford the consequences.²⁹

²⁷ Department of the Attorney General, *Statistical Summary 2008-09 to 2012-13* (2013) pp 11, 12. However, it needs to be noted that these figures include multiple suspensions of the one party (Department of the Attorney General, *Report on the Fines Enforcement Registry 2008/09 to 2012/13* (2013) p 8).

²⁸ Anna Ferrante, *The Disqualified Driver Study - A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia* (September 2003), p vii.

²⁹ Anna Ferrante, *The Disqualified Driver Study- A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia* (September 2003), p vii.

More recent studies of a similar kind in New South Wales have produced similar conclusions in relation to the significant over-representation of Aboriginal people amongst those losing their driver's licence for non-payment of fines, with disproportionate effect upon those in regional and remote areas.³⁰

Day fines – a solution?

From time to time consideration has been given to the possibility of endeavouring to improve equality and justice for those many people who are fined by introducing the system of day fines or unit fines which is not uncommon in Europe. Under those systems, offenders receive a penalty expressed in terms of a number of days or units, which is translated into a monetary value by their daily income or a proportion of their annual income.

Professor Kate Warner has advocated for the adoption of similar systems in Australia. She wrote:

While it is acknowledged that the criminal justice system, and sentencing in particular, can do little to address social inequalities, it is argued that by failing to adopt a day or unit fine system, the United Kingdom, Australia and other common law countries have lost an opportunity of doing justice to difference.³¹

Professor Warner also notes:

While in theory offenders may have the option of going to court or applying to a state agency for review or relief rather than accepting the penalty notice or fiscal fine, there are uncertainties in, and disincentives for

³⁰ The report found that the majority of licence sanctions in that State (52%) occurred because of non-payment of fines and noted an earlier report which found that more than half the Aboriginal licence holders surveyed had their licence suspended or cancelled for unpaid fines or demerit points (Committee on Law and Safety (Legislative Assembly of NSW), *Driver Licence Disqualification Reform* (November 2013) pp 17, 18).

³¹ Kate Warner, 'Equality Before the Law and Equal Impact of Sanctions: Doing Justice to Differences in Wealth and Employment Status' in Lucia Zedner & Julian V Roberts, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) p 225.

choosing to do so. For marginalized groups, lack of literacy can present an obstacle to contesting the offence or obtaining time to pay. These penalties clearly impact unequally on economically disadvantaged and marginalized groups. An on-the-spot fine of a modest amount can represent a significant proportion of weekly income for a low-income earner, but only a small percentage of the average take-home weekly wage.³²

However, despite regular consideration in various Australian jurisdictions, these proposals have always been rejected. The reasons most commonly cited for rejection include the difficulty and expense of assessing the means of individual offenders, and the intrusion upon an offender's privacy – the latter seen particularly in occasional European media reports of heavy fines being imposed upon wealthy individuals for relatively minor offences because of their high incomes. But it is clearly the difficulty in balancing individual justice and administrative efficiency which plays a significant role here. The figures that I have set out above show the frequency with which fines are imposed in Western Australia. In practical terms, it would be extremely difficult for every court imposing a fine to conduct a means inquiry into the offender's income.

A more limited reform, applicable only to infringement notices and not to court-imposed fines, was suggested by the Criminal Justice Research Consortium of Monash University. In its 2013 report dealing with Victoria, the consortium found that:

An infringement notice can have a disproportionate impact on disadvantaged groups compared to other groups in society and can thus entrench and perpetuate a state of poverty. Factors that contribute to the accrual of fines that some people may never be in a position to pay include: no fixed address to receive fines, mental health issues, substance abuse issues, intellectual disability, low literacy levels, financial hardship, social isolation, and exposure to domestic violence. Fines can lead to a downward spiral that may

³² Kate Warner, 'Equality Before the Law and Equal Impact of Sanctions: Doing Justice to Differences in Wealth and Employment Status' in Lucia Zedner & Julian V Roberts, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) p 229.

contribute to cyclical or long-term homelessness. Financially disadvantaged individuals may have no means of paying an accumulated fine...³³

The report recommended that provisions should be implemented:

that allow those in financial hardship to apply for a standard concession rate. Those who have a concession card and receive their fine in person should be immediately issued with a concession fine amount.³⁴

However, a similar proposal was rejected by the New South Wales Law Reform Commission in its 2012 report dealing with *Penalty Notices*. The Commission concluded:

While there was some support for this in submissions, there were few contributions, and no consistency, about the way in which it would be administered. A concession rate would add considerably to the complexity of the penalty notice system. The main difficulty would be determining who would be eligible for a concessionary rate and what that rate, or amount, should be. It might also encourage greater resort by issuing agencies to placing offenders before the courts, thereby diminishing an important advantage of, and reason for, the penalty notice system.³⁵

This brief review of the difficulties which attend any attempt to ameliorate inequality and injustice arising from the frequent use of fines and infringement notices as the most prolific penalty in our justice system suggests that the solutions to these problems are not easily found. It seems that in these matters common law jurisdictions retain a greater attachment to the law's 'majestic equality' than some European jurisdictions. This leaves difficult questions outstanding in relation to the extent to which those penalties 'do justice to difference'

³³ Dr Bernadette Saunders, Dr Anna Eriksson, Assoc Prof Gaye Lansdell & Ms Meredith Brown, *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System – Towards a Best Practice Model* (February 2013) p 17; and see pp 36, 37.

³⁴ Dr Bernadette Saunders, Dr Anna Eriksson, Assoc Prof Gaye Lansdell & Ms Meredith Brown, *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System – Towards a Best Practice Model* (February 2013) p 12.

³⁵ NSW Law Reform Commission, *Penalty Notices* (February 2012) p 322.

(to use Professor Warner's words), and whether standard penalties which treat all offenders alike do not in fact result in 'justice for all'.

Equality of access to the law

Justice for all can only be possible if the legal system and the courts are accessible to all. The need to improve accessibility has long been recognised in this State and elsewhere, and is the subject of regular investigation and commentary including, at the current time, an investigation by the Productivity Commission.³⁶

One of the earlier recognitions of the need to improve accessibility occurred in Western Australia with the passage of the *Poor Person's Legal Assistance Act 1928* (WA). The public policy reasons which underpin the desirability of increasing access to justice were succinctly enunciated in the second reading speech for the bill:

we know there that considerable costs are involved in the administration of justice... So it will be seen that it is necessary to charge some fees in order that the State should not gratuitously render service to those able to pay. Then there is good reason for the charging of fees from the standpoint that to a considerable extent it provides a safeguard against frivolous litigation. If it were to cost people nothing at all to gain access to the courts, we would have all sorts of frivolous litigation which would take up the time of the courts and mean considerable expense to the country. It is necessary that most people seeking the aid of the courts to establish their rights should have legal representation. Very often people can establish their rights only through a court of law, and those without means should not for that reason be deprived of that opportunity to establish their rights. Similarly, in criminal cases persons may have been convicted, and I suppose have been convicted, because they have not been represented by experienced counsel in the presentation of their cases. Not all the facts of their cases have been placed before the court, and in consequence of this inadequate representation those persons, in some instances, have suffered injustice...³⁷

³⁶ Productivity Commission, 'Access to Justice Arrangements' available at: <http://www.pc.gov.au/projects/inquiry/access-justice> (accessed 22 October 2014).

³⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 November 1928, p 2025 (Hon J C Willcock, Minister for Justice).

Unfortunately, history tells us that these ideas, and the legislation were ahead of their time. No salaried professional staff were ever employed under the terms of the Act, and one commentator has described it as a scheme which was 'poor by name and poor by nature'.³⁸ In 1961 the Law Society of Western Australia eventually established its own legal aid scheme, relying heavily on pro bono assistance by members of the Society. A publicly funded and properly resourced legal aid scheme was not established until 1974, when the Commonwealth government established the Australian Legal Aid office. In 1978 the scheme was replaced in Western Australia by the Legal Aid Commission of Western Australia, which is jointly funded by both Commonwealth and State governments.³⁹ Public funding is also provided to community legal centres and to legal services assisting Aboriginal and Torres Strait Islanders, and to those affected by domestic violence. However, it remains fair to say that the provision of publicly-funded legal assistance is very limited and, at the risk of over-simplification, generally extends only to those charged with serious crime, and to a limited category of family law cases.

Since my appointment as Chief Justice I have spoken many times on the need to improve access to justice, and I considered the particular problems and accessibility in differing contexts.⁴⁰ Revisiting those issues in this paper would unduly protract an already lengthy address. However, there have been recent surveys of legal needs which provide contemporary insight into the nature and extent of the gap between legal needs and legal services.

³⁸ Lloyd Davies, *Sheila: A Biography of Sheila Mary McClemons* (2000) p 145.

³⁹ Legal Aid Western Australia, 'History and services', available at: <http://www.legalaid.wa.gov.au/LegalAidServices/About/Pages/Historyandstructure.aspx> (accessed 9 October 2014).

⁴⁰ See, for example, Wayne Martin, 'Access to Justice' (Inaugural Lecture, Eminent Speakers' Series, Notre Dame University, Fremantle, 26 February 2014); Wayne Martin, 'Because delay is a kind of denial' (Address, Timeliness in the Justice System: Ideas and Innovations Conference, Australian Centre for Justice Innovation, Monash University, Melbourne, 17 May 2014).

Legal needs

A significant research project has been undertaken by the Law and Justice Foundation of New South Wales. Known as the Legal Australia-Wide Survey, it aims to 'provide a rigorous and sustained assessment of the legal and access to justice needs of disadvantaged people and the broader community'. Significantly, it uses broad definitions of 'legal need' and 'access to justice' to include the extent to which disadvantaged people are able to obtain assistance from non-legal advocacy and support.⁴¹

Following a survey in Western Australia, the Foundation reported that:

The main findings were similar across [other Australian] jurisdictions and were also consistent with past legal needs surveys. For example, the LAW Survey confirms that:

- legal problems are widespread and often have adverse impacts on many life circumstances
- some people, most notably disadvantaged people, are particularly vulnerable to legal problems, including substantial and multiple legal problems
- a sizeable proportion of people take no action to resolve their legal problems and consequently achieve poor outcomes
- most people who seek advice do not consult legal advisers and resolve their legal problems outside the formal justice system.⁴²

In Western Australia, the most common problem types identified were consumer problems (21% of respondents), crime problems (19%), housing problems (12%) and government problems (11%). I suspect that this breakdown of problem type would be familiar to many financial counsellors.⁴³ I suspect financial counsellors would also be unsurprised by the survey finding that almost one-third of the adverse

⁴¹ Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Western Australia* (August 2012) p iii.

⁴² Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Western Australia* (August 2012) p xiv.

⁴³ Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Western Australia* (August 2012) p xiv.

consequences resulting from the legal problems identified by Western Australian respondents to the survey were income loss or financial strain.⁴⁴

The survey identified the particular problems faced by those suffering from various forms of disadvantage when they intersected with the legal system:

Many disadvantaged or socially excluded groups were particularly vulnerable to legal problems. They were not only more likely to experience legal problems overall, but also had increased vulnerability to substantial legal problems and multiple legal problems. In all jurisdictions, people with a disability stood out as the disadvantaged group that had higher prevalence according to the greatest number of measures. In addition, the associations between disability and increased prevalence were often among the strongest. However, Indigenous respondents, the unemployed, single parents, people living in disadvantaged housing and people whose main income was government payments also had increased prevalence in a number of jurisdictions. In Western Australia, people with a disability had significantly higher prevalence of legal problems overall, substantial legal problems and problems from most of the 12 problem groups. The unemployed and single parents also had significantly higher prevalence according to several measures.

Low education levels and non-English main language showed a distinct relationship with the prevalence of legal problems. Unlike the other indicators of disadvantage [however], these two indicators, when significant, were typically related to low rather than high prevalence... The lower prevalence of legal problems reported by people with low education levels in all jurisdictions and by people with a non-English main language in some jurisdictions may reflect a failure to recognise legal problems.⁴⁵

Indigenous legal needs

Another significant research project currently under way is that conducted through James Cook University in relation to the legal

⁴⁴ Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Western Australia* (August 2012) p xvi.

⁴⁵ Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Western Australia* (2012) pp xv, xvi.

needs of Indigenous people.⁴⁶ That project has not yet released its report on Western Australia, although it seems that such a report may be imminent. However, research conducted elsewhere in Australia has highlighted major deficits in the capacity of Indigenous Australians to access the legal system and obtain justice. In its submission to the Productivity Commission's inquiry into access to justice arrangements, the researchers submitted:

Through its research, the ILNP has identified substantial levels of Indigenous civil and family law need in the ILNP focus communities and significant problems for Indigenous people in accessing justice.

The high level of unmet Indigenous civil and family law need should be of major concern ... It compromises Indigenous peoples' capacity to realise their full legal entitlements. These entitlements are important in their own right, but are also essential to combating Indigenous social disadvantage, evident in a range of areas; including, for example, in access to quality housing, Indigenous rates of employment and incarceration rates and their educational outcomes. Our research indicates that Indigenous social disadvantage makes Indigenous people much more vulnerable to experiencing legal problems. It also impacts on their capacity to then access justice on an equal footing with the majority of others in the community. Without improved access to justice, the social exclusion of and disadvantage suffered by Indigenous people cannot be adequately addressed. The link between unaddressed civil law need and criminalisation are particularly significant, and has been a 'stand-out' issue emerging in ILNP research. Improving Indigenous capacity to access civil and family law justice is likely to build resilience in individuals and communities, to reduce offending and to contribute to increased levels of Indigenous social inclusion.⁴⁷

The suggestion that there is a 'stand out issue' showing a connection between criminalisation and unaddressed civil law needs has a particular resonance in Western Australia, where I have said many times that the over-representation of Aboriginal people in the criminal justice system remains the greatest challenge to that system. This

⁴⁶ 'Indigenous Legal Needs Project', available at: <http://www.jcu.edu.au/ilnp/> (accessed 10 October 2014).

⁴⁷ Indigenous Legal Needs Project, 'Submission to the Productivity Commission Inquiry: Access to Justice Arrangements' (2013) p 2.

research suggests that there may well be a connection between barriers to access to civil justice applicable to Aboriginal people and their over-representation in the criminal justice system.

If this proposition is correct, and I see no reason to doubt it, it provides another reason why our community should place a high value on the services provided by financial counsellors. As I have already noted, those services extend far beyond the simple provision of financial guidance, but provide a much more holistic service which is of assistance to marginalised groups within society. Your support in advocating for and negotiating on behalf of your clients goes a long way to addressing the gap between legal needs and legal services, and should assist those who suffer from disadvantage of one form or another to obtain access to basic social safety nets and mechanisms for the resolution of disputes that others might take for granted.

The legal system is not just the courts

In this context it is important to note that our legal system extends well beyond the formal systems for the administration of justice embodied in our courts. There are many and varied mechanisms for the resolution of disputes including grievance mechanisms within government departments, ombudsman services both public and private, community law centres which provide mediation services, administrative tribunals and so on. One does not necessarily need legal qualifications to assist somebody to negotiate these systems, and I am sure that financial counsellors play an important role in identifying mechanisms appropriate to the resolution of problems which their clients may be experiencing. That intuitive assumption is reinforced by a survey of recipients of financial counselling services conducted in 2012, which reported that 74% of respondents believed that the advice provided had helped them to avoid legal action, and

that it had assisted 73% to take advantage of hardship programmes offered by their creditors.⁴⁸

Justice precincts

The interconnection between the services provided by financial counsellors and a broader notion of the justice system is illustrated by a recent Victorian proposal to develop a justice precinct at East Werribee. As I would understand it, the proposal includes the co-location of courts, legal services, financial counsellors and drug and alcohol workers all in one place.⁴⁹

Conclusion - Justice for all: is it possible?

How then should we answer the question which provides the theme for this conference and this paper? At a semantic level, the question can be answered in the affirmative quite easily, because almost everything is possible, including justice for all.

However, sensibly construing the question as inquiring whether justice for all is practical or feasible in contemporary Australia requires a more guarded answer, given the topics which I have addressed above. If 'justice for all' is taken to connote unlimited access by every person in Australia to a court for the resolution of every dispute which they encounter in their life, then plainly the answer to the question must be negative.

However, if 'justice for all' is more sensibly construed as connoting the reasonable availability of a variety of different mechanisms for the resolution of disputes to a broad range of people, and to a justice system which accommodates difference and disadvantage, then, I believe there are grounds for cautious optimism about our capacity to

⁴⁸ Dr Nicola Brackertz, *I wish I'd known sooner: The Impact of Financial Counselling on Debt Resolution and Personal Wellbeing* (2012) p 1.

⁴⁹ Margaret Paul, 'Victorian lawyers call for 'one stop shop' legal precinct for Werribee' ABC news online (12 October 2014) available at: <http://www.abc.net.au/news/2014-10-12/lawyers-call-for-one-stop-shop-legal-precinct-for-werribee/5807634> (accessed 14 October 2014).

achieve that objective. However, that objective will only be achieved with the assistance of a broad range of people outside the legal profession, including financial counsellors and others, and will necessitate constant review of our systems, principles and procedures to ensure that they remain relevant to the issues which confront contemporary Australians. The two issues specifically addressed in this paper, being the need for penalties to reflect the particular circumstances of the offender, and the need to bridge the gap between legal needs and legal services, particularly for marginalised groups within our society, are just some of the topics which require detailed consideration and continual review if we are to achieve 'justice for all'.