Community Legal Centres Association WA Annual Conference 2012

Creating a Just Future by Improving Access to Justice

Address by

The Honourable Wayne Martin AC
Chief Justice of Western Australia

Northbridge, Perth
24 October 2012

Introduction

It is a great pleasure and an honour to have been invited to give this address to the annual conference of the Community Legal Centres Association of Western Australia. For reasons which I will develop during my address, it is I think impossible to overstate the importance of the role played by community legal centres in improving access to justice for many Australians. I am grateful for the opportunity to acknowledge that contribution and pay tribute to the many whose tireless efforts to provide legal assistance to others go largely unsung and under-remunerated.

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 pay my respects to their Elders past and present.

The Best System That Money Can Buy

Australia has a terrific legal system - a system that leaves no stone unturned, no possibility excluded from consideration, however remote, in the search for an outcome in which we can have complete confidence.

As I have commented previously, it is the Rolls Royce of justice systems, but there is not much point of having a Rolls Royce in the garage if you can't afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it to rich friends or hire it out to people who can afford to drive it, but you can't use it for its basic purpose, which is to

get you from A to B. We might be better off trading our Rolls Royce for a lighter more fuel efficient vehicle.

Improving access to justice is not just a question of improving the efficiency of service delivery. Significant limitations upon the accessibility of justice have profound implications for the rule of law. If justice is not accessible to ordinary Australians, the rule of law becomes mythical.

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, then the justice system is not worthy of that description.

Returning to the motor vehicle metaphor with which I started, the two issues I propose to address in this paper are, firstly, the various mechanisms which exist for providing funds in order to purchase the fuel, and, secondly, the steps that might be taken to improve our car's efficiency, so that less fuel is required.

The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. They can and should take pride in the fact that Australia has a very good legal system provided by judges and magistrates who are independent of executive government and in which corruption is virtually unknown. In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.

In the next session of my address I will address the various forms of assistance currently available in contemporary Australia in order to show that their coverage is far from complete, leaving a substantial gap to be filled by organisations like community legal centres.

Legal Aid

Essentially, the provision of legal aid in Australia is limited to serious criminal matters and some family law matters. Some years ago, the Law Council of Australia announced a commendable aspiration for the provision of legal aid in civil matters, but unfortunately that remains an aspiration only at this stage.

The main problem with legal aid is, of course, the inadequacy of funding, and it seems unlikely that there will be any substantial increase in funding available to any of the Legal Aid Commissions around Australia in the foreseeable future.

It is, however, possible to encourage government to increase funding - particularly if a business case methodology is used. To take an example from some years ago, when I was President of the Law Society of WA we made enquiries of the Attorney General's department in relation to the number of persons who were sentenced to imprisonment in the Magistrates Court without having been legally represented. We were advised that some 600 people in Western Australia were sent to prison each year as a result of sentences imposed in the Magistrates Court without having been legally represented. Rather than mounting a case with government on the basis of the unfairness and immorality in sending people to prison without them having been represented, the case was put forward on a purely commercial basis. Imagine, we said, if legal

representation reduced the number going to prison from 600 to, say, 500. The 100 less people imprisoned would save government around about $5M a year (on the costs then being incurred). That would buy an awful lot of legal aid.

The government responded positively and announced that funds would be provided to expand legal aid services to enable representation to be significantly expanded in the Magistrates Court, with a view to providing representation in cases in which there is a significant prospect of a custodial sentence.

However, it will likely always be the case that legal aid will be inadequately funded. Analysis has been undertaken which suggests that the amount spent on legal aid in Western Australia, viewed on a per capita basis, is about one-fifth of that which is spent on legal aid in the United Kingdom. However, on another analysis, in 2006 the Commonwealth government provided $6.74 per Western Australian by way of funding for legal aid. By contrast, in the UK, the government provided $230 per head for legal aid. Thus, the contribution of the government in the UK was some thirty times that of the contribution of the Commonwealth government to legal aid funding in Western Australia.

In real terms, funding for legal aid in Western Australia has regressed substantially over the last decade or so.

There are also issues in relation to the evenness of the funding of legal aid throughout Australia. The elaborate model used by the Commonwealth government has consistently resulted in Western Australian legal aid

agencies receiving less funding per capita than agencies in other States and Territories even though the cost of providing services across our vast and sparsely populated State is significantly higher than the costs incurred in smaller, more densely populated jurisdictions.

The unevenness of funding is exacerbated as a result of differential access to other sources of funding. For example, in Western Australia very little of the conveyancing of real estate is undertaken by the legal profession. The consequence is that significantly less funds are held in solicitors' trust accounts than in other States, which in turn reduces the interest earned on those trust accounts which, in other States, is a significant source of funding for legal aid. For example, in 2004 - 2005 it was expected that the funds available for legal aid from this source in New South Wales would be approximately $18,000,000, in Queensland $16,000,000, in Victoria $15,000,000, in South Australia $1.8 million, and in the ACT $0.85 million, whereas in Western Australia something less than $700,000 was available from this source.

Aboriginal Legal Services

My experience of the Aboriginal Legal Service in Western Australia is that it provides a very good service to its clients, and I have no reason to doubt that the services provided in other States are any different. However, the Aboriginal Legal Service's potential client base is only about 3% of the Western Australian population, although tragically they are clients that are grossly overrepresented in the criminal justice system. Approximately 40% of the WA prison population is Aboriginal, and at any given time in Western Australia, one in 14 adult Aboriginal males is in prison.

Funding to the Aboriginal Legal Service of Western Australia has not kept pace with the increasing cost of providing that service across such a vast State. The cost of providing transport and appropriate accommodation, together with office facilities in remote and regional Western Australia has risen exponentially in recent years, no doubt fuelled by the inflation associated with the mining and resources boom. Because funding has not kept pace with those increases in costs, the ALS has had to reduce services provided in a number of regional areas, and has been forced to introduce cost-cutting measures like paying its lawyers less than the equivalent salaries available from Legal Aid WA. In some parts of our State, the extraordinary demands placed upon the lawyers working for ALS are such that their positions are unsustainable, and raise significant occupational health and safety issues.

Pro Bono Services

These services are, of course, laudable, and their provision distinguishes the professional practice of law from that of merely conducting a business. Estimates of the amount of time provided on a pro bono basis vary substantially. One report I have read suggests that the average hours provided for pro bono work by each practitioner in Australia is around 20, whereas another suggested it is 42.2 hours. Similarly, the estimates of the total amount of time provided around the country vary from about 600,000 hours, in one report I saw, to approximately 1.5 million hours, in another report. Another estimate suggested that the total services provided pro bono were approximately 20% of those provided through the legal aid system.

It is unlikely that the proportion of work provided pro bono will ever change dramatically, although much can be done to increase its

significance - for example, by the announcement of target numbers of hours by the Pro Bono Resource Centre, and by the improvement of referral services matching supply and demand.

Legal Assistance Funds

An example of this type of funding is provided by the system which did operate in Western Australia during the 1990s. It was set up with a capital base of approximately $1,000,000, contributed by the Lotteries Commission and from funds derived from the Public Purposes Trust. It was originally aimed at conducting test cases, and the fund was replenished by an arrangement under which a percentage of the proceeds - usually around 40%, of successful cases, was required to be reinjected into the fund.

However, there were difficulties with the operation of the system, and consideration was being given to operating the fund as a disbursements only system. However, it was then thought that there might be significant issues arising under the *Credit Act*, and legal advice was sought. After receipt of that advice, it was realised that resolution of the *Credit Act* issue by the provision of exemption might take three years.

Law Access

In Western Australia, Law Access operates a shopfront lawyer service which augments Legal Aid and the advice provided by the Legal Aid Commission.

Legal Expenses Insurance

There are a number of types of legal expenses insurance available in different parts of the world. The systems can perhaps be classified in the following way:

(a) add-on cover;

(b) pre-paid legal expenses;

(c) stand-alone cover;

(d) after-the-event insurance.

Add-on cover

This type of cover is provided as an add on to a policy primarily provided for another purpose - such as, a household policy or a motor vehicle policy. Legal cover as part of household policies is very popular in Sweden, where it is provided as a standard part of all household policies. In relation to motor vehicle policies, for a time the RAC of Western Australia had a provision which entitled its policyholders to legal advice in relation to motor vehicle matters. The Law Society of New South Wales is lobbying strongly for increased add-on cover in relation to standard policies such as household and motor vehicle policies.

Pre-paid legal expenses

Under these schemes, an organisation such as a union will make an arrangement with a law firm for the provision of legal expenses which are paid for by the first organisation. Under those schemes, advice is provided to union members in relation to specified areas of law - such as, for example, personal injury. There have been such schemes operating successfully in Australia, although their influence is not substantial.

Stand-alone legal insurance

Under these policies, cover for legal expenses can be provided in return for a premium, in advance of the need for the legal advice arising. Such a

scheme was operated in New South Wales between 1987 and 1995, although it ultimately closed. One of the difficulties for such schemes is that people who take out cover are likely to be people who are at significantly higher risk of needing legal advice, thus jeopardising the financial stability of the scheme.

However, insurance of this kind has proved successful elsewhere. For example, in Germany, in 2001, 25 million legal expenses policies were written, and, according to one report, in America, in 1997, 105 million people were insured pursuant to policies of this kind. However, the type of legal matter for which advice is provided is usually significantly constrained under the policy.

After-the-event legal expense insurance

This type of insurance is very prominent in the United Kingdom. The way it works is that at the time litigation is commenced, the policy will be taken out to cover the cost of the legal expenses involved in conducting that litigation. The premium will customarily be about 40% of the anticipated expenses. If the litigation is unsuccessful, the insurer will pay the legal fees and, under some systems, also any costs order made against the insured. As I have mentioned, these schemes are significant in the United Kingdom, where they are often written by the solicitors themselves as agents for the insurers.

Third Party Litigation Funding for Profit

There are about five or six commercial enterprises engaged in the funding of litigation across Australia. The difficulty with this type of business is that in essence the underwriters are only interested in major cases. Traditionally, they have been primarily interested in insolvency cases

and, more recently, in class actions. Unless the amount to be awarded is in the vicinity of at least $3,000,000 or $4,000,000, the economics are not sufficiently attractive enough to whet the appetite of the litigation funder.

Nevertheless, these companies do provide a means whereby funding available for litigation can be increased. Their involvement should be encouraged, although regulated essentially from a consumer protection focus. That regulation must be undertaken on a nationally uniform basis, because these companies carry on business on a national basis.

Fee Uplift Schemes and Contingency Schemes

Traditionally in Australia, schemes under which a lawyer takes a percentage of the return from the litigation by way of a fee have been unlawful. A variant on this type of funding arrangement, however, is a fee uplift scheme, under which the practitioner agrees that in the event that the case is lost, no fee will be rendered, but in the event the case is won, the fee rendered will be a multiple of the fee normally charged, to reflect the risk that the practitioner will not be paid at all. Multiples of up to double are not unheard of.

These schemes seem to me to be preferable to contingency arrangements of the kind that operate in the United States, in that the practitioner's reward is determined by reference to the amount of work done, rather than by the proceeds of the litigation. As with third party funding arrangements, the primary focus for regulation of these schemes should be consumer protection.

Universal Access Schemes

Universal medical health insurance was introduced into Australia during the seventies, and there has, from time to time, been talk of a similar approach to legal expenses insurance. However, I think it highly unlikely that we will be offered a 'legibank' any time soon.

The Proliferation of Tribunals

There is, in my view, another rapidly emerging area of unmet legal need in the administrative tribunals which are becoming much more prominent around Australia. For example, on any given weekday the number of hearings conducted before the Victorian Civil and Administrative Tribunal will be more in number than in any court in Victoria. The Commonwealth Administrative Appeals Tribunal now has jurisdiction under more than 400 pieces of legislation, and the State Administrative Tribunal in Western Australia is rapidly increasing its activities and its jurisdiction. There are also lower tier tribunals such as the Social Security Appeals Tribunal, the Veterans Tribunals, and the Immigration Tribunals. Although there are arrangements for legal representation in some of these tribunals, their increasing significance leaves a substantial demand for legal services in that area.

The Mosaic Has Many Tiles Missing

In this review of the various systems potentially available to bridge the gap between the need for legal assistance and the capacity of those in need to pay for that assistance, it can be seen that the coverage is far from complete. In Western Australia, those charged with a criminal offence which is likely to result in their imprisonment if convicted will generally be provided with legal advice and representation if they lack the resources to pay for that advice and representation themselves. However,

those charged with less serious offences will often be unable to afford legal advice or representation and will be ineligible for legal aid. On the civil side of the court's business, apart from a portion of family law work, legal aid is virtually non-existent. Those who have suffered serious personal injury might be fortunate enough to obtain a lawyer who will take their case on a 'no win no fee' basis. Those who have suffered loss in company with many others may receive assistance from a private litigation funder to participate in a class action. However, for the many cases which fall outside these limited areas, legal assistance is largely unavailable and unaffordable for many.

Community Legal Centres

This is why community legal centres play such an important role. By their very nature they are located within, accessible to, and responsive to the needs of the communities which they serve. They provide a vital first port of call for those who have a legal problem and no other means of finding a solution to that problem. By necessity, the lawyers and others working in such centres develop skills in communication, enabling them to convey information on complex legal issues in a way which makes those issues comprehensible to the clients they serve. These centres are an invaluable adjunct to the services provided by the legal aid agencies to which I have referred.

The Constitutional Dimension

There is a constitutional dimension to the role played by community legal centres. The rule of law exists to provide order, stability and justice in our liberal democratic society. The courts which administer the rule of law exist only to serve the community. A number of factors have worked to distance courts from the communities which they serve. They include

cost, complexity, delay, formality, inaccessibility and incomprehensibility of language, forms and procedures. A court which is not accessible to the community which it serves is not performing the vital role of administering the rule of law. The rule of law, and the efficacy and accessibility of the judicial branch of government are vital planks of our constitutional arrangements. The efficacy of our constitutional structures is significantly diminished if the courts are not generally accessible to the communities which they serve.

The constitutional dimension of the work done by community legal centres is exemplified by the exceptional work which has been done by the Refugee and Immigration Legal Centre in Melbourne. As many of you will be aware, this is a community legal centre specialising in refugee and immigration law situated in inner city Melbourne. Each year it provides advice and assistance to around 4500 extremely vulnerable people in relation to the most important issue in their lives - namely, the country in which they will live. It has a conspicuous record of success. Over the last 8 years or so it has commenced five sets of proceedings in the High Court, all of which have either been settled on terms satisfactory to the client, or determined in the client's favour by the court.

Those successes have resulted in the centre gaining a significant public profile. Its principal solicitor, Mr David Manne, has acquired something akin to celebrity status within the legal profession and is a regular public commentator on issues relating to refugee and immigration law. Anyone who has had the benefit of meeting David (as I did a couple of weeks ago), could not fail to be impressed by his dedication, enthusiasm and commitment to the protection of the legal rights of displaced persons who seek the centre's assistance. When required, David has been able to

galvanise a team of experienced and leading lawyers, including senior and junior barristers, and experienced solicitors, all working pro bono to assist clients whose futures were under a very dark cloud and whose pasts have often been traumatic and tragic.

A good example of their work was the so-called 'Malaysian solution' case which was dealt with by the High Court last year. David received a telephone call at home in Melbourne early one Saturday evening. The call came from a Canberra-based Legal Aid duty lawyer. He told David about a telephone call he had received, out of the blue, from a group of men mainly from Afghanistan, who were in detention on Christmas Island and who feared being expelled to Malaysia. They were concerned that they could be flown to Malaysia as early as Monday morning. David contacted the men, and was told that in addition to their plight, they were concerned for the future of a number of unaccompanied children, and mothers with young children but without partners who were facing the same predicament. That evening David got on the phone and enlisted the support of Debbie Mortimer SC and Richard Niall SC, and the pro bono assistance of a major law firm - Allens Arthur Robinson. Papers were prepared during Sunday, and by 6pm that evening the matter was before Justice Hayne of the High Court of Australia, sitting in Melbourne. He issued an injunction restraining the removal of the persons concerned. The following day the injunction was extended until the matter could be determined by the High Court. That occurred three weeks later when the High Court ruled that it was unlawful for the government to expel those people to Malaysia.

The determination of the lawfulness of government action is a fundamental and inalienable characteristic of the system of courts which

we inherited from our colonial forebears. It is such a fundamental characteristic of a court that it is protected by Chapter III of the Constitution of the Commonwealth, in relation to both State and Federal courts (see *Kirk v Industrial Relations Commission of New South Wales*[1]; *Public Service Association of South Australia (Inc) v Industrial Relations Commission of South Australia*[2]).

Reasonable people can and do hold different opinions with respect to refugee policy. But it is difficult to see how any reasonable person could sensibly contest the proposition that it is in the public interest for the lawfulness of government action to be tested and determined in the courts. That process has been a feature of common law courts since the Magna Carta was signed at Runnymede almost 800 years ago (in theory at least), and in practice the jurisdiction has been regularly exercised since the absolute power of the monarch was subordinated to the rule of Parliament more than 400 years ago. There is absolutely nothing novel or radical about this jurisdiction or its exercise. Nor is there anything subversive or undemocratic about this jurisdiction. The law enforced by the High Court in the 'Malaysian solution' case was a law of the Commonwealth Parliament. It is a law which can be changed by the elected representatives of the people, like any other law.

The 'Malaysian solution' case attracted a great deal of public interest, understandably. Much of the work done by the many community legal centres around Australia is just as important for the clients whom they assist, but passes largely unnoticed by the public. The work done by those centres and the dedicated people who work within them, with the

[1] [2010] HCA 1; (2010) 239 CLR 531
[2] [2012] HCA 25

assistance of the private legal profession, helps to ensure that in Australia the rule of law is a practical and realistic concept which applies to ordinary Australians, including those most vulnerable, rather than a purely theoretical and abstract concept. This is why I say that community legal centres perform an important function which has a significant constitutional dimension.

Community legal centres play a vital role in bridging the gap between the courts and their communities. The services which they provide render our justice system more comprehensible and accessible to many Australians. However, resourcing limitations necessarily mean that the CLCs are incapable of filling the large gap of unmet legal need. This means that the courts must do whatever we can to improve access to justice.

Improving Access by Improving Efficiency

Dissatisfaction with the justice system as a result of limited access to that system is not new. The tragic plight of litigants in the Court of Chancery was the subject of *Bleak House* written by Dickens during the 19th century. Dean Roscoe Pound of Harvard Law School wrote a famous paper entitled '*The Causes of Popular Dissatisfaction with the Administration of Justice*' in 1906. Central themes in that paper were the evils of costs, delay and complexity which continue to plague the justice system today. Progress has been made on the issue of delay since the pitiful progress of *Jarndyce v Jarndyce* in *Bleak House*, but reducing cost and complexity seem to be beyond our reach. However, we must not give up. In the last section of this paper I will endeavour to touch upon some of the steps that we are taking with a view to increasing efficiency, reducing cost and complexity, and thereby increasing access to justice.

Increasing Emphasis on Alternative Dispute Resolution

One of the characteristics of civil litigation over the last 20 years or so has been the increasing emphasis on alternative dispute resolution techniques including, particularly, mediation. All civil courts in Western Australia now provide court-based mediation services, and at least in the superior courts it is virtually impossible to go to trial without first undertaking a mediation process. This has significantly reduced the number of cases going to trial, and therefore the cost to the parties and to the public, given that the courts are publicly funded.

In the Supreme Court, the number of cases resolved by a trial or other adjudicated outcome is consistently around 3% of the total number of cases commenced in the court. The emphasis on mediation has played a significant part in maintaining the low rate of adjudicated outcomes.

Assessment of the most propitious time to commence the mediation process involves questions of balance and judgment. Much depends upon the particular circumstances of the case, and the interests of the parties. Previous practice under which mediation was regarded as the last step to be taken before a trial has been abandoned in favour of mediation occurring earlier in many cases. In our experience, the settlement rate achieved by mediations conducted relatively early in the process is about the same as the settlement rate achieved by mediations conducted immediately before trial. Obviously if a case settles earlier, both the parties and the court are saved significant legal costs. Increasingly we are viewing mediation as a process, rather than an event. Under that approach, if mediation does not achieve consensual resolution because the parties require further information to evaluate their positions,

directions can be made with respect to the gathering of that information before the mediation is resumed.

For about 5 years or so we have been using a form of mediation in the criminal jurisdiction of the court. It has proven to be successful in reducing the number of cases going to trial, and in reducing the length of trials. Even if the case is not completely resolved, we have found the process quite useful in achieving agreement with respect to issues that are not controversial, thereby reducing, in some cases very significantly, the amount of evidence that has to be led.

Case Management

The other dominant characteristic of civil litigation over the last 20 years has been the emergence of proactive case management by judicial officers. Most courts have abandoned the traditional approach under which the pace and progress of each case was essentially left to the enthusiasm (or whim) of the parties and their legal representatives. In our court, any case that is likely to be contentious is managed proactively either by a judge or a registrar. The pace at which the case travels is set by the case manager, in consultation with the parties. The objective of the process is to bring the case to resolution, either by agreement or by trial, as quickly and as cheaply as possible. That objective is fostered by the use of an individualised approach in each case, rather than the previous adoption of a 'one size fits all' approach under which virtually all cases followed the same procedural route.

Pre-action Protocols

In some jurisdictions (notably the UK, Victoria and the Commonwealth), protocols have been introduced requiring parties to take certain steps, and

in particular genuine efforts to resolve the dispute prior to the commencement of proceedings. Experience of those protocols in the UK has been mixed, and their introduction in Australia is too recent to enable any firm conclusions to be drawn as to their efficacy. However, their objective is to save time and cost by encouraging parties to resolve or narrow their differences before even opening the door of the court. Critics of these protocols suggest that in fact they add to cost and delay. Empirical analysis of the effect of these protocols would be very helpful.

Early Issue Identification

One of the principal objectives of case management is to enable the identification of the real issues between the parties at the earliest possible time. Many courts have moved away from the assumption that the process of formal pleading was the best way of identifying the issues, in favour of other less formal and more flexible techniques. In our court it is not uncommon for directions to be made dispensing with pleadings, where the issues can be more effectively identified through some other means.

Strategic Conferences

One of the techniques we use to facilitate the early identification of issues is a procedure which we have coined a 'strategic conference'. It is held relatively early in the life of cases managed by judges, and involves the parties and their legal representatives meeting with the judge in a conference room, rather than in an adversarial environment. The purpose of the meeting is to identify the real issues in the case, to discuss the timing of mediation, and to chart the procedural course which the case will follow thereafter.

We have found that meetings of this kind have at least two distinct advantages. First, they facilitate movement away from the 'one size fits all' approach whereby the parties and their legal advisers mechanically apply, without discerning thought, the traditional processes of pleading, particulars, discovery, exchange of witness statements, exchange of expert evidence, etc.

The second advantage is that the charting of a procedural course at the outset of the case can have the effect of reducing the number of subsequent appearances required, especially if the parties and their lawyers stick to the charted course, thereby reducing cost.

Reduced Adversariality

One of the dominant characteristics of the common law system we inherited from our colonial forebears is the adversarial process. Its logic was put succinctly by Lord Eldon in 1822 when he observed:

> Truth is best discussed by powerful statements on both sides of the question.

However, the fairness and efficacy of the adversarial process presumes that all parties have equal access to legal and investigative resources. That assumption cannot be made in contemporary Australia.

There are other problems with the adversarial process. It encourages parties to focus upon issues which they believe will provide them with a forensic advantage, rather than the real issues in the case. It is economically inefficient because it requires every party to the proceedings to fully prepare each and every issue, no matter how contentious. Perhaps most significantly of all, the adversarial process is

fundamentally antithetical to the building of consensus, which we know is the main way in which civil disputes are resolved. There is a real tension between courts providing parties with mediation services aimed at building and achieving consensus, while at the same time encouraging parties to prepare for a trial by maintaining partisan and aggressive positions which are likely to impede consensual resolution. The disadvantages of the adversarial process explain why there is a distinct movement away from that process in our courts, including through mechanisms like the strategic conference to which I have just referred.

Proportionality

Most courts, including ours, have now embraced, in differing terms, the notion of proportionality coined by Lord Wolff at the time his procedural reforms were implemented in England and Wales about 15 years ago. Essentially the notion requires the court to assess whether the time and expense associated with any particular interlocutory step is proportional to its contribution to the enhancement of the fairness and justice of the outcome. If the time and expense involved is disproportionate, the step will not be taken. This is another means by which the courts are endeavouring to reduce delay and cost.

Conferral

Another technique which we have found particularly useful in our court is a requirement that the legal advisers of the parties confer before bringing any interlocutory dispute before the court. In this context, conferral does not mean exchanging aggressive emails - it means a conversation, perhaps by telephone but ideally face to face, between lawyers who have the authority to resolve the dispute. We have found that this requirement

significantly reduces the number of disputes that are brought before the court.

Discovery

The obligation to disclose relevant documents through the process of discovery has proven to be increasingly burdensome and expensive, in a world in which the ease of production and exchange of data has magnified the amount of documents (either hard copy or electronic) involved. Most courts have moved away from a default position whereby a general obligation to discover all relevant documents was imposed upon all parties, toward a position where more specific discovery obligations are fashioned having regard to the real issues in the case. There is scope for further improvement in these techniques, especially in a context in which most data is stored electronically, and can be searched and retrieved electronically, rather than manually. The problem is that without qualitative evaluation of the data retrieved, there is a tendency for massive amounts of irrelevant data to be retrieved and exchanged, thereby magnifying the cost to the parties who have to review the data produced.

Expert Evidence

The production of expert evidence has also proven to be a source of delay and expense. Various techniques have been introduced with a view to alleviating these problems, including more proactive judicial supervision of the process of gathering expert evidence. For example, it is not uncommon for the court to convene a conference with the parties and their legal advisers with a view to identifying the issues to which expert evidence is relevant, the appropriate areas of expertise, the questions to be asked of the expert witnesses, the facts which the witnesses can

assume are non-contentious, and the facts which are in contention. These techniques avoid the phenomenon which we have seen all too often of the expert witnesses being like ships passing in the night, without knowledge of each other or any real engagement.

Another technique commonly used to mitigate this risk is the taking of expert evidence from a number of expert witnesses concurrently (the so-called hot tubbing process). This process will only be engaged following a conference of the experts, where they have identified the issues upon which they are agreed, and the issues upon which they differ. The process enables the parties' lawyers and the judge to engage with the experts directly, and enables the experts to engage with each other in the presence of the judge and the lawyers.

Other techniques used in this area include limiting the number of expert witnesses which the parties may call, or requiring the experts to confer before they have produced their written reports with a view to minimising the differences between them.

Conclusion

Many Australians lack the financial and other resources required to effectively access our justice system, particularly in the area of civil justice. Although there are a number of mechanisms designed to provide access to those who lack the requisite resources, their coverage is incomplete. Community legal centres fill a very important role in facilitating access to justice for those to whom it would otherwise be denied. There is an important constitutional dimension to that role. The courts must, and are in fact, modifying their systems and procedures to

improve efficiency, reduce cost and delay, and thereby augment the role played by community legal centres in improving access to justice.