



John Huelin Memorial
Human Rights Day Lecture

Access to Justice
A Human Right in Principle, Policy and Practice in
Western Australia

The Hon Wayne Martin
Chief Justice of Western Australia

Alexander Library Lecture Theatre
Perth Cultural Centre

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I would like to thank the United Nations Association of Australia (WA) for inviting me to deliver the John Huelin Human Rights Day Lecture today. I would also like to acknowledge the traditional owners of these lands, the Nyoongar people, and pay my respects to their Elders.

This lecture is not only part of the commemoration of Human Rights Day, but is also an opportunity to remember the significant contribution to our community made by the late John Huelin. A Perth lawyer, he commenced practice in 1947 at the age of 37 - which is of course somewhat later in life than is usual. No doubt his experiences of life before entering legal practice provided an important perspective, which was to come to the fore later in his professional life. Until 1974 he was a member of the firm of Darbyshire, Gillett and Huelin. In 1974 he became the co-ordinator of the Perth office of the Aboriginal Legal Service, at about the time of the formation of that service. He and John Toohey Q.C. (later Justice Toohey of the High Court) worked together in this enterprise, with Mr Toohey opening the ALS office at Port Hedland. Together, they raised the status of the Aboriginal Legal Service within the profession, while striving to improve the situation of Aboriginal people, particularly in their dealings with the law. A little later, they were assisted by Henry Wallwork - later a Judge of the Supreme Court. John Huelin's work at the ALS continued to the day of his death in 1982 at the age of 72, after 45 years of devotion to the law. The high standing which the ALS enjoys today can be attributed in part to the solid foundations provided by the likes of John Huelin, John Toohey and Henry Wallwork.

In tributes to him after his death, he was described as "one of the most highly respected legal practitioners in Western Australia". Particular reference was made to him as "a tireless worker for human rights ... deeply involved in striving to assist his fellow man ...".

Peter Michelides, Principal Legal Officer with the Perth ALS at the time of Mr Huelin's death, (now Magistrate Michelides) reflecting on his contribution to the Aboriginal community in particular, remarked that: "Mr Huelin was deeply concerned about such issues as the high rate of Aboriginal imprisonment and the improvement of Aboriginal-Police relations. He worked with great vigour and devotion for the Service and for Aboriginal people. We will remember him for his compassion, energy and generosity".¹

No doubt, were he alive today, John Huelin would be extremely saddened by the fact that the Aboriginal imprisonment rate has increased in this State since his death. 40% of the prison population is Aboriginal, compared to 3% of the general population. Tragically, the position is even worse for juveniles, where more than 80% of the inmates of our juvenile detention facility are Aboriginal. This is a terrifying omen for the future. And viewed in terms of imprisonment per head of Aboriginal population the rate in Western Australia is almost double that in the Northern Territory.

Neither I, nor the Government, regard this situation as acceptable. It must be addressed as a matter of high priority. But it is a big topic, beyond the scope of today's lecture, and which I will therefore leave for other days.

¹ This quote available at <http://www.austlii.edu.au/au/journals/AboriginalLB/1982/61.html>, as at 15 September 2006, although otherwise the material referred to on Mr Huelin has been sourced from Mr Huelin's Obituary in [1982] 57 *Australian Law Journal* 60)

Justice Toohey (as he then was) summed up Mr Huelin's character: "In an age of specialisation, he was a man of broad outlook and of great compassion". Beyond his role with the ALS, he actively participated in numerous organisations attempting to improve the lot of those in need in the community, amongst them his membership of Amnesty International, as first Chairman and a continuing member of the UN International Children's Emergency Fund (WA), and as President (for 12 years) of the Good Neighbour Council. In just recognition of his contribution, in 1979 he was awarded the United Nations Peace Medal and in the following year was made an Officer of the Order of the British Empire. We rightly honour his contribution through this annual lecture series.

Human Rights are at the very heart of the United Nations. A glance at the UN web page reveals that "[v]irtually every United Nations body and specialized agency is involved to some degree in the protection of human rights".² The UN justifiably describes as one of its great achievements "the creation of a comprehensive body of human rights law, which, for the first time in history, provides us with a universal and internationally protected code of human rights, one to which all nations can subscribe and to which all people can aspire".³

In Australia, of course, our Commonwealth and State Constitutions provide no comprehensive framework guaranteeing the recognition and protection of human rights. The debate continues in this country about the adoption of a Bill of Rights either constitutionally, or in ordinary legislation. In the absence of constitutional recognition, the protection of

² <http://www.un.org/aboutun/basicfacts/hrights.htm>, as at 13 September 2006.

³ <http://www.un.org/aboutun/basicfacts/hrights.htm>, as at 13 September 2006.

human rights in Australia rests essentially upon our statutory and common law framework.

Although the Constitution of the Commonwealth provides only limited express recognition or protection of human rights (eg, in s116 which protects freedom of religion under Commonwealth law), it has provided opportunities for judicial interpretation which have impacted on human rights values. Cases such as *Kable*, in which the High Court invalidated legislation intended to authorise the indefinite detention of one man, relying on Chapter III of the Constitution, the Communist Party case in which the High Court held that the prohibition of a political party was beyond the constitutional powers of the Commonwealth, and *Lange*, in which the High Court found an implied constitutional freedom of political expression, come to mind. However, the State constitutions, particularly the garbled constitution of this State, provide a much less fertile field for the simplification of human rights protections.

In considering common law protections, cases such as *Mabo (No 2)*, *Coco*, *Dietrich* and *Teoh* come immediately to mind, although, of course, the effect of *Teoh's* case was somewhat shortlived. The main bulwarks for the protection of human rights in Australia have been achieved legislatively. In this State, the *Equal Opportunity Act 1984* provides an example, although the most well known legislation perhaps is the body of Commonwealth Acts including the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1991*, resulting from the ratification by Australia of a range of international human rights treaties promoted by the United Nations.

The nature of human rights is, by their very nature, wide-ranging; they include civil, political, economic, social and cultural rights. Human

rights are particularly amorphous and are not readily susceptible to precise definition. The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, is a useful starting point in identifying their ambit and content. Of course, the Declaration is not a legal instrument, but merely a resolution of the General Assembly generally (although admittedly not universally)⁴ argued to create no binding obligations on states under international law. Nevertheless, it is a document of profound moral, philosophical and political import, described by the eminent Professor Ian Brownlie as "a good example of an informal prescription given legal significance by the actions of authoritative decision-makers".⁵

As a Judge, I have an especial concern about one particular aspect of the field of human rights – and that is access to justice. In that regard, I refer in particular to articles 6 to 10 of the Declaration:

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

⁴ On which see, eg, the discussion and references in O'Neill et al, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, Sydney, 2004, 2nd ed.) at 141).

⁵ Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2003, 6th ed.) at 535.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him

At its internet site, UNESCO discusses these requirements in terms of access to justice:

"All persons are equal before the courts and tribunals and enjoy certain procedural guarantees in civil and criminal trials. Equality before the courts means, in particular, that all persons must be granted, a right of equal access to an independent and impartial court or tribunal for the determination of civil disputes or criminal charges without discrimination. The most important procedural guarantee in both civil and criminal proceedings is the right to a fair and public hearing."⁶

This reflects the position recognised by the European Court of Human Rights in *Golder v The United Kingdom* [1975] ECHR 1 and in many

⁶ At http://portal.unesco.org/shs/es/ev.php-URL_ID=4673&URL_DO=DO_TOPIC&URL_SECTION=201.html, as at 14 September 2006.

later cases⁷. The facts of that case were that Golder had been serving a term of imprisonment in the UK consequent upon his conviction of robbery with violence, when there was a serious disturbance in a recreation area of the prison. Subsequently, a prison officer who had been injured in quelling the disturbance, identified Golder as one of those who had assaulted him during the disturbance. Golder addressed a petition to the Home Secretary requesting, amongst other matters, that he be given permission to consult a solicitor with a view to taking civil action for libel in respect of this statement. The Home Secretary refused his request. Golder challenged this action.

The Court was specifically concerned with the European Convention on Human Rights, and in particular article 6 para 1 which provides relevantly:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...".

This of course more or less corresponds to article 10 in the Universal Declaration and indeed the Preamble to the European Convention notes that it aims to secure the universal and effective recognition and observance of the Rights declared in the Universal Declaration of Human Rights.

The Court concluded that Article 6 para. 1 "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (para 36). Since Golder could justifiably wish

⁷ Available on the internet at <http://www.worldlii.org/eu/cases/ECHR/1975/1.html>, as at 13 September 2006

to consult a solicitor with a view to instituting legal proceedings, in declining to accord the leave which had been requested, the Home Secretary failed to respect Golder's right to go before a court as guaranteed by Article 6 para. 1. Access to the courts and in that manner access to justice is recognised in the Convention and it is equally recognised in the Universal Declaration.

The concept is similarly reflected in other international human rights documents. One example is the *International Covenant on Civil and Political Rights* (ICCPR) which was adopted by the UN General Assembly in 1966. Unlike the Universal Declaration, the ICCPR is of course a treaty, opened for signature, ratification or accession, and which came into force in 1976. More than 150 states have ratified or acceded to it⁸, including Australia, which ratified the Convention in 1975. It also relevantly provides in Article 14 para 1:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

That the various international Declarations and Conventions should recognise the right to access to the courts and in that manner access to justice is hardly surprising, as these are properly considered fundamental notions of the rule of law. Indeed, the Court in *Golder* recognised that:

"[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised'

⁸ As noted in in O'Neill et al, *Retreat from Injustice: Human Rights Law in Australia* (Federation press, Sydney, 2004, 2nd ed.) at 143.

fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 ... must be read in the light of these principles" (para 35).

The Court concluded that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts" (para 34);

The majority of the work, by volume, of the Supreme Court arises in the civil context, although this is not to diminish the importance of our criminal jurisdiction, to which I will later refer. When one speaks of international human rights there is perhaps a tendency at times to think primarily in the context of the criminal law. However, as is clear from the *Golder* case, access to justice is not a matter peculiar to the criminal environment. Chief Justice Spigelman of the New South Wales Supreme Court recognised this in his important 1999 paper, "Access to Justice and Human Rights Treaties"⁹ where he commented on the fact that human rights treaty obligations may impinge on a private action for damages and are not simply concerned with matters of public law and criminal law, although much of the discussion of human rights, focuses exclusively on public law and criminal law issues, to the virtual exclusion of the consideration of civil actions.

Issues of access to justice in the context of human rights also often arise for discussion in the context of work being done in the developing world. However, it is dangerous to see these issues as relevant only to the challenges faced in that context. Access to justice is of critical concern to every Australia citizen, to every Western Australian, and is not a matter

⁹ The Keynote Address to the National Conference of the Australian Plaintiff Lawyers Association (22 October 1999) available at

for complacency. Last year, Justice Michael Kirby in the Foreword to the book, *United Nations Development Programme: Programming Justice - Access For All - The Access To Justice Practitioners' Guide*¹⁰ commented that the book is strong on practical measures for translating the aspirations of international human rights law into practical means of assuring access to justice for all people in giving useful notes on expanding alternative dispute resolution; on promoting the use of information technology in court registries; on helping in judicial training in ways that respect the independence of the judges from propaganda; on promoting public interest litigation; and on teaching people about their rights and how they can use the courts to repair violations and to promote the entitlements of the vulnerable. These concerns are familiar to us in the workings of a modern court; they remain just as important in Western Australia as they are in the developing world.

Justice Kirby refers in his Foreword to "practical measures for translating the aspirations of international human rights law into practical means of assuring access to justice for all". This is a sentiment I strongly share. There is no doubt in my view that access to justice is well understood as a matter of principle in this country, and in WA in particular. However, as Chief Justice, I am as much concerned with the practical realisation of that right as with its 'in principle' recognition. I am concerned about the reality of access to the courts and in that manner access to justice in this State, and in particular to the Supreme Court. It is on this issue that I particularly wish to focus today.

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_22109, as at 15 September 2006.

¹⁰ Available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_18mar05.html, as at 15 September 2006.

It is well known that I seek practical changes to improve the processes, procedures and administration of the Courts to better ensure access to justice in the State. However, the Supreme Court and the Courts generally are but one facet of the administration of justice in Western Australia. I have emphasised before that the community owns the justice system of this State but very few of its citizens can afford to engage in its processes. The Court system is far from alone in seeking to facilitate access to justice in WA; the involvement of government in legislative reforms such as the establishment recently of the State Administrative Tribunal, the provision of legal aid and pro bono work by the legal profession, and the potential of litigation funding (particularly in the light of the recent High Court decisions in this area) are but a few examples.

Legal Aid

Governments must be constantly vigilant to ensure that legal aid receives the resources it needs. The provision of legal aid in WA is principally an amalgam of State and Commonwealth funding.

In the Commonwealth sphere, the then Attorney-General, Daryl Williams, issued a media release in 1999 revealing that a needs study undertaken by the Commonwealth as part of the processes of its legal aid funding allocations showed that "people in Western Australia are more likely to miss out on legal aid for some Commonwealth matter than people in other States. ... Under current funding arrangements, Legal Aid Western Australia has received a lower proportion of national legal aid resources than it should compared with other States and Territories".¹¹ At least one academic commentator, Reid Mortensen, Reader in Law at the

¹¹ Williams D (Commonwealth Attorney-General), "Western Australia to Receive More Money for Legal Aid" (Media Release, 23 December 1999)

Centre for Public, International and Comparative Law at the University of Queensland, has suggested that this still remains a concern, with federal funding for WA legal aid around 8.1 - 8.2% of the national base compared with a population proportion of 9.8%.¹² It was also reflected in the submissions made by WA Legal Aid to the Senate Legal and Constitutional References Committee as appears from its 2004 Report: "Inquiry into Legal Aid and Access to Justice" (at p.8): "that in per capita terms, 25% fewer people obtain legal representation to resolve a family law matter in Western Australia than do the national average" (par 2.16).¹³

It is encouraging to note that State and Territory governments and legal aid commissions signed new agreements nationally in March and April 2005, now due to expire on 31 December 2008 and which provide nationally for additional funding of \$12 million per annum (provided in the 2004–05 Budget).¹⁴

It is also encouraging to note in the context of State funding that on 25 May 2006 the Attorney General of WA, Jim McGinty, announced that overall funding to Legal Aid WA had increased by 14.7 per cent in the 2006-07 Budget to \$21million, up from \$18.3million last year. The funding boost also includes an additional \$593,000 for a new duty lawyer service at the Perth Children's Court and more recently additional funds

(http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_1999_December_WA_to_receive_more_money_for_Legal_Aid, as at 19 July 2006)

¹² Mortensen R, "Interest on Lawyers' Trust Accounts" (2005) 27 *Sydney Law Review* 289 at 310-311.

¹³ Senate Legal and Constitutional References Committee, "Inquiry into Legal Aid and Access to Justice" (June 2004) (http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf, as at 20 July 2006).

¹⁴ Commonwealth) Attorney-General's Department, *2004-2005 Annual Report* at 59 ([http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~13+October+annual+report.pdf/\\$file/13+October+annual+report.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~13+October+annual+report.pdf/$file/13+October+annual+report.pdf), as at 19 July 2006).

were provided for a programme to enable representation of offenders at risk of imprisonment in the Magistrates Court.¹⁵

These are valuable developments for Western Australians, both nationally and at a State level. This recognition and support must continue. Legal Aid WA does a very good job with the limited resources provided to it but, absent a dramatic change in the attitude of the State and Federal Governments to the funding of legal aid, will struggle to do more than fund the defence of serious criminal charges and provide assistance in areas of Federal law which are specifically funded - mainly family law.

I should also mention that over and above this contribution by legal aid commissions, community legal centres (represented by the National Association of Community Legal Centres) make a valuable contribution . In its 2004-2005 Annual Report (at p.9), the National Association reported dealing with 275,000 community legal centre clients nationally, of whom 62% were women, 82.5% had a low income and 62% were sole-parent of families with dependent children. The staff of the centres was assisted by almost 3500 volunteers (at 9).¹⁶

Legal aid is a valuable part of meeting legal needs both nationally and in Western Australia, but leaves much need unmet.

Pro bono

Pro bono work by lawyers helps meet some of this unmet need. This work receives little public recognition but has a significant benefit. It must be encouraged and supported. There have been valuable initiatives in recent times in this area. In particular, the National Pro Bono Resource

¹⁵ [McGinty], "WA - Legal funding boost for 1,100 extra court cases" (Media Statement, 25 May 2006) (<http://www.wa.alp.org.au/media/0506/20005872.html>, as at 19 July 2006).

Centre was launched in August 2002 as an initiative of the Federal Attorney-General¹⁷ in response to the largely fragmented and unco-ordinated way in which pro bono services were being delivered in Australia. The Centre is a valuable initiative: as Tony Fitzgerald AC QC, Chairman, recently described its role:

"Some legal practitioners continue to provide free or affordable legal services to low income and socially disadvantaged people and deserving organisations. The Centre exists to support and extend the range of those services and the number of practitioners involved.

...

The Centre aims to build pro bono capacity across Australia and will continue to promote pro bono possibilities not only to the private profession but also to corporate and government lawyers and law students."¹⁸

As noted on its internet site ("About Us"), the "Centre receives financial assistance from the Commonwealth Attorney-General's Department, the State and Territory Attorney-Generals and the Faculty of Law at the University of New South Wales."¹⁹ On 10 May 2005, the Attorney-General Philip Ruddock announced the allocation of \$1 million over four years to the Centre. Mr Ruddock said the new funding reflected the Government's commitment to pro bono services and recognition of the

¹⁶ National Association of Community Legal Centres, *2004-2005 Annual Report* (<http://www.naclc.org.au/docs/AnnualReport05.pdf>).

¹⁷ As appears in its *First Annual Report 2003* at 1 (http://www.nationalprobono.org.au/publications/NPBRC_AR_2003_000.pdf.pdf, as at 17 July 2006).

¹⁸ *Annual Report 2005* (<http://www.nationalprobono.org.au/publications/Annualreport0405.pdf.pdf>, as at 17 July 2006) at 1.

¹⁹ Internet site: "About Us" (<http://www.nationalprobono.org.au/about/index.html>, as at 17 July 2006).

role of the Centre in promoting it.²⁰ Encouragingly, this has addressed the Centre's future for the time-being.

In the context of pro bono, I note in particular that the WA Law Society offers "Law Access". As appears from their internet site:

"Law Access was established in October 1992 to co-ordinate the giving of free, reduced fee, cost recovered or fixed fee legal advice or representation by the legal profession. The service is targeted at those people in the community in genuine need of legal assistance who are unable to afford the usual rates charged and are unable to obtain Legal Aid.

Funding for the administration of Law Access has been provided by grants from the Public Purposes Trust and the Law Society of Western Australia.

In 1996 Law Access took over the administration of the Shopfront Lawyer Service on the ground floor of the Law Society building [which] ... provides 20 minute appointments to obtain general legal advice. There is a booking fee of \$25.00 (incl GST).

In 2002 Law Access changed its name to *Law Access Public Law Clearing House* to more accurately reflect the work it undertakes.

...".²¹

However, pro bono is not a panacea for unmet legal need. As the National Pro Bono Resource Centre's inaugural Director, Mr Gordon Renouf, observed in the Centre's First Annual Report 2003 (at 2):

²⁰ Attorney-General Philip Ruddock, Media Release 10 May 2005
(http://www.ag.gov.au/agd/WWW/budgethome2005.nsf/Page/Media_Statements_Media_Documents_

"In 2001/02 Australian lawyers reported an average of 42.2 hours per year spent providing pro bono legal services, about two thirds of this without expectation of a fee and one third at a reduced rate. This considerable contribution comprises around 1.5 million hours work per annum. At roughly one fifth of the total hours of free or nearly free legal assistance funded through the broad legal aid system, *pro bono is neither a panacea for unmet legal need in Australia* nor an insignificant contribution to meeting those needs." (emphasis added)²²

Professor David Weisbrot (Chair, National Pro Bono Task Force) noted at the National Pro Bono Workshop in August 2002, marking the launch of the National Pro Bono Resource Centre, that the Task Force had provided in its Report recommending the establishment of the Centre a statement of principles, or a Preamble, which contained its working assumptions about the nature and purpose of pro bono practice in Australia, including that:

"Pro bono practice is *not* a substitute for legal aid. It is essential to distinguish lawyers' professional/ethical obligation to do pro bono work from the fundamental government/community responsibility to provide adequate levels of legal aid, especially in such core areas as criminal law and family law.

However, there is also a recognition that even dramatically increased levels of legal aid funding would not completely relieve the demand

10_May_2005_Funding_boost_for_national_pro_bono_resource_centre, as at 17 July 2006.

²¹ <http://www.lawsocietywa.asn.au/index.php?p=7&c=30>, as at 20 July 2006.

²² As appears in its *First Annual Report 2003* at 2

(http://www.nationalprobono.org.au/publications/NPBRC_AR_2003_000.pdf.pdf, as at 17 July 2006).

for pro bono work, given the high level of unmet legal need in the community."²³

Litigation funding

Other avenues of providing legal assistance in the community must be explored. Innovative methods of supporting litigation must be developed. A promising development in this area is litigation funding, particularly in the light of the recent decisions of the High Court in *Campbell v Cash & Carry Pty Ltd v Fostiff Pty Ltd* [2006] HCA 41 and *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42 which have continued to reflect the gradual relaxation over time in the way courts have approached litigation funding. Subject of course to ensuring proper consumer protection constraints and the need to ensure that the client and not the funder retains control of the litigation, these are encouraging and welcome developments.

Court reforms

These resources, services and developments aside, my particular interest and role is in the steps which the Courts of Western Australia, and in particular, the Supreme Court might take to improve access to justice. I have previously emphasised that improving the access of all Western Australians to the Courts of this State is at the forefront of my objectives and is guiding and will continue to guide the specific proposals I am presenting to my judicial colleagues and, where appropriate, to government.

²³ Professor David Weisbrot (Chair, National Pro Bono Task Force), National Pro Bono Workshop: Launch of the National Pro Bono Resource Centre (15 August 2002) (<http://www.alrc.gov.au/events/speeches/DW/20020815.rtf>, as at 18 August 2006).

I must emphasise that no Chief Justice can implement significant change on his or her own. I am very conscious that changes in the processes and procedures of the Courts will only occur if they enjoy the support of the members of the Courts. Changes which involve expenditure or legislation can only occur with the support of government. In this regard, I have been delighted with the support that I have already received both from my judicial colleagues and from government to the changes which I have begun to implement and those which I am seeking to implement.

Self-represented litigants are here to stay and indeed are likely to be more common in all Courts in future. We must develop programs to assist and encourage people to present their own cases and provide them with access to the information they need to enable them to do so effectively. The Internet provides great opportunities for cost-effective information delivery in this area and the State Administrative Tribunal Wizard is an example of what can be achieved. Equally, it must be recognised that not all have Internet access and we must look also to other initiatives to improve the provision of information and assistance to self-represented litigants.

Prior to my appointment as Chief Justice, I had come to the view from long experience that perhaps the most effective way of improving access to justice in the longer term is by improving the processes and procedures of the Courts so that the real issues are identified and resolved earlier and with an absolute minimum of interlocutory processes. I had found that a wholly disproportionate amount of time and money can be and far too often is expended on the many steps that take place between the commencement of a proceeding and its resolution by trial or agreement. To this end, the Supreme Court has established the Commercial and Managed Cases List. All cases in the List are, as far as possible, docket

managed by the Judge or Master likely to hear the trial of the case. This is a major reform to improve the efficiency of the Court, with the express purpose of speeding up cases which in the past have dragged on for months or even years. The principle of proportionality is a feature of the reform. In other words the time and effort put into a case by various parties must be proportional to the importance of the issues and the value of the subject matter involved. In future legal processes prior to mediation or trial will only be permitted if the time and expense involved is justified by the contribution they make to the just resolution of the case. It will be a rare case that will go to trial before being mediated first. Issues concerning file churning and adjournments should be substantially resolved by the adoption of the new case management system.

I also believe that more expeditious resolution of interlocutory disputes should be facilitated through the use of directions limiting oral argument and requiring that parties nominate at the outset the amount that should be awarded in costs if successful, to reduce costs arguments to a minimum.

Related to this, Government approval has been given to a review and rewrite of the Supreme Court Act to ensure that it and the associated Rules reflect contemporary approaches to litigation (including adopting a principle of "proportionality" in the Rules) rather than those which evolved in England during the 19th Century. This should realise efficiencies in the Court's civil process and reduce the average time from lodgement to finalisation. Consideration of a new set of Rules must involve our judicial colleagues at the District Court because it is highly desirable for the superior Courts of this State to operate with the same basic rules. For the same reason, we are liaising closely with the Federal Court which is itself undertaking a general review of its rules of practice. There would appear to be a significant benefit in this reform in supporting

harmonisation with the Federal Court, subject to the guiding principle that there be an emphasis in the Rules upon empowerment and flexibility, and the avoidance of prescription.

The rules which evolve from this collaborative process should be much simpler than those we have at present, and expressed in plain English. All forms should be reviewed, simplified and expressed in plain and contemporary language. There need be only one form of originating process which is best described in language understood by all of the community; namely, an application to the Court.

Criminal Practice Rules

In the criminal jurisdiction the Rules of Practice have recently been reviewed and revised. However, there are other initiatives which may also facilitate the conduct of the proceedings. The court has very recently introduced (on an initial 6 month trial basis) criminal case conferencing in circumstances where a Judge at a status conference can identify a case which might usefully be the subject of such a conference and the parties voluntarily agree to be involved. The process is conducted in accordance with a protocol, developed by the Court to ensure that criminal case conferencing does not in any way improperly interfere with the proper conduct of the criminal process. It is aimed at seeking to resolve issues in criminal trials speedily and in some cases may avoid the need for a trial.

The Criminal Law and Human Rights

On the general subject of human rights and the criminal law, can I repeat some observations I have previously made about the relationship between those two topics. Often human rights and the criminal law are seen as antithetical concepts. For example, from the perspective of a suspect

under investigation, the conduct of the investigation is seen to present a threat to the suspect's right to privacy, or silence, or liberty. Those are very real concerns. But there is another very real sense in which the criminal law actually protects human rights. The law of homicide protects the right to life, the law of assault protects the right to personal safety and the law of theft protects the right to enjoy property, the law of burglary the right to be secure in our homes and workplaces, etc. While there are therefore aspects of the criminal law which potentially conflict with human rights, there are also many aspects of the criminal law which reinforce fundamental human rights and liberties.

Public Information about Criminal Justice

The human rights instruments to which I have earlier referred recognise the right to a public hearing. The transparent and open conduct of criminal justice is a long-standing tradition in this country and the country from which our justice system is derived. Open justice is not given mere lip service by our courts, but is rigorously protected. That is because of our conviction that open justice is essential for the maintenance of public confidence, which is in turn essential for the proper and efficient operation of the justice system.

But not everybody can attend a court hearing. Contemporary society is dependent upon the modern media for its information, including its information about what occurs in our courtrooms. The dominance of the print and broadcast media is yielding to the internet. However, in relation to criminal justice, at the moment in Western Australia the public is generally dependent upon the limited and sometimes slanted information which they read in newspapers or receive in very brief bursts on television. It is regrettably not uncommon for that information to be

presented with a version which an editor thinks will attract attention to the story. That approach often involves either explicit or implicit criticism of the judiciary. It results in entirely erroneous public perceptions. For example, I have no doubt that many members of the public in this State are under the impression that the Judges of this State are lenient when it comes to the imposition of sentences. That impression is demonstrably false. This State has the highest imprisonment rate of any State in the country, and is second only to the Northern Territory in all the jurisdictions of this country. This State has the sixth highest imprisonment rate in the world. I do not provide this information as a badge of honour, but simply to illustrate the yawning chasm between reality and public perception.

As I have mentioned, the internet is rapidly gaining popularity as a source of information. For a relatively modest sum expended by government, it would be possible for the courts to place the full remarks made by a Judge at the time of passing sentence on the internet within a very short while of sentence being passed. That would enable any member of the public with a particular interest in the sentence and the real reasons for it, to access those reasons in full, rather than being dependent upon the limited and possibly slanted information provided in the media. This would significantly improve the access which the public have to information about what is occurring in their courts.

Human Rights and the So-Called War on Terror

The evocative expression "war on terror" has no doubt been coined and is used in order to induce the belief that our country and our allies face an unprecedented threat to our security. That proposition is in turn used to justify significant changes to law and practice, on the basis that the

allegedly unprecedented conditions which we now face require radical changes to the balances which have traditionally been struck between the protection of human rights and law enforcement.

But as we have been recently reminded by Chief Justice Gleeson, terrorism in the form of bomb plots directed at our vital institutions by religious fanatics can be traced back at least as far as 1605 to Guy Fawkes and his conspirators. When their conspiracy was discovered, they were subjected to torture and punishment of a ferocity which is unimaginable today. However, in our time, sanctions which have been imposed by our allies in response to the so-called war on terror, would themselves have been unimaginable a few years ago.

No reasonable person would contest the proposition that the terrorist attacks, including those on 9 September 2001, those in Madrid, London, Bali and elsewhere have created a justifiable need for action on the part of law enforcement agencies including the courts. But our responses to those tragic and outrageous events must be kept within perspective. It is a mistake to think that those atrocities are acts of a kind limited to our time or to our communities. In fact, most communities and societies have had to endure regular and occasionally frequent attacks upon their peace and security.

So it is with our country and the country from which our criminal justice system was derived. It is an historically demonstrable fact that the rules and practices which have evolved over the centuries in which our criminal justice system has operated, have served us well by striking an appropriate balance between the enjoyment of the liberties and freedoms we cherish in our democracy, and the protection of those liberties and rights by the law and its enforcement.

It therefore seems to me to follow that there is a practical onus upon anybody who would seek to alter that traditional balance to demonstrate the precise manner in which those traditional approaches are deficient to the proper investigation and prosecution of crime.

We must also take care that we do not so dramatically alter our principles which recognise human rights and liberty as to erode the characteristics of our democracy, so that the criminal law ceases to be a bulwark for the protection of human rights, but becomes an instrument of their oppression. If that ever occurs, the terrorists will have succeeded, and turned our society from one which cherishes the liberty of the subject to one in which that liberty is subordinated to the wishes of a powerful group - being exactly the totalitarian regime for which many terrorists contend.

Summary

I have endeavoured in this address to identify the many ways in which human rights intersect with access to justice. Without ready access to justice, human rights are an impractical ideal. In both the civil and criminal areas of the jurisdiction of the courts, there are steps which can and should be taken to improve access, and thereby enhance and reinforce our respect for, and protection of, human rights. I think John Huelin would have approved of those ambitions.