

**THE HON T F BATHURST AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

**INAUGURAL BILL GRANT ACCESS TO JUSTICE ORATION**

**JUSTICE ON A SHOESTRING: HOW DO WE MAKE THE LEGAL AID DOLLAR  
GO FURTHER?**

**17 SEPTEMBER 2018\***

**Introduction**

1. I too would like to acknowledge the traditional owners of the land on which we meet, the Gadigal People of the Eora nation, and pay my respects to their elders, past, present and emerging.
2. I would also like to take a few minutes to echo the words of Mr Humphreys and pay my personal respects to the late Bill Grant. I extend my sincere condolences to those members of his family present here this evening. Bill's unwavering commitment to equality before the law for all has had a lasting and profound impact on the lives of many individuals in this state. He was at the forefront of expanding the civil law services of legal aid and bringing legal services to those living in remote, rural and regional areas. His work in increasing Legal Aid's support for victims of domestic violence is not simply noteworthy or laudable. It should be recognised as work which has, beyond doubt, saved the lives of women and children fleeing violence and abuse. The state of New South Wales owes him a great debt, particularly in this regard.
3. I first met Bill when I was a young lawyer and we were both barracking for our daughters on the netball court. I came to know him professionally when I was on the Bar Council, during his first stint as a director of Legal Aid, and then in his capacity as Secretary-General of the Law Council, and finally on his return to his favourite job, as director of Legal Aid, which coincided with my appointment to the

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\* I express thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

Court. He loved his work, particularly when he could see that the immense effort on his part was producing positive results.

4. It is my hope that this yearly oration will go some way to recognising his contribution, but will also further the causes to which Bill dedicated much of his working life. I recognise, of course, that words and platitudes can only achieve so much. It is the individuals who work in the legal assistance sector, or who donate their time to that sector, or who perform grossly underpaid work for that sector, who in fact make access to justice a reality for those who would otherwise be denied it. I extend my thanks to those here tonight who perform this role. It is one which will not always win you admiration or adoration. Public criticism seems increasingly directed towards those lawyers who abide by the rule of law by upholding the rights of the unpopular or insisting that the government follow the rules it sets for itself. However, if you do not, then the courts cannot, and if the courts cannot, then nobody will.
5. In saying that, I also recognise that your ability to do so is constrained by the practical considerations of money and time. In 2015 I had the privilege of participating in a panel discussion with Bill on the topic of “Valuing Justice: How much justice can we afford?”. He proposed, at the outset, a different title: “Valuing Justice: How much injustice can we put up with?”. He concluded his contribution with the following question: when will governments “learn to value and appropriately fund access to justice solutions provided by all in the legal assistance sector?”.<sup>1</sup>
6. In reflecting on how best to commemorate Bill’s contribution this evening, I have decided to try and once again tackle this perennial problem of money. In a seemingly endless era of fiscal constraint, where there will always be a limited pool of funds available for legal assistance – how do we do justice on a shoestring? How do we make the legal assistance dollar go further? Are government funds best spent on reforming civil justice, repackaging the court into a smartphone app and helping people help themselves? Or are they better spent

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<sup>1</sup> Bill Grant, ‘Valuing justice: how much justice can we afford?’ (Panel Discussion at the Access to Justice and Pro Bono Conference, Sydney, 18 June 2015).

on more legal aid and CLC lawyers, who can navigate the convoluted web of laws, tribunals and courts on their behalf? Is there a way that access to justice can be increased without more funding? Can the dollar we are already getting go any further?

7. Before I begin, however, I should make clear that I am focusing on civil law problems and minor criminal matters for which there is no likelihood of imprisonment, and leaving serious crime to one side.<sup>2</sup> I should also emphasise that while I hope this address is somewhat useful to those operating in and making decisions about the legal assistance sector, I cannot pretend to fully understand the difficulties and challenges faced on a daily basis by those working in the field. My opinions are necessarily limited by the fact I am not, and have never been on the ground in this sector, and should be taken with whatever dosage of salt you deem appropriate.

#### **A limited, inadequate pool of funds**

8. Funding to the legal assistance sector is grossly inadequate to meet the demands it faces and the expectations which are in turn placed on the justice system. However hackneyed or trite this point now is, it remains important that we keep on saying it, so bear with me while I go through the evidence.
9. At almost any given time in Australia an inquiry into access to justice is underway. Acting Justice of Appeal Sackville recently commented that in many ways the problem is like Australia's deficit: "the problem is chronic, the discussion is endless and no solution seems to be in sight".<sup>3</sup> Report after report has established, for the benefit of "finance bureaucrats and the politicians", that the legal assistance sector delivers economic value to the community "well beyond its direct cost".<sup>4</sup>

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<sup>2</sup> Given the principle in *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>3</sup> Ronald Sackville, 'Law Society Leadership Panel' (Panel Discussion at the Law Society Leadership Panel, 15 May 2018).

<sup>4</sup> Grant, above n 1.

10. First and foremost there is the PwC finding that every \$1 invested in legal aid gave a return on investment of \$1.60 to \$2.25.<sup>5</sup> Second is the Productivity Commission's 2014 report which recommended an urgent interim injection of \$200 million per annum in legal assistance for civil matters alone.<sup>6</sup> I am aware there have been many internal legal aid and CLC reports which make similar points.<sup>7</sup> At the very least they evidence the existence of unmet legal need – CLCs turn away around 160,000 people per year and about 35% of those people could not be given an appropriate referral.<sup>8</sup> Further to this, the LAW Survey, conducted in 2008 by the Law and Justice Foundation, found that over half of Australians had experienced a legal problem in the last 12 months and one-fifth of them took no action to resolve it.<sup>9</sup>

11. Just last December, Alan Cameron was tasked by the New South Wales Government to conduct a review of "Community Legal Centre Services".<sup>10</sup> He concluded that the services provided by CLCs are "delivered at very low cost to government. CLCs are extremely efficient, leveraging volunteer and pro bono support to maximise the total hours, dollar value and range of services they provide. Despite this, there is significant unmet demand for legal assistance services which cannot be met without additional funding."<sup>11</sup>

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<sup>5</sup> PricewaterhouseCoopers, *Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism* (Report prepared for National Legal Aid, 2009).

<sup>6</sup> Productivity Commission Inquiry Report, *Access to Justice Arrangements* (Report No 72, 5 September 2014).

<sup>7</sup> Grant, above n 1.

<sup>8</sup> See National Association of Community Legal Centres, 'Over 160,000 people turned away from Community Legal Centres every year' (Media Release) <[http://www.naclc.org.au/cb\\_pages/news/Over160000peopleturnedawayfromCommunityLegalCentreseveryyear.php](http://www.naclc.org.au/cb_pages/news/Over160000peopleturnedawayfromCommunityLegalCentreseveryyear.php)>.

<sup>9</sup> Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia* (Report, 2012) xiv, xvi.

<sup>10</sup> NSW Department of Justice, 'Review of community legal centres (CLC) services' <<https://www.justice.nsw.gov.au/justicepolicy/Documents/community-legal-centre-services-ToR.pdf>>.

<sup>11</sup> Alan Cameron, *Review of NSW Community Legal Centre Services* (Report, December 2017) <<https://www.justice.nsw.gov.au/Documents/publications-research/Final-Report-CLC-Services.pdf>> 7.

12. Finally, just last month, the Law Council of Australia published its “Justice Project” report.<sup>12</sup> Unfortunately, its release coincided with media convulsions over our annual change in prime minister, so it did not receive the attention it might otherwise have attracted, and which it probably deserved. The report, which totals nearly 1500 pages, is a comprehensive review of the national state of access to justice, and contains 59 recommendations, some of which I will touch on shortly.

13. What the report makes clear is that a significant number of Australians simply do not enjoy equal justice. However, it is the economic point emanating from the report that I think needs to be given particular attention, which is that failing to meet legal need is not a cost-neutral exercise for governments. It instead becomes an exercise in cost-shifting to areas like health, housing and corrective services. I want to highlight this because it is an extremely important and powerful way to convince policy makers and finance bureaucrats that it is worth spending on legal assistance, rather than other areas of government responsibility.

### **Cost-shifting**

14. The cost-shifting exercise occurs because, as we know, legal problems often have considerable adverse impacts on a broad range of life circumstances.<sup>13</sup> Over half of the respondents to the LAW survey with legal problems had a “substantial one” that had what they described as a “severe” or “moderate” impact on everyday life – the most common adverse consequences being income loss or financial strain, followed by stress-related illness and physical ill health. Next were relationship breakdowns and the need to move home.<sup>14</sup>

15. Now, I am not an economist, so I won’t try and quantify the cost of delayed justice to other areas of government spending – in any event, I think the economists at

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<sup>12</sup> Law Council of Australia, *The Justice Project: Final Report* (Report, August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

<sup>13</sup> See Law and Justice Foundation, above n 9, xvi.

<sup>14</sup> *Ibid.*

PwC and the Productivity Commission have already made the point. However, I would like to highlight the point using two of the case studies in the Justice Project Report.

16. Kingsford Legal Centre relayed the story of Tyrone, a local Aboriginal man with caring responsibilities for his young nephews. He bought a car, and after paying CTP went to pay for his rego. As he is on a pension, the RMS officer told him he was “all good” and he proceeded to drive his car. Shortly after he was pulled over by police and given a substantial fine, which he could not afford to pay. He was justifiably shocked, thinking he had done all that he needed to get his car registered. He then had a massive fine, no car to transport his nephews to and from school and a mess to sort out getting his car registered. There are two alternatives at this point. Unpaid fines can lead to license suspension. His caring responsibilities would have placed pressure on him to drive, thereby committing a criminal offence which can lead to licence disqualification and a very hefty fine. If there are repeat offences, a jail term is a possibility along with a lengthier period of disqualification. In the long term, it could well have cost him the prospect of any future employment.

17. This is, of course, an enormous problem for people in regional, remote and rural Australia, where fines that go unpaid lead to suspension, and the lack of transport options mean people are faced with a choice between breaking the law by driving to work to earn a living and pay their fines, or losing their income. In the event they don't drive, the consequence is simply more demand for social welfare, and more cost-shifting. In Tyrone's case he contacted Kingsford Legal Centre for advice, they applied for review of the fine, which was withdrawn, and negotiated for the RMS to reimburse the cost of registering his car again.<sup>15</sup> The consequent economic benefits are clear. Tyrone's nephews will be able to go to school and receive an education. Tyrone himself will not be isolated with either a large debt or at worst a criminal conviction, and will have a greater opportunity to become a productive member of society. It is not a bad return for a couple of hours of legal aid.

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<sup>15</sup> Law Council of Australia, above n 12, Part 1, 'Aboriginal and Torres Strait Islander People', 59.

18. The second case study, submitted by Homelessness NSW, detailed the story of Kim, who with her three children was forced to leave their social housing property due to her partner's violent behaviour. She was unable to remove her belongings for fear of her partner, so the tenancy was not ended and she incurred \$20,000 worth of debt as a result of her partner's damage to the property. Due to the debt, she was unable to access other housing and was in a refuge for about 7 months. During this time she became depressed, self-medicated with prescription drugs and crashed her car into a tree. She and her children were homeless for 12 months before a specialist homelessness service was able to advocate on her behalf for the debt to be reduced.<sup>16</sup> The extra costs to the health, housing and education budgets that resulted from a lack of early legal intervention are obvious.

19. Justice Connect's Women's Homelessness Prevention Project, which assists women who have received eviction notices, recorded that over a two year period 102 women were provided with legal representation and intensive social work support. These women had a total of 157 children in their care, who were also at risk of homelessness, hardship and social dislocation. A staggering 90% of the women had experienced family violence. At the end of two years, 83% of finalised matters were successfully resolved, resulting in women maintaining safe and secure housing or resolving a tenancy legal issue that was a barrier to accessing safe housing. This included directly preventing the eviction of 62 women and their families into homelessness. Using research from the Australian Housing and Urban Research Institute, they estimated that this would mean a cost saving of \$1.8 million in health, justice and welfare costs.<sup>17</sup>

20. These case studies and the Justice Project's research findings "reinforce the personal, community, social and economic costs when people cannot access justice".<sup>18</sup> These include the inability to resolve mounting debts, fines or payments, resulting in poverty, eviction, homelessness and in some jurisdictions

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<sup>16</sup> Ibid, Part 1, 'People who are Homeless', 53-4.

<sup>17</sup> Ibid, Part 2, 'Legal Services', 24.

<sup>18</sup> Ibid, Part 1, 'Introduction and Overview', 18.

imprisonment, inability to access entitlements like unpaid wages or pensions, resulting in destitution, and other unresolved civil problems which can escalate into family and criminal matters.<sup>19</sup>

21. The upfront investment required in the legal assistance sector must be viewed in terms of the downstream fiscal impact. These include the costs of imprisonment of \$104, 000 per prisoner per year, the cost of juvenile detention of \$541, 000 per young person per year, the costs of policing of \$11 billion per year, the costs of child protection of \$4.8 billion per year, and the cost of homelessness of \$763 million per year.<sup>20</sup> In the oft-repeated words of former Chief Justice Gleeson: “providing legal aid is costly. So is not providing legal aid”.<sup>21</sup>

### **Making limited dollars go further: some preliminary points**

22. However, we must also acknowledge that, no matter what, there will always be competing demands on government funds and a limited pool available for this sector. The next question is then how those limited funds can best be allocated, and if there is a way to plug gaps in access to justice without more money.

23. Before considering these questions, I make two preliminary points. First, the legal system is not a panacea for poverty.<sup>22</sup> The simple fact is that a staggering proportion of Australians live in poverty, and poverty rates have not declined in a decade.<sup>23</sup> Acting Justice Sackville recently concluded that “it is hardly surprising that ‘access to justice’ appears to be an elusive aspiration if, despite so many

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid 19.

<sup>21</sup> Murray Gleeson, ‘The State of the Judicature’ (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

<sup>22</sup> Sackville, above n 3.

<sup>23</sup> See Productivity Commission, *Rising inequality? A stocktake of the Evidence* (Productivity Commission Research Paper, August 2018).



reforms, there has been no significant decline in the proportion of the population experiencing the multidimensional disadvantages associated with poverty”.<sup>24</sup>

24. Secondly, and relatedly, we should not have inflated expectations as to what the justice system, and particularly the civil justice system can actually achieve.<sup>25</sup> While courts can and should strive to function more efficiently and determine matters at a cost and time proportional to the issues in dispute, there are fundamental characteristics of a court that “cannot and should not be jettisoned”.<sup>26</sup> There may instead be a need to look “beyond the established mechanisms for dispute resolution”.<sup>27</sup>

### **Reforming the justice system**

25. So, what is it that lies beyond the established mechanisms for dispute resolution? The NSW Government last year released a consultation paper into the reform of the civil justice system, and pointed to first, simplifying the courts and expanding the reach of more accessible forums like tribunals and external dispute resolution bodies and second, the use of technology to facilitate self-help.<sup>28</sup> The final report is yet to be released, but the question I want to consider is whether focusing government funds on such reforms will make the legal assistance dollar go further.

### **Simplification**

26. In my opinion, there is much to be said for greater simplification in legal proceedings, particularly around the language used. Many of the terms used are unnecessarily opaque and could be replaced with simpler, clearer alternatives. Technical terms can overcomplicate that which is in fact simple, and undermine

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<sup>24</sup> Ronald Sackville, ‘Law and Poverty: A Paradox’ (2018) 41(1) *University of New South Wales Law Journal* 80, 91.

<sup>25</sup> *Ibid* 88-9.

<sup>26</sup> *Ibid* 90.

<sup>27</sup> *Ibid*.

<sup>28</sup> NSW Government Department of Justice, *Justice for everyday problems: Civil Justice in NSW* (Consultation Paper, January 2017) 21, 23.

confidence that the legal system is accessible to all. Former Chief Justice Corbett of South Africa has written that “society’s distrust of lawyers and the law is mainly due to the tendency of lawyers in the past to keep the law to themselves”.<sup>29</sup>

27. However, it should also be recognised that making the legal system simple and accessible to all to navigate unassisted may not be achievable, or in fact desirable. First, reducing costs and delays will always come at some cost to both procedural fairness and the ability for a decision maker to reason to a principled and just outcome.<sup>30</sup> In addition, in many cases there will remain a power imbalance in navigating even simple and “accessible” forums like tribunals, which weigh in favour of the privileged and well-resourced at the expense of the marginalised and disadvantaged. Even if Shakespeare’s path to utopia, “kill all the lawyers” was adopted, the imbalance would remain if only because of educational differences.

28. For example, the Justice Project’s chapter on “Legal Services” emphasised that a firmer emphasis on individual legal capability and that of opposing parties should prompt recognition that even in tribunals, representation is “an appropriate and necessary response for vulnerable people”.<sup>31</sup>

29. Another Justice Project case study evidences the difference that representation makes in a tribunal. An Indigenous Australian named Jacqueline, with an acquired brain injury, lived in community housing. Her son, who had a severe mental illness, attended the property and caused physical damage. She hid in the bathroom and called police, as she already had an intervention order against her son. The following day she received an immediate notice to vacate due to the damage, which was assessed without speaking to any of her support workers. The landlord proceeded with an application to VCAT for possession, which Jacqueline attended without legal representation, and a possession order was made. Days before she was due to be removed from her home by police, Justice

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<sup>29</sup> M Corbett, ‘Writing a Judgment: Address at the First Orientation Course for New Judges’ (1998) 115 South African Law Journal 116, 122.

<sup>30</sup> Sackville, above n 24, 89.

<sup>31</sup> Law Council of Australia, above n 12, Part 2, ‘Legal Services’, 23.

Connect's Homeless Law service entered negotiations with her landlord, which were unsuccessful. They then filed an urgent injunction application in the Supreme Court on the basis of her Charter rights. The result was that the eviction was cancelled, alternative housing was offered and she was not held liable for the damage caused by her son.<sup>32</sup> It is unsurprising that Justice Project stakeholders reported that for many vulnerable clients, "legal representation is essential to ensure fair outcomes."<sup>33</sup>

30. The same is true of minor criminal matters. There are limits to which the criminal justice system can or should be simplified, given the strictures of fairness which must attend criminal proceedings. However, the unavailability of legal aid for matters unlikely to result in imprisonment means that thousands of people self-represent against professional prosecutors.<sup>34</sup> The complexity of criminal charges is simply beyond the capacity of the vast majority of defendants in criminal cases, even minor ones.<sup>35</sup> In addition, the consequences of a criminal conviction and the other vast range of penalties falling short of imprisonment still "have a profound effect on a person's life chances".<sup>36</sup>

31. This was highlighted in the Victorian Government's 2016 *Access to Justice Review*. The Chief Magistrate estimated that up to 50% of all accused persons in criminal matters were self-representing, which amounted to over 100,000 people per year in criminal matters alone.<sup>37</sup> Court staff are well acquainted with the distress and confusion accompanying a self-represented litigant. In any event, it just doesn't make good economic sense, given that court time is the most expensive part of the system.<sup>38</sup> Courts have an obligation to ensure proceedings

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<sup>32</sup> Ibid 24-5.

<sup>33</sup> Ibid 23.

<sup>34</sup> Ibid, Part 1, 'People experiencing economic disadvantage', 24.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid, Part 2, 'Legal Services', 22.

<sup>37</sup> Department of Justice and Regulation (Victoria), *Access to Justice Review* (2016) 472-3.

<sup>38</sup> See Law and Justice Foundation, *Evaluation of the appropriateness and sustainability of Victoria Legal Aid's Summary Crime Program* (Report, June 2017) xviii.

are fair and assist self-represented litigants to that extent. In a high-volume criminal court dealing with 100 mentions per day, an extra 3-5 minutes for such assistance can add several hours to the duration of a court hearing day.<sup>39</sup>

32. There are two points I want to make from all of this. First, while I would not dispute that simplification is necessary and appropriate, it should not be assumed that people will be able to resolve their legal problems without advice or representation just because the forum is made more accessible. Second, this will not necessarily be a cost-saving exercise if court and tribunal time is simply extended.

### **Tech-ification**

33. Some analogous concerns arise in relation to the possibilities that technology holds for expanding access to justice. Should funds be spent on finding ways to more effectively use technology, to both transform the justice system itself and help people resolve their problems outside it? The NSW Government's consultation paper put forward ideas including smartphone apps, web-chat legal advice services, online tools that generate letters for common problems and taking tribunal processes entirely online.<sup>40</sup> What I think must be recognised in this discussion, however, is that those most in need of legal assistance are also most likely to suffer from digital exclusion. There are two propositions in that last statement that need some unpacking, the first being who are those most in need of legal assistance?

34. There is a solid evidence base for the notion that people experiencing disadvantage are more vulnerable to legal problems and disproportionately represented within the justice system.<sup>41</sup> The LAW Survey found that just 9% of

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<sup>39</sup> Pauline Spencer, 'A View from the Bench: A Judicial Perspective on Legal Representation, Court Excellence and Therapeutic Jurisprudence', in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 87, 90-91 cited in Law Council of Australia, above n 12, Part 2, 'Courts and Tribunals', 21.

<sup>40</sup> See NSW Government Department of Justice, above n 28.

<sup>41</sup> Law and Justice Foundation of NSW, *Collaborative Planning Resource - Service Planning* (Report, 2015) 20-1.

respondents accounted for 65% of legal problems, and respondents with six or more indicators of disadvantage reported six times as many problems as those with none.<sup>42</sup> The result is that what might seem to be small or simple legal matters are often experienced by particular individuals in defined clusters, compounding and remaining unresolved.<sup>43</sup> According to another study, each time a person experiences a legal problem, their vulnerability to experiencing further legal problems increases.<sup>44</sup> The indicators of disadvantage included disability, low education, unemployment, single parenthood, indigenous background, disadvantaged housing, reliance on welfare, a non-English speaking background and living in a remote area.<sup>45</sup>

35. What we know about digital exclusion is that it particularly affects those living in poverty “with barriers including physical access to technology, cognitive abilities, limited literacy and [limited] education”.<sup>46</sup> The Digital Inclusion Index produced in 2017 by RMIT and Swinburne University of Technology indicates that digital exclusion affects those on low incomes, people over 65, people with a disability, people who did not complete secondary school, Indigenous Australians and people not in paid employment especially.<sup>47</sup> There are striking similarities between those groups most vulnerable to legal problems and those most vulnerable to digital exclusion. In considering a heavier reliance on technology we

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<sup>42</sup> See Law and Justice Foundation, above n 9, xiv.

<sup>43</sup> See Law Council of Australia, above n 12, Part 1, ‘Introduction and Overview’ 55.

<sup>44</sup> Pleasence et al, *Causes of Action: Civil Law and Social Justice*, (The Final Report of the First LSRC Survey of Justiciable Problems, 2004) ch 2.

<sup>45</sup> Law and Justice Foundation, above n 9, 174.

<sup>46</sup> Law Council of Australia, above n 12, Part 1, ‘People Experiencing Economic Disadvantage’, 20 citing Roger Smith, ‘Digital Delivery of Legal Services to People on Low Incomes’ (Paper presented at International Legal Aid Conference, Edinburgh, Scotland, 10 June 2015) 3 <<http://internationallegalaidgroup.org/index.php/papers-publications/conference-papers-reports/category/5-edinburgh-2015-conference-papers>>; Rosemary Hunter, Cate Banks and Jeff Giddings, ‘Technology is the answer... but what was the question? Experiments in the Delivery of Legal Services to Regional, Rural and Remote Clients’ in Pascoe Pleasence, Alexy Buck and Nigel J. Balmer (eds), *Transforming Lives: Law and Social Process* (The Stationery Office, 2007) 133.

<sup>47</sup> Julian Thomas et al, *Measuring Australia’s Digital Divide: The Australian Digital Inclusion Index 2017* (RMIT University, 2017) 5-6 quoted in Law Council of Australia, above n 12, Part 2, ‘People: Building Legal Capability and Awareness’, 12.

should also keep in mind that a staggering 44% of adult Australians lack the literacy necessary for everyday life.<sup>48</sup> The fact that someone has a smartphone does not make them literate.

36. What we don't want to see is an increasing reliance on technology and online information meaning that those most in need of legal help are least able to access it. Injustice might be further entrenched rather than addressed. This probably all sounds somewhat critical and negative. I should make it clear that in my opinion efforts to modernise the courts, moving to online dispute resolution and providing more self-help tools are all positive reforms which are worth doing. What I am concerned about is first, that well-meaning reforms might unintentionally marginalise the disadvantaged, and second, that working with a limited pool of funds, this will be done by taking funds away from frontline legal assistance services for those who need it the most.

37. There is one further point to make, which is the value of face-to-face legal advice. There is something in the sitting down with a client that is lost when advice is given over the phone or virtually. Non-verbal cues are lost, and with clients who have difficulties communicating orally, this is significant. The research has shown not only that clients and lawyers found it easier to express themselves and understand each other face-to-face, but that vulnerable clients were more likely to be adversely affected by the potential disadvantages of telephone-only contact.<sup>49</sup>

38. One area which could be explored is the potential to use technology to create efficiencies for legal advisers. An online tribunal where individuals are legally represented could result in significant time savings for advisers who can "virtually" appear in multiple matters on one day, and consequent cost savings for clients. Online case management in local court matters could expand exponentially the number of matters that one individual CLC lawyer, for example, could deal with by cutting out the time required to physically appear. It may be

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<sup>48</sup> Australian Bureau of Statistics, 'Programme for the International Assessment of Adult Competencies, Australia, 2011-2012'  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4228.0main+features992011-2012>>.

<sup>49</sup> Marie Burton, 'Justice on the line? A comparison of telephone and face-to-face advice in social welfare legal aid' (2018) 40(2) *Journal of Social Welfare and Family Law* 195.

that the legal assistance dollar can best be stretched by reforming the justice system to make it more efficient for advisers, and in turn reduce the cost of legal assistance to clients or government.

### **Other innovations**

39. Aside from these wholesale reforms of civil justice, are there other more minor innovations which can plug justice gaps without necessarily needing more money? In the final part of this address I would like to highlight some of the ways this might be possible.

40. The first example is the decision of the NSW Government, adopting a recommendation of the Cameron Review, to move to a three-year rather than one-year funding cycle.<sup>50</sup> The Review found that the annual funding arrangements had resulted in difficulty in attracting skilled and qualified staff and up-skilling staff, resulted in a high staff turnover, a negative impact on community capacity building which requires long-term commitment and involvement, and a diversion of management and coordination resources away from legal services towards planning for funding.<sup>51</sup>

41. Far West Community Legal Centre's submission described the impact of unstable funding in the following terms: "Two years ago when funding cuts to our organisation were imminent, there was an understandable mass resignation of staff, who sought other, more secure, jobs. This resulted in a subsequent decimation of services provided by our CLC to the Broken Hill Community, and a very slow resumption of services when funding was restored, due to the community's loss of trust in our organisation's ability to assist them".<sup>52</sup>

42. The commendable government decision to address these issues by moving to three year cycles is one small example of the manner in which listening to the

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<sup>50</sup> NSW Government Department of Justice, 'Cameron Review of Community Legal Centres: NSW Government Response' <<https://www.justice.nsw.gov.au/Documents/publications-research/govt-response-cameron-review-clc-services.pdf>>.

<sup>51</sup> Cameron, above n 11, 80.

<sup>52</sup> Ibid 81.

sector can make the dollars they have go further without necessarily requiring more of them. That being said, it is also commendable that the government has adopted the Cameron recommendation of an injection of \$2.2 million in additional funding to address critical service gaps.<sup>53</sup>

43. The second innovation is recognising the value of early intervention. Money can be saved when legal assistance comes early and prevents problems spiralling out of control. In saying this, I recognise that at the moment, the sector is forced to turn away a significant proportion of those seeking help, in favour of prioritising those who are at a critical stage. This feeds into a cycle of escalation because matters at an early stage are not dealt with.<sup>54</sup> However, the simple fact is that the earlier someone seeks advice, the less likely the problem will escalate, the cheaper it will be to resolve, and the less likely they will continue to incur further legal problems. At some point there needs to be a circuit breaker so the sector is able to start prioritising early intervention.

44. Thirdly and relatedly, there is the fact that there is a general lack of understanding amongst people, particularly disadvantaged people, that they even have a civil law issue about which they should be seeking advice. The Federation of Community Legal Centres has stated that “most people who have legal issues are unaware that they are legal problems and, even if they are, a very small proportion seek assistance from a legal service”.<sup>55</sup> One study found that income support recipients were not aware that the right to access social security was part of a legislative regime, or that legal recourse was possible where relevant

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<sup>53</sup> NSW Government Department of Justice, above n 50.

<sup>54</sup> See, eg, Tenants’ Union of New South Wales, ‘Submission: Response to “Justice for everyday problems: Civil Justice in NSW Consultation Paper”’ (February 2017) 5.

<sup>55</sup> Law Council of Australia, above n 12, Part 1, ‘People Experiencing Economic Disadvantage’, 16-17 quoting Federation of Community Legal Centres, ‘Submission No 69 to Department of Justice and Regulation (Victoria) Access to Justice Review’ (March 2016) 29.



processes were not followed.<sup>56</sup> Rather, social security was considered something that the government decided that recipients could have or not have at will.<sup>57</sup>

45. One way which has proven effective in reaching people in this group is through the use of joined-up services, such as health-justice partnerships. An evaluation of such a service in the Hume-Riverina area found that it was reaching clients who would not otherwise have sought legal help.<sup>58</sup> They reduce the burden on disadvantaged clients who may have mobility issues or financial pressures to locate help from fragmented services,<sup>59</sup> and underlying issues that are often catalysts for their engagement with the justice system are dealt with at the same time as legal problems.<sup>60</sup> The NT Legal Aid Commission has reported that the assistance of a social or health worker to address those needs enables the lawyers to focus on legal work, undoubtedly increasing efficiencies.<sup>61</sup>

46. Now, joined-up service delivery is time and resource intensive, both in establishment and maintenance.<sup>62</sup> However, there are flow-on benefits to other areas of government responsibility. Examples include the ability in health-justice partnerships for lawyers to advocate for handrails or other aids, avoiding injuries and fostering independence, or ensuring people do not lose their jobs when they take time off to care for a sick family member, or resolving hospital patients' access to housing, enabling them to vacate their bed earlier and reduce the strain on public hospitals.<sup>63</sup>

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<sup>56</sup> Liz Curran and Mary Anne Noone, 'Access to justice: a new approach using human rights standards' (2008) 15(3) *International Journal of the Legal Profession* 195, 216.

<sup>57</sup> Ibid quoted in Law Council of Australia, above n 12, Part 1, 'People Experiencing Economic Disadvantage', 16.

<sup>58</sup> Law Council of Australia, above n 12, Part 2, 'Legal Services', 85.

<sup>59</sup> Ibid 78.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 80.

<sup>62</sup> Ibid 86.

<sup>63</sup> Ibid 82-3.

47. Finally, it is necessary to focus attention to a point even earlier than when an individual client has a problem, and rather look at the wholesale redressing of systemic issues.<sup>64</sup> Where particular policies or commercial practices repeatedly result in disputes, reforming those policies or practices themselves will be far greater “bang for your buck” than resolving disputes after the fact.
48. The result of a failure to recognise and redress systemic failures can be seen in the devastating consequences unearthed by the Banking Royal Commission. It should seriously be questioned whether if resources were allocated to early identification of these problems, this enormously profitable exercise for the private legal market would have been necessary. Of course, hindsight is a wonderful thing.
49. That is why it is unfortunate that the National Partnership on Legal Assistance Services provides that Commonwealth funding cannot be used to lobby governments or to engage in public campaigns. In the words of Justice Sackville – it is “at the heart of legal assistance agencies to be free to agitate for changes in government policy or commercial practices that have an unfair impact on vulnerable people”.<sup>65</sup>
50. However, if the legal assistance sector continues to be unable to do so, the other option might be for the government itself to start identifying and addressing systemic problems. One of the recommendations of the Justice Project could assist in this regard, being the introduction of “Justice Impact Tests”, to “foster a whole-of-government understanding of how different law, policy and funding levers intersect to either combat or exacerbate disadvantage through the justice system”.<sup>66</sup> Such tests are in place in the United Kingdom, “requiring the justice impacts of policy proposals to be assessed and quantified, so that they can be planned for at an early stage”.<sup>67</sup> In the UK, the test incorporates a presumption

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<sup>64</sup> See Sackville, above n 24, 98.

<sup>65</sup> Sackville, above n 3.

<sup>66</sup> Law Council of Australia, above n 12, Part 2, ‘Governments and Policymakers’, 14.

<sup>67</sup> Ibid 19.

that the policy-owning department will meet the costs flowing to the justice system from its proposals.<sup>68</sup>

51. One example of how this would work is, for example, where the immigration minister is considering expanding the visa cancellation powers based on the “character test”.<sup>69</sup> Changes of this nature recently resulted in a doubling of requests for advice and minor assistance at Legal Aid NSW,<sup>70</sup> and inevitably increased the workload of the Federal Circuit Court. A justice impact test might recognise this, and acknowledge the downstream effect on waiting times in that Court, which might have the unintended consequence of increasing delays in other matters dealt with in the same court, including family matters affecting the well-being of children.<sup>71</sup>

52. That is not to say that policy decisions should not be made as a result of a justice impact test. It is simply the case that these costs should be borne in mind and an informed, accountable decision made about how or if these costs are going to be avoided, ameliorated, accommodated or at least owned.

## **Conclusion**

53. What can be drawn from all this? I think that there are a number of points which can be made. First, there never was and never will be enough money. Second, budget allocations will always be constrained by the limit on government resources, and the competing demands for those resources. Third, it must be remembered in this context that the provision of legal assistance plays a vital role in the promotion and preservation of a civilised society. It provides access to justice in a real sense to disadvantaged members of our society and thereby significantly promotes the rule of law. In addition, it can lead to significant cost savings in other areas of government responsibility such as health, police, prisons and for that matter the courts themselves.

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<sup>68</sup> Ibid 20.

<sup>69</sup> Ibid 17.

<sup>70</sup> Ibid 18.

<sup>71</sup> Ibid.

54. In these circumstances, governments should be urged to consider legal assistance funding not simply on the basis that it is a moral obligation, but on the basis that it is expenditure from which there can be real flow-on benefits both in cost savings and in assisting the vulnerable members of the community to become more active and productive members of society.

55. Finally, recognising that the dollars will always be limited, it is essential that they be spent in a focused fashion. This involves making sure they are targeted to provide real assistance to persons most in need. Dare I say it, but that result might best be achieved by consultations with you at the coalface rather than by reports from consultants and technocrats. I had the privilege of knowing Bill Grant for over 25 years. I know he would have approved of that sentiment.