LAW AND JUSTICE ADDRESS

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"A LIFETIME IN THE LAW"

The Hon Sir Anthony Mason AC KBE GBM QC*

It is an honour to be invited to deliver this Address on the occasion of the Foundation's 50th Anniversary. For 20 years I have been the Patron of the Foundation and I have taken great pride in its many achievements.

As I look back on my lifetime in the law there are many recollections that jostle for recognition. The first is a fact, strange as it may seem. When I commenced first year law at Sydney University in 1946, then the only Law School in Sydney, of a student intake of over 300, only 9 female students graduated in 1950. Contrast the case today when 60% of Australian law students are females. The Sydney intake of over 300 in 1946 was much greater than any previous intake, because many ex-service personnel decided to study law.

Our lecturers, with only a few exceptions, were practising barristers or solicitors. There were only a handful of academic lecturers, all male. Our textbooks were almost exclusively English, a fact which would astonish the Australian law student of today. This was because

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Australian law was at that time no more than a sub-branch of English law. We owe a debt of gratitude to our legal publishers whose enterprise, along with that of Australian judges, lawyers and lawmakers, have enabled us to develop a national legal system and jurisprudence suited to our circumstances, subject to an important qualification which, as will appear shortly, is the major point I want to make in this Address.

My next recollection is of a tenancy case, my second or third brief as a barrister in Ryde Court of Petty Sessions (Ryde Police Court as it was then called), where I appeared for the tenants Mr and Mrs Kotoff. We succeeded in resisting the landlord's claim for possession. Mr Kotoff, who was in modern parlance, a "tradie", offered me a lift back to Phillip Street in his utility. Mr Kotoff and his wife travelled in the front, while I sat on the tray of the vehicle, keeping company with a cement-mixer and a dog of suspect antecedents. The dog kept jumping over me and barking furiously, no doubt celebrating our forensic triumph. My fee in total was nine guineas, seven on the brief and two for a conference, the standard fee at that time, the dollar equivalent being 18½ dollars.

The point of this otherwise pointless recollection is that counsel's fees were then a small fraction of what they are today. Junior counsel, like myself, were constantly engaged in the police courts, and the District Court, gaining experience in conducting cases. Much of that work, as

well as interlocutory applications in the Supreme Court is now undertaken by solicitors who, I suspect, probably charge more than counsel would. In those days, success as junior counsel was measured largely by performance in court. Today, so I am told, success as a junior counsel is largely measured by the quality of your written submissions. In my day, advocacy was oral. Written submissions, though not unknown, were notes of argument, occasionally handed up during one's address.

In my early days I was the Examiner in the Barristers Admission Board course in Constitutional Law, then regarded as the lowest form of academic life in Australia. I recall with affection one student whose examination paper consisted only of a one line answer to part of a question. He did not attempt to answer any other question. The relevant part of the question was

> "What are the functions and the purpose of the Senate in the Australian Parliament?"

The student's answer was "The Senate is a house of revue". I awarded the student full marks for the answer, but it was of no avail. He failed.

Another recollection is of an application to set aside a default judgment in the District Court. To succeed I had to establish that my client had an arguable defence. In seeking to establish that, I cross-

examined the judgment creditor. The judge, who was adverse to my client, asked the judgment creditor some inadmissible questions to which I objected. The result of my objections was that the judge took an adverse view of me as well as my client. The judge, however, ultimately decided the case in my favour. My opponent, a solicitor, claimed that I had been guilty of professional misconduct in my cross-examination and threatened to report me to the Bar Council. But in the following week he delivered two briefs to me. He had never briefed me before. He did not report me to the Bar Council.

My father, who was a surveyor, said to me "Never trust a lawyer who occupies a luxurious office". He approved of my early chambers, a basement room in Denman Chambers, 180 Phillip Street, a building of Victorian times, with dim light coming down through an iron grill at footpath level. Some friendly solicitors occasionally delivered briefs to me through the grill. Needless to say, they weren't big briefs. I obtained possession of the basement room by means of a concurrent lease from Denman Chambers which enabled me as an ex-serviceman to recover possession in court proceedings from the tenant. He was an official liquidator, who used the premises as a store-room for old files. When he moved out, we discovered there was no floor. His files had been resting on black sand. So I had a timber floor put in place. It was not entirely

level. Fortunately it sloped inward towards my desk so that a solicitor who entered the Chambers had to walk uphill to get out. As one solicitor said to me, “It is easier to enter your chambers than to leave them”.

In my third year at the Bar I succeeded in winning a constitutional case in the High Court, *The Queen v Davison*[1], where the Court held that the Deputy Registrar in Bankruptcy’s function in making sequestration orders on debtor’s petition was unlawful as an exercise of judicial power. This was not a great feat of advocacy; it was a point waiting to be taken in a suitable case. But my success was noted in the ALJ which was a bonus.

My years as Commonwealth Solicitor-General provided interesting experience in various areas of the law. In my time as Solicitor-General I was able to set in train, with Nigel Bowen QC, then Attorney-General, through the Kerr Committee, the administrative law reforms which were enacted in 1975-1977.

The 23 years I served on the High Court are now so well documented that there is no need for me to talk about them this evening, except to recall that the Court’s historic decision in *Mabo (No.2)* recognised, even if only in a limited way, the connection between Indigenous peoples and their traditional lands, and to say that today it

[1] (1954) 90 CLR 353.

seems almost unthinkable that the decision attracted a storm of criticism after it was delivered.

The legal world I knew as a young lawyer, a world without computers and mobile phones, was entirely different from the legal world as it exists today. We have seen many changes in the law – electronic storage of legal materials accompanied by online access, the emergence of a national integrated court system and virtually a national legal profession, the elimination of appeals to the Privy Council from Australian courts, and the consequential recognition of the High Court as Australia's ultimate Court of Appeal, the establishment of the Federal Courts and the Family Court, the creation of dedicated Courts of Appeal in most of the Australian States, the virtual elimination of juries in civil cases and the requirement for written submissions and case management in civil cases, reform in criminal procedure, as well as provision for representative class actions. Other important innovations were the comprehensive reforms of administrative law (including the establishment of the Ombudsman), the enactment of consumer protection and competition legislation, a strong emphasis on ADR, the introduction of legal aid in both civil and criminal cases and the Freedom of Information Act (which I often call "The Freedom *from* Information Act".)

Nonetheless – and this is the major point I want to make in this Address – it has long been recognised that our system of justice is so costly that it does not provide adequate access to justice to those who are not well off or disadvantaged.

In 1967 legal aid was introduced to alleviate this situation. Legal aid has played an important part in criminal and civil justice. But legal aid has come under ever-increasing pressure in an era of budgetary restraint. Indeed, in England legal aid is no longer available in civil cases.

In the 1990s "Access to Justice" inquiries were established in Australia and elsewhere with the objects of eliminating trial by ambush, reducing legal costs and providing greater access to justice.

The resulting reforms achieved some but not all of their objectives. The reforms did not significantly improve access to justice by reducing costs, despite the new emphasis given to ADR. Speaking of the Woolf reforms in England, Lord Neuberger, later President of the UK Supreme Court, said in 2010

> "When it comes to failure, it is above all in the reduction of litigation costs where the Woolf reforms have signally failed".

His view was that the rules introduced by the Woolf reforms were just as complex as the rules they replaced and that pre-action protocols and case management may have increased work.

What were the reasons for this failure? In my view there were two. One was the absence of adequate research into the justice needs of the community. The other was a failure to recognise that the *existing* court-based justice system was incapable of servicing the needs of the entire community. Recent research, much of it undertaken by the Law and Justice Foundation, has demonstrated just how deficient our existing justice system is. The heavy cost of litigation is a barrier both to disadvantaged people and to people who are moderately well off. Chief Justice Bathurst noted recently that he is always worried when a case before the Court of Appeal involves a claim for $200,000 because the money will be absorbed by legal fees.[2]

Analysis of court filings in this State in 2014 revealed that of the total court filings of 200,000, 100,000 were in the Local Court, 80,000 in NCAT and only 20,000 in the Supreme Court, the District Court and the Land and Environment Court. In the Local Court, the median claim was for $6,500 and 45% of claims were for $2,000 or less. These figures tell us that it is the lower end of the court system that is the front line of court delivery of legal services. Unfortunately major problems exist outside the court system.

The Annual Report of the National Association of Community Legal Centres (CLCs) released recently recorded that 170,000 potential

[2] Australian Financial Review, 15 September 2017.

clients with legal issues were turned away – in many cases because Centres lacked the resources to service them. Demand for legal services from the most disadvantaged people is rising. CLCs rely heavily on volunteers. They worked 890,000 hours last year, up from 575,000 hours the previous year.

The Productivity Commission in its 2014 Report on Access to Justice recommended that governments provide an additional $200 million – an increase of 25% – in funding legal aid and other legal services. If we put to one side other recommendations of the Commission to meet the shortfall in delivery of legal services to disadvantaged people, the amount of $200 million is a low-ball estimate of need.

My own view is that, with increased funding, CLCs can make an even greater contribution to improve delivery of legal services, in particular to disadvantaged people, working in conjunction with other organisations such as Law Access, NSW Legal Aid, Indigenous Legal Services and Family Violence Prevention Legal Services.

If we are to deliver legal services to people who cannot afford to participate in the existing system we should be thinking of a system along the lines of the ombudsmen or trained decision-makers, who have been set up in financial and other industries. One example is the

Financial Services Ombudsman who fields almost 1,000 complaints a day.[3] The legal services delivered should be tailored to the needs of particular categories of consumers with decisions on complaints made by decision-makers who deal directly with complainants and respondents, whether or not they are assisted by lawyers. Availability of legal information should be expanded to encourage litigants to present their own case where the claim is small or uncomplicated. Costs would be substantially reduced if this system of decision-making were based on online communication, as it is in existing and proposed court pilot programs which involve courts giving assistance to litigants in person.

A similar system in which parties present their own case to a judge or decision-maker is to be trialled in the United Kingdom this year. This approach may suit many but not all. Older people, who disproportionately form part of the disadvantaged group, and others who form part of that large group, are by no means always competent online. In particular, members of our large migrant population will require some form of legal assistance to understand the issues and how to go about putting their case, even filling in a complex form. Equality of opportunity and equality before the law – those overworked expressions – are of no avail to people who are incapable of taking advantage of the opportunity that is offered.

[3] Australian Financial Review, 5 October 2017 p.21.

This approach entails a need for lawyers as decision-makers and advisers with skills different from the highly-specialised skills possessed by lawyers who participate in the existing "Rolls Royce" legal system.

Recently the UK Supreme Court recognised that the right of access to the courts is a constitutional right and that it is inherent in the rule of law[4], which, as Sir Owen Dixon once said, is an assumption on which the Australian Constitution is based.[5] The UK Supreme Court pointed out that courts exist for the benefit of all, not merely for the benefit of those who use them. Against this background of constitutional principle, it has been repeatedly affirmed that the constitutional right of unimpeded access to the courts can only be curtailed by clear statutory enactment. So when the Lord Chancellor made a Fees Order fixing fees in Employment Tribunals the effect of which created a real risk of deterring litigants from accessing such Tribunals, the Fees Order was declared unlawful because the statute authorising the making of a Fees Order did not clearly authorise one which impeded access to justice. The Supreme Court arrived at this conclusion both as a matter of common law and European Union law.

The decision should cause governments to think twice before they decide to increase court and tribunal fees on the basis of a "user pays"

[4] *R(Unison) v Lord Chancellor* [2017] UKSC 51 at [66].
[5] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

approach. The decision illustrates the centrality of access to justice in our constitutional system.

In Australia, no organisation has done more to advance access to justice than the Law and Justice Foundation of NSW. Its activities include research into the law and the legal system and their impact on the community and the facilitation of access to legal information and legal services, particularly to disadvantaged people. The Foundation has published many titles providing legal information. Together with the State Library, it established the Legal Information Access Centre which is now a statewide service providing free community access to legal information through Public Library networks. The Foundation has funded many notable legal initiatives. They include the College of Law (the largest provider of practical legal training in Australia) which has graduated more than 60,000 students, the Redfern Legal Centre (the first community legal centre), the Public Interest Advocacy Centre (which deals with access to justice issues such as homelessness, Indigenous justice, human rights and health), AustLII, an initiative of UTS and UNSW (the world's largest source of legal materials on the Internet's World Wide Web) which provides prompt and inexpensive access to those materials and Foundation Law (a portal also providing access to legal information and materials). The great success of AustLII has

resulted in its adoption in many other jurisdictions, among them the UK. And it was on the Foundation's initiative that Legal Studies was included in the Higher School Certificate curriculum.

The Foundation has concentrated its efforts on empirical legal research into the community's need for legal services. This research has resulted in ground-breaking reports, such as "Justice Made to Measure – NSW legal needs survey in disadvantaged areas". It found, to my astonishment, that nearly three-quarters of those with a legal issue who sought advice did so through a doctor or an accountant and that less than 5% of legal issues were resolved through formal legal proceedings. There was no record of anyone seeking legal advice from a dentist or a plumber, deterred no doubt by the size of their fees and charges. Another research-based Foundation report was "Taking Justice into Custody" on the legal needs of prisoners, which was followed by the Legal Australia-Wide Survey, the most comprehensive quantitative assessment of legal needs ever conducted in Australia.

The Survey has had a powerful impact on policy formulation by Australian governments. The Productivity Commission's 2014 Report relied heavily on the Survey, referring to it on more than 100 occasions and quoting from it substantially.

The high quality of the Foundation's research work has been recognised overseas, most notably by the OECD, in the United Kingdom (by Professor Dame Hazel Genn and others) and Canada. Following the Foundation's participation in two OECD Roundtables on Access to Justice, the OECD engaged the Foundation as an expert to assist the OECD in its development of a proposal whereby OECD member countries will commit to an Access to Justice program.

In conclusion, I am delighted that the autumn of my lifetime in the law has coincided with my association with the Foundation. Its achievements over 50 years have been truly remarkable. And, as always, this Dinner, through its Awards, celebrates the notable voluntary achievements of many people, lawyers and non-lawyers, in achieving justice for those who are in search of justice.

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