The Crisis in the Law - Continued

The Hon Justice Michael Kirby AC CMG*

Putting it in Context

There are four matters which I wish to mention in order to place my remarks in their contemporary context:

1. The first is the "crisis" facing the justice system. In a joint paper[1] presented to a New Zealand legal convention, the Chief Justice of Australia (Sir Gerard Brennan) and the Chief Justice of New Zealand (Sir Thomas Eichelbaum) warned of the serious problems facing the courts and the administration of justice:

> "Consider the present situation. The courts are over-burdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant. Governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an over-statement to say that the system of administering justice is in crisis. ... Ordinary people cannot afford to protect their rights or litigate to protect their immunities. To that extent, the coercive force of the law is undermined."[2]

These remarks, by the heads of the Australian and New Zealand judiciaries, not given to extravagant language, captured much attention in the media and in the community. Every lawyer and every judge has the obligation to heed the Chief Justices' words and, to the fullest extent possible, to respond to the crisis they describe.

2. Coinciding with this crisis and with a potential to exacerbate it, has been the announcement of the reduction of federal funding from legal aid in Australia. At present this runs at approximately $263 million per year, shared in proportions long settled between the Commonwealth and the States of 55:45. The new Federal government is determined to change this. It objects to carrying the burden of funding legal aid for matters which are exclusively within the constitutional responsibilities of the States and Territories. A reduction has been announced of $40 million over three years, ie $120 million in the triennium[3]. The end of the current ratio of federal funding has also been foreshadowed.

3. The crisis and these changes are occurring in a community which is very conscious of the difficulties which ordinary people have in getting at justice. It is one thing to refuse public legal assistance. It is another thing to take it away where it has been previously established. Citizens are now much more questioning of the law and of all forms of authority, including the courts. The denial of justice because of the incapacity of the legal system to deliver it in a particular case is not now accepted with a shrug. It causes attacks on the legal system, media programs and demands for political solutions.

4. Finally, there is the growing evidence of dissatisfaction in the legal profession, particularly amongst young lawyers[4]. In part, this dissatisfaction probably derives from the lower self-esteem felt by members of the legal profession as a result of the constant barrage of attacks upon them. In part, it may derive from the growing numbers of lawyers and their inability to gain employment which fulfils their expectations. In part, it may flow from the inability of lawyers to respond, in a way that satisfies them, to the needs for justice. This malaise is not confined to Australia. It is found in other countries[5].

The Legal Aid Cuts

The government justifies its reduction in federal funding for legal aid in various ways. It points to the need to reduce the $8 billion budget deficit which suggests that Australia is living beyond its means. It argues for greater responsibility and accountability in the use of government funds. Users of the justice system should share an appropriate part of the cost of providing services. The provision of free services can lead to abuse and reduced efficiency. Furthermore, the shift of responsibility for funding legal aid in non-federal areas back to the States and Territories will, it is said, increase accountability. Those who spend taxpayers' funds should be accountable to the voters in the appropriate polity who elect them.

These arguments of necessity and of political and economic theory cut little ice with the critics of the reduction of legal aid in Australia. They point out that Australia is already, by world standards, a low spending country in the field of public legal assistance. Whereas Australia spends approximately $13 per person per year, New Zealand spends $16; Canada $18; the Netherlands $22; and the United Kingdom $65 in public legal aid. The differences between

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1. F G Brennan and T Eichelbaum, "Key Issues in Judicial Administration", Address to the 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington, 20 September 1996.
2. *Ibid* at 3-4.
3. D Williams, "Law and Justice for Australians - 1996-97 Budget", News Release, 20 August 1996.
4. Victorian Law Foundation, Survey Extracted from *The Australian*, 11 March 1996 at 19. See also V Palestrant, "Lawyers, Doctors are Doing it Tough" in *Sydney Morning Herald*, 19 September 1995 at 31.
5. A T Kronman, *The Lost Lawyer - Failing Ideals of the Legal Profession*, Harvard University Press, Cambridge, Massachusetts, 1993. See also D M Dawson, "The Legal Services Market" (1965) 5 JJA at 147.

those countries do not appear to justify the different figures[6].

Critics of the proposed reduced funding range from Sir Ronald Wilson, through to those working in Legal Aid Commissions and community bodies who are serving in the front line. Sir Ronald told a recent seminar in Melbourne that the proposed reduction threatened the "inherent dignity of all human beings and the right to equality before the law"[7]. He said:

> "A fundamental characteristic of [our] society is its respect for the rule of law and for the equality of all in citizens before the law. This must mean that no person is above the law. Neither is any person outside the law. This can only be true if access to the law is secure to every person."[8]

Mr Bernard Bongiorno QC, former Director of Public Prosecutions for Victoria, told the same seminar that without legal aid there was no doubt that "more people will be convicted - and unjustly convicted"[9].

Whilst acknowledging the arguments about accountability, Chief Justice Doyle, in a recent paper in Adelaide[10] cautioned against the shedding by governments of their responsibilities in the "core" activities of government. These, it was suggested, included the provision of the justice system. Whilst Chief Justice Doyle was not specifically addressing the budget cuts, his point is pertinent to the extent to which responsibility for legal assistance can be diverted from the public purse to the private pocket and to private sacrifice.

The proposed cuts in the legal aid budget come at a time when there are many other pressures on the justice system. These include the insistence of the courts upon the right of the individual to have a fair trial when facing serious criminal charges[11]; the increase in fees for filing process in State and federal courts and in federal tribunals[12]; and the introduction of charges and costs for family law counsellors and for official services in bankruptcy[13].

The justice system may be in crisis. But those concerned with access to justice in Australia argue that the crisis will not be helped by a pincer movement involving the effective reduction of public legal aid and the contemporaneous increase of costs which will inevitably be passed on to the user.

Long term Solutions

Naturally, governments and the experts who advise them are looking for the solutions which may be offered to respond to the crisis of which Chief Justice Brennan spoke. Amongst the proposals made have been the following:

1. The introduction of mediation and of other forms of alternative dispute resolution to reduce the delays and costs of formal litigation in the courts and tribunals of Australia[14]. The use of alternative dispute resolution is now well advanced in this country. It has many advantages. But in the same speech in Adelaide, Chief Justice Doyle cautioned against putting excessive faith in these alternatives. Whereas a court has, or should have, the will to do justice according to law, the pressure upon mediators will often be to get through more cases. Courts strive to equalise those of unequal power before them. Mediation, and other forms of alternative dispute resolution, may sometimes put undue pressure on the powerless to sanction the will of the powerful. It is somewhat ironic that, at the time when, in industrial relations, procedures for formal conciliation of industrial disputes are being rejected, in other areas of the law's operation, we are being urged to return to more conciliation and more non-court arbitration.
2. Then it is said that systems of insurance should be available so that middle-class people can protect themselves in advance against the risks of litigation. The analogy of medical insurance is often cited. Proposals for legal insurance have been made for many years[15]. The idea deserves exploration. But it seems scarcely likely to cover the range of needs, particularly those of poor and disadvantaged groups.
3. A third possibility is a shift of funding from the federal to State or Territory governments. This is obviously what the federal government wants. But State governments have limited sources for budgetary allocations. Far from rushing to fill the void left by the planned departure of federal funding of legal aid, some States have even publicly contemplated a pull-out of legal assistance in order to force the hand of the federal authorities.
4. Finally, the Australian Law Reform Commission has been asked to investigate the adversarial system of justice in federal courts and tribunals, other than in areas of criminal law. The Commission has appointed a number of experienced consultants, including former Chief Justices Mason and Street and former Justice Andrew Rogers. Assuming modification of the adversarial system to be possible in federal courts (a question which raises potential constitutional difficulties) the re-examination of the way in which justice is delivered to the

6. Law Council of Australia, Report, March 1994. See eg Paul McInerney, "Regions Legal Aid Service in Jeopardy" in *Illawarra Mercury,* 7 September 1996 at 4.
7. C Laird, "Legal Aid Cuts Condemned" in (1996) 70 *Law Inst J (Vic)* No 10 at 10.
8. *Loc cit.*
9. *Loc cit.*
10. J J Doyle, Address to Australasian Law Teachers' Association, Adelaide, 11 July 1996.
11. See *Dietrich v The Queen* (1992) 177 CLR 292; cf *New South Wales v Cannellis* (1994) 181 CLR 309.
12. Attorney-General's Portfolio - 1996-1997 Budget Summary at 2.
13. *Loc cit* at 3-4.
14. F G Brennan and T Eichelbaum, above n 1, 6-8.
15. The Law Council of Australia has put forward a proposal for legal insurance.

litigant could be beneficial. However, I would caution against undue confidence in the inquisitorial system of the civil law countries. A recent case before the European Court of Human Rights, to challenge the process of litigation in France, revealed an appalling story of neglect and delay in administrative courts which may not be unique[16]. At least the adversary system, coupled with pro-active judges, tends to stimulate the progress of litigation through the courts. When the system is bureaucratised, the only stimulation may come from within the courts themselves. And that may not be enough.

Short term Solutions

The immediate crisis cannot wait for these long term solutions. There is an urgent need to respond to the reduction in public legal assistance in Australia. Already proposals have been made to cap the funding available for trials. A cap of $80,000 for criminal trials has been proposed in New South Wales. Other proposals include the withdrawal of assistance for any retrial and a reduction, still further, in the funding available in civil cases, including Family Court disputes. A further immediate consequence is that the Legal Aid Commissions, which feel that their forward funding (as reduced) is already committed, are reportedly reducing the funds available for legal aid in the coming year.

The Australian legal profession understands that it cannot simply look to government to solve the growing gap between public needs and expectations (on the one hand) and available public funds (on the other). The profession, in the past two decades especially, has responded in many ways to improve the delivery of legal services in this country. It has introduced the system of duty solicitors. It has established Community Justice Centres. It has adopted procedures for specialist accreditation so that specialists can process disputed cases more efficiently. It has provided specialist and sometimes in-house lawyers to work in fields advising and representing the disadvantaged: children, people with handicaps, refugees and migrants. These and other initiates bring credit on the legal profession.

But Australian lawyers have also generously provided free legal advice and representation to the needy. They have not done so under compulsion, as sometimes applies in the United States. The burden has not fallen evenly. Some large firms have adopted arrangements for the provision of pro bono assistance out of a sense of professional duty and also out of a realisation that this can help to retain the best and brightest lawyers in their ranks. Sole practitioners and members of the Bar have a long tradition of providing legal assistance in worthy cases. In my own life I did so as a solicitor and later as counsel for university students, for the Council for Civil Liberties and for trade unions and their members. Many of those who gave such assistance in those days are now leaders of the Australian legal profession.

Pro bono is nothing new in the law. What is new is the increasing need for it and the belated willingness to recognise it and to honour those who set a good example to the whole legal profession. In the current times that need will increase. I do not doubt that the legal profession will respond.

The original motivation of most of us was in joining a profession with a noble cause, was the righting of wrongs and the doing of justice, according to law. A civilised society will recognise that the demands on volunteers will soon reach their limits. Australians must ensure that access to justice is not just a pious myth, told at dinners such as this, but a reality in every community and in every courthouse of this land. Lawyers, who know how vitally important legal aid is to the attainment of equal justice and human rights, should lift their voices to convince their fellow citizens, and their government, that this is so. Otherwise, the crisis in the administration of justice in this country will deepen and many wrongs will be done that we should not allow. ❑

16. See *Phocas v France*, decision of the European Court of Human Rights, unreported, 23 April 1996 noted in *Release by the Court*, 23-25 April 1996. Mr Phocas' dispute with the French administration began with the adoption of a road development scheme in May 1960. He applied for a planning consent in March 1965. There followed an astonishing saga of disputes, appeals to the Administrative Court (on four occasions) and eventually to the Conseil D'Etat of France. The application to the Conseil was made on 11 August 1986. It did not deliver its judgment (against Mr Phocas) until 25 May 1990. The European Court of Human Rights found no violation of Article 6 paragraph 1 (by five judges to four) apparently on the ground that Mr Phocas had not made any special effort to speed up the proceedings.