28TH AUSTRALIAN LEGAL CONVENTION

HOBART, TASMANIA

MONDAY 27 SEPTEMBER 1993

CHANGES IN THE DELIVERY OF LEGAL SERVICES IN AUSTRALIA

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The Hon Justice Michael Kirby AC CMG*

BENEATH THE LEGAL ICEBERG

This convention assembles at a time when the ageless criticism about the delivery of legal services has reached, in Australia, a new level of stridency and anger. The air is thick with speeches criticising the judiciary and attacking the restrictive practices of the legal profession. In some States of Australia, solicitors are at loggerheads with barristers. "Lawyer bashing"[1] has become even more energetic than usual, and not just in the popular press. The New South Wales Attorney-General is reported as "lashing" the Judges of the State over "long delays in handing down judgments".[2] He reportedly suggested that they were partly responsible for "the State's seriously over-crowded court system".[3] Knowledgeable users of the legal system, such as the Australian Securities Commission, have accused it of being "obscenely and intolerably expensive".[4] An energetic judge, who retired early to return to private practice, accused the régime he lately superintended of failing to identify early enough the 90% of cases which would be settled; of facilitating the use of litigation where

it was not really apt; and of promoting uncertainty in the law by enlarging unpredictable factors to undermine the certainty of the legal rights of the parties.[5] He said that few, if any, judges could today afford to litigate a private dispute. According to him things are getting worse for the delivery of legal services, not better.

In these circumstances, it is little wonder that editorialists lament the fact that for most citizens of Australia, the "legal remedy is out of reach":[6]

> *The huge legal costs faced by former Premier, Sir Joh Bjelke-Petersen in his defence of perjury charges resulting from the Fitzgerald Inquiry illuminate a truth of modern litigation: it is beyond the reach of all but a few people. And this in turn points up another truth: that in an open and free society, such a turn of events is unconscionable. The law, applied properly, applies to everyone. It follows, then, in natural justice, that the remedy of litigation must be available to everyone."*

The solution offered by the editorialist was the trimming of fees by QCs and the greater use by lawyers of technology. Other observers have proposed new ways of tackling the twin problems of cost and delay. This paper will review some of the changes which have been implemented and others which are under consideration.

There are, it is true, sceptics about the prophecies of doom. For example, Justice T R Cole of the Supreme Court of New South Wales told a Summit on Accessible Justice held in Sydney a year ago that the legal profession and the community should seriously question the general acceptance of the fact "that an increased access to justice is an unquestioned goal". He pointed out that increased throughput in the courts would itself place intolerable strains on the already overworked infrastructures provided by government for the administration of justice.[7] He doubted the suggested obligation upon governments to provide all the infrastructure

necessary for the resolution of every civil dispute. He certainly would not have agreed that the remedy of litigation should be available for everyone for every dispute. It is this response which is leading to the new-found utilization dispute resolution to provide, in at least some cases, a more effective delivery of solutions to problems categorized as legal.

Chief Justice Gleeson, of the Supreme Court of New South Wales, has pioneered many innovations in an attempt to make the court system in the most litigious State of Australia more efficient, open and accountable.[8] In a paper "Access to Justice"[9] he, like Justice Cole, pointed to the need for governments to determine, as a threshold matter of policy, whether certain kinds of issues would continue to be treated as justiciable such as to be resolved within the ordinary court system.[10] In New Zealand, for example, by a profound change of the substantive law, claims for personal injury are now dealt with almost wholly outside the ordinary court system. Yet such claims still constitute a very large proportion of the civil workload of the courts of Australia - in some States estimated at 80%. Also like Justice Cole, Chief Justice Gleeson questioned the repeated assertion that the very rich and those who, because very poor, are legally aided were the only citizens who could invoke the courts:[11]

> *"[W]hen I look at the people who actually commence actions in the Supreme Court of New South Wales, and, in particular, actions for damages for personal injuries, I observe that the great majority of them in fact appear to be neither very rich nor very poor. Most plaintiffs in personal injury cases give some evidence about their occupation and their financial position. So far as one can tell, that information generally does not bear out the proposition which, on paper, seems so reasonable. So far as I am aware, no-one has ever undertaken a systematic attempt to construct a financial profile of litigants for the purpose of testing whether it really is the case that only very rich or very poor people in fact litigate. My own impression is that it is not the case. The explanation may lie in the fact that, in personal*

injuries litigation, the plaintiffs' lawyers operate on what is, de facto, a contingency fee basis."

If this is a correct assessment, a large proportion of present legal services are being offered by the legal profession through a symbiosis of the client's needs and the lawyer's self-interest. This fact merely poses another question. If informal contingency fees work in some circumstances, should they not be introduced more broadly into Australian legal practice? Is the use of the courts for personal injuries litigation the appropriate priority of lawyerly activity in Australia? Are there more socially worthwhile things which lawyers can do, and which they do not presently perform because they are busy with running down cases or because their potential clients in new fields are unable to afford them?

The courts, whilst presenting a glorious pageant, also represent (to mix the metaphors) but the tip of the iceberg in the delivery of legal services in Australia. Not all of the legal problems of the growing numbers of economically disadvantaged people in Australia are identical to those of the middle class spectrum which uses the legal profession. Some uses, of course, are common to people of different economic profiles - such as the urgent need for lawyers in brushes with the criminal law, in securing a divorce and custody of children and in recovering damages for personal injury. Further up the ladder of affluence, most Australians still use lawyers in their most important single lifetime investment: the acquisition of title to their home. But in some States even this may not now be so.

There is a growing number in our community who have quite special and distinct needs for legal services. They face different legal problems for which lawyerly skills are relevant yet often unavailable. I refer to the poor, the unemployed, the old, minority

groups, Aboriginals, refugees, drug dependent persons, sex workers and those who survive on the margins of society, living from one social security cheque to the other. The Australian Government Commission of Inquiry into Poverty examined the legal needs of such people and found, unsurprisingly, that they were, in significant respects, different from those of the average Australian who is in employment, paying off the family home and car.[12] Since the report on the legal needs of the poor in 1975, their numbers have grown in this country. Their needs have become more acute. Such needs tend to include disputes about housing, residential properties, liability for repair and security of tenure for tenants; social security disputes, claims and appeals; domestic and family cases including disputes about custody, care proceedings and maintenance; employment cases involving protection in respect of employment rights and redundancy; minor cases of bodily injury for assault; and insurance matters relating to the right of entry, refuge, residence and work.[13]

Theorists looking at the problems of such people tend to propose three different modes for the delivery of legal services to them. There is the interventionist mode involving the provision of orthodox legal services, often in approachable store front offices: bodies such as the Fitzroy and Redfern Legal Centres or by public funding of private attorneys. Then there is the prevention model, emphasising community education, de-professionalisation of issues and removing (so far as possible) the source of the legal problem. Connected with this is the third or law reform model, emphasising test cases in the courts and parliamentary changes to eliminate or reduce costly legal problems. I suppose the best known of the parliamentary reforms relevant in this regard is the system of accident compensation in New Zealand or perhaps the proposed systems

for automated, administrative transfer of land title without benefit of lawyer.

It would be a tragedy if the only way the legal system of Australia could respond effectively to the special legal problems of the poorer members of our society were to opt out of the delivery of services to them. If the legal profession and the judiciary have nothing to say to disadvantaged groups, except when viewed in the dock in a criminal proceeding, it will be little wonder if the legal profession's poor reputation persists and if the judiciary's standing as the guardians of fairness in the Australian community continues to erode.

Relevance to the whole range of legal problems of our fellow citizens is the basic challenge before the legal profession. And that means the whole range of fellow citizens, including those who are out of work, low in funds or otherwise facing difficulty in paying for a lawyer. Overworked community legal bodies like the Redfern Legal Centre and the Fitzroy Legal Service can afford a measure of outreach. But they are limited by resources, available expertise and geography. Specialist legal services for Aboriginals and Torres Strait Islanders, the Consumer Credit Legal Centre, bodies advising prisoners, people with mental handicaps, the mentally ill, children and immigrants have been established in the past two decades.[14] Often they call upon enlightened and idealistic members of the private legal profession, young graduates and even students to help to bring reality to the proud boast of our system - "Equal Justice Under Law". Fortunately the Federal Government has recognised the vital work these community legal services perform. It recently approved a substantial increase in Federal funding for a number of them.

Still further initiatives have been taken, for example the

funding of public interest litigation and the establishment of bodies such as the Public Interest Advocacy Centre - another admirable achievement of the Law Foundation of New South Wales.[15] These are practical attempts to bring the issues affecting many people before the courts where those people could not, or would not, have the resources, the courage or the determination to see through a difficult test case.

In addition to these private initiatives, changes of the law have, to some extent, improved the delivery of legal services to ordinary Australians. Even in my professional lifetime I have seen radical changes in the availability of publicly funded legal aid. The creation of the Office of Public Defender has ensured that, at least serious criminal charges would ordinarily attract professional representation to supplement *pro bono* work on the part of the private legal profession,[16] the work of the specialised legal centres and the work of duty solicitors operating at the courts. However, the governments of Australia, as of England and elsewhere, have responded to the hard economic times by serious reductions of the funds available for legal aid, particularly in civil cases.[17] These changes have occurred at the precise moment when the High Court of Australia has reversed its earlier decision in *McInnis v The Queen*.[18] In *Dietrich v The Queen*[19] the High Court held that in the absence of exceptional circumstances, a judge, on application, should adjourn, postpone or stay a trial where an indigent accused person, charged with a serious offence is, through no fault of the accused's own, unable to obtain legal representation. Adopting the approach of the dissenting judgment of Justice Murphy in *McInnis*, the majority held that if the accused's application were refused and, by reason of lack of representation the resulting trial was not fair, the accused's

conviction would have to be quashed on the ground of a miscarriage of justice. Such was the order made in Mr Dietrich's case. It represents a belated recognition of the actual way in which the criminal trial process operates in Australia and the imperative need for most persons to have skilled legal representation in such a trial. Needless to say, the decision has significant economic implications for legal aid. It has important professional implications for lawyers and for the judiciary.

Other changes which have occurred, of relevance to meeting the previously unmet needs for legal services of the poor, or people with modest means, have included the establishment of specialised bodies with more informal procedures, often using inquisitorial techniques, sometimes affording hearings by way of telephone, permitting lay advocates and occasionally forbidding legal representation. I refer to bodies such as the Administrative Appeals Tribunal and Social Security Appeals Tribunal of the Commonwealth and the Credit Tribunal, Commercial Tribunal, Equal Opportunity Tribunal and Residential Tenancies Tribunal of my own State.[20]

All of these are doubtless worthy initiatives to tackle the previous neglect of the Australian legal system and profession to cater for the legal needs of many ordinary people in this country. It is a somewhat discouraging fact that many, although not all, of the initiatives taken involve bypassing the general legal profession and regular judiciary. This amounts to a worrying acceptance of the failure of the heartland of legal practice to deliver the goods for many of the legal problems of ordinary Australians. In part, this conclusion may be inevitable and inescapable. Lawyers are highly educated, expensively trained professional people. By their education and training they have legitimate expectations of higher than average incomes. Many of them are themselves middle class

people, who mix in circles which have little to do with the problems of the unemployed, the homeless, refugees, drug dependant people, street kids, the intellectually handicapped and other disadvantaged groups. Of course, there are noble exceptions. But for the most part it will probably always be so that, criminal cases apart, the courts and much lawyerly activity is confined to sorting out the property interests of propertied members of society. The most skilful lawyers will tend to gravitate, both at the Bar and in the solicitor's branch, to such activities. The economic market will produce that result. Personal injury cases apart, much court time in civil matters will be taken up in cases of this kind. Unless funded by legal aid, supported by a community group, assisted by a legal centre or *pro bono* lawyer or somehow facilitated by funding or other support, there are thousands of people who cannot pursue their legal rights. To them, the legal profession seems inaccessible. The courts appear remote.

Acknowledging that the courts represent (and some will say should represent) only a tiny part of legal practice it is nevertheless fair to say that in the last two or three years some changes have been initiated, or proposed, to enhance the relevance of the legal profession and the courts of Australia to the community which they nominally serve. In the balance of this paper, I will take a critical look at some of these initiatives. A number of them may have important implications for the delivery of legal services. Necessarily, I will be able to touch on some only of the developments.

THE JUDICIARY

The delivery of legal services concerns the accessibility of justice and its relevance to ordinary people. This means far more than free legal aid. It includes the service of a judiciary which

has a heightened concern about the unmet needs for legal support, an increased interest in disadvantaged and minority groups and a sensitivity to changing social attitudes.

The debate in recent months about gender issues in the Australian judiciary has, to some extent, exaggerated the allegedly sexist attitudes of Australian judicial officers. The notion that the corrective is a return to school and compulsory instruction in political correctness may be doubted. But there is little doubt that there will be irresistible pressure for the appointment of more women, and more from the ethnic communities and other minorities to the Australian judiciary. This diversification of the bench is to be welcomed. It can be accomplished without significant diminution in the quality of the judges.

In New South Wales, the Attorney-General advised the Law Society in May 1993 that he intended to introduce legislation to remove the distinction between barristers and solicitors concerning judicial appointments and other statutory officers.[21] An increasing number of solicitors has been appointed to the bench in a number of States of Australia and in the Family Court of Australia, generally with excellent results. However, it is to be hoped that the Attorney-General, a solicitor, will perceive other legitimate and hitherto neglected qualifications.

Some barristers have warned against the risk of mass resignation of judges if the "quality" of the bench is reduced.[22] Whilst this prospect seems unlikely, maintaining quality and attracting the special kind of personality need for judicial life will continue to be a high responsibility of governments in Australia. Now new qualities must be added to those of honesty, learning, integrity, diligence and independence. There are now increasing demands that judges should take greater control of

litigation in their courtrooms. Chief Justice Mason told the Australian Bar Association conference in July 1992:[23]

> *"If we are to reduce the length of cases, we should perhaps consider the adoption of procedures which would enable the judge to take a more active role in deciding the parameters of the case and limiting the evidence to be adduced, in particular setting limits to cross-examination. Introduction of time limits and more emphasis on persuasive written submissions are expedients which now require very serious consideration."*

Many such facilities have been introduced to Australian courts or are under consideration. In a more recent note, Chief Justice Mason remarked that when the House of Lords interrogated counsel to provide an explanation as to how it had come about that they had exceeded the time limit given by them, counsel's response, by their agreed answer, was:[24]

> *"We did not appreciate that your Lordships required so much assistance."*

Some judges have a greater inclination and capacity to streamline proceedings than others. We have seen some notable examples of judicial activists in lists dedicated to commercial cases. Chief Justice Mason predicts:[25]

> *"[I]f the adversary system is to survive, the difficulties must be overcome and that means that the judge must become more of a manager, an active overseer, so to speak. It also means that the differences between the common law trial and the civil law trial will be reduced to some extent. And that would accord with the move towards convergence of the two systems which is taking place in Europe."*

These remarks do not go without criticism. Practice Notes requiring a measure of interventionist case management and judicial control of the hearing beyond the traditional rôle of the umpire, inspire angry criticism by members of the legal profession. A past President of the Law Society of New South Wales asserts that the

additional monitoring of cases and responding to judicial call-overs will add thousands of dollars to the costs of the average cause. This comment emphasises the importance of ensuring that heightened powers for the judiciary are not only attuned to the skills of the people who make up the bench. But are also attentive to the cost/benefit equation. And do not make litigation still more unattractive by adding to what is already a highly labour intensive activity carried on by highly expensive labour.

Sadly, a great deal of the criticism of the judiciary concentrates on trivial matters such as wigs and robes. Often, the criticism betrays a shocking ignorance of the hard and disciplined life that is required of a judicial officer in Australia today. In the past, when there were more lawyers in politics, it was a convention that the Attorney General would defend the judges against public attack. Nowadays, the judges are all too often laid bare to ill-informed attacks by Premiers[26] and Attorneys General who should know better. It is because they are not defended as once they were that judges must find better ways of communicating to the public. By doing so, I believe they may help to win back the confidence of the community despite the media and political barrage. Notwithstanding the calumny, most Australian judges (and I know very large numbers of them) are admirable, hard-working and honest people who deserve the good opinion of the community they faithfully serve.

BARRISTERS AND SOLICITORS

The plethora of current inquiries into the organisation of the Australian legal profession is truly remarkable. Those at work include, on the national scene, the Senate Standing Committee on Legal and Constitutional Affairs, the Trade Practices Commission, the National Review of the Tax Profession, the National Competition Policy Review, the Parliamentary Inquiry into the *Family Law Act*

and the initiative of the Standing Committee of Attorneys General. The last-mentioned body, in June 1993, issued from Darwin a Discussion Paper *Reclaiming Justice - A National Approach to Access to Justice*. In additional to the national inquiries, virtually every State has proposals for reform on the boil. In New South Wales there is before Parliament the Legal Profession Reform Bill 1993. It would abolish the distinction between barristers and solicitors. It would reduce the control of the Supreme Court judges over the admission of legal practitioners to the proposed common Roll. It would change the procedures for the discipline of the legal profession and the making and handling complaints about legal practitioners. And it would alter the regulation of legal fees and other costs.

In other States of Australia, the reforms proposed by State authorities may not be so radical.[27] Thus in some States the decision to appoint no more Queen's Counsel (but to countenance a new rank of self-selected senior counsel) has been rejected.[28] But the reforms in New South Wales continue apace. Their prospect led to deep divisions between barristers and solicitors and even an apparent split in the ranks of solicitors concerning the attitude that should be adopted to a separate Bar.

The Senate Standing Committee has now produced a report *The Costs of Justice - Foundations for Reform*. Amongst the proposals made are:

* Constant monitoring of the rules of procedure and evidence;
* Introduction of cheap and simple procedures to ensure that "a party in breach of a court order can be swiftly brought to order";
* Enforcement by the judiciary of its own rules of procedure to reduce the costs and delay of litigation and improvement in the

"poor administration" of justice;

* Greater attention by appellate courts to reduction of legal complexity;
* Maintenance of self-regulation by the legal profession but with due attention to "public resentment at the high cost of justice to which some of its members have contributed";
* The provision of more information about legal fees and increase in *pro bono* work;
* The removal of restrictive practices within the legal profession, such at the two counsel rule which still applies if not in name then in practice;
* The diversion of much legal work to non-lawyers, such as has been achieved with licensed conveyancers in South Australia and Western Australia; and
* Increased funding for community legal centres and better education of the community in legal fundamentals.

Two Senators on the Committee (Senators Schacht and Spindler) dissented from parts of the above report. They expressed a greater sense of urgency about the reduction of legal costs and a conclusion that the legal profession was incapable of effective self-regulation.[29] Needless to say, the main recommendation of the committee was that its own mandate of inquiry be continued.

The Federal Attorney General's Department has responded to the inquiry opened by the Trade Practices Commission with many proposals relevant to the future organisation of the legal profession in Australia. Its proposals include:[30]

* The establishment of a single (national) legal market served by lawyers and non-lawyers;
* The abolition of the divided profession and its replacement by

a fused profession;

* The abolition of restrictive practices which have no nett public benefit;
* Permission to appropriately trained, licensed and/or supervised non-lawyers to perform work currently reserved to lawyers including advocacy and also mediation and arbitration in areas such as conveyancing, succession, taxation, criminal law, etc;
* The introduction of contingency fees, advertising and a single national régime for ethical conduct, legal liability and insurance;
* The encouragement of multi-disciplinary practises, eg of lawyers and accountants;
* Fee competition amongst lawyers; and
* The abolition of the rank of Queen's Counsel.

With a great many of these proposals I completely agree. Each one of them should be tested against the way in which they would operate in practice to improve the delivery of legal services to our fellow citizens at costs they can afford. It should not be forgotten that the Monopoly Commission in England concluded that the division of the legal profession was, on balance, economically rational and in the public interest.[31] It will be important that the Australian Trade Practices Commission considers dispassionately the same possibility. For my own part, I find it difficult to believe that the abolition of the rank of QC and its substitution by a professional rank of SC will affect in the slightest the provision of improved legal services to ordinary people. One advantage of the current mode of appointment, with the involvement of the elected government, has been the infusion in the ranks of the leaders of the legal profession of lawyers who might not always have been the top of the pops within the profession. Sometimes they were precisely

lawyers concerned with the provision of legal services to disadvantaged groups.

Those who think that the broad thrust of the various proposals set out above will go away and that life in the legal profession will settle back to comfortable complacency should compare the published agendas of a number of governments in Australia of different political persuasions. There is, in fact, a high measure of consistency in the proposals at least of the Federal, New South Wales and South Australian law officers. The broad landscape ahead for the legal profession in this country seems clear enough. If there is complaint by lawyers about its contours, I suspect that politicians will show no great sympathy. In this, they will probably have the support of the ordinary citizens horrified in hard times at the reports of huge legal incomes and mindful of the inaccessibility of the law to many and the urgent need, at last, to do something about it.

For those who consider that the proposals set out above are unbearably radical, involving a disturbance of things long settled in the organisation of the legal profession of Australia, there are other lawyers who urge even more drastic changes. Mr John Weingarth, a lawyer who is Vice-President of Citibank is hardly the kind of practitioner who could be accused of proletarian tendencies. Yet in a paper on *Accessible and Affordable Justice* he concludes that the legal system of Australia urgently needs to implement its own version of *Glasnost* (openness) and *Perestroika* (restructuring), if it is to substantially modernise and to play its vital rôle in the democratic society. He suggests:

* The reorganisation of the courts;
* Micro-economic reform within the legal profession;
* The abolition of wigs and gowns with their disproportionate

contribution to the "image problem" of the profession; and

* The adoption of a uniform nationally based legal profession with modern work practices.

Those who watch these proposals from afar should insist that economic forces alone should not govern the design and functions of the legal profession in the future. Lawyers are not merely another occupational group. By virtue of their work they frequently play an important rôle in one of the central branches of government of the country. Whilst a measure of economic rationalisation is doubtless required to render the legal profession more competitive, the likely future impact of the growing influx of numbers of young law graduates from the increasing numbers of Australian law schools should not be overlooked in this respect. Nor should the special needs of high ethics and effective professional discipline to uphold the integrity and honesty of the legal profession be underestimated in a world of fast-changing institutions and social attitudes.

RECENT COURT INITIATIVES

No doubt stimulated by the many inquiries and heightened public debates and concern about the costs and delays of justice, new initiatives have been tried in recent years in every jurisdiction of Australia to improve the workings of the courts and the efficiency of the legal profession. A number of the innovations, chosen virtually at random can be noted:

* The introduction of written submissions in criminal appeals to improve the efficiency and thus the speed of disposing of such proceedings, urgent in most cases but particularly where the appellant is in custody;[32]

* The reduction of delays in criminal trials by improvements in the prosecutorial process, the increased devotion of judicial

resources and the more effective administrative control and denial of adjournments.[33] There are, of course, many instances where criminal accused, on bail, feel no great urgency to have their cases heard promptly. In such cases, it is in the public interest for the judiciary to maintain a close control over such hearings and to monitor them at important stages;

* In civil appeals throughout Australia written submissions have long been generally required. In New South Wales important appellate innovations include the monitoring of appeal notices by one of the judges to detect and remove incompetent or irregular appeals; the requirement (by Practice Note) of narrative statements of facts in large and complex appeals to facilitate decision-making and the planned facility of two judge appeal courts in some cases to increase the throughput;

* The conduct of running compensation, damages and other lists to permit speedy disposal of appeals involving no likely point of legal principle and the delegation to the Registrar of a power to settle and finalise appeal papers even if the parties cannot agree. A large facility for expedition of the hearing of appeals is also available in New South Wales. This is probably a feature of a permanent appellate court. Such a court permits the more flexible utilisation of available judicial time. Notwithstanding these innovations, the burden of appellate work continues to grow.[34] The greater the efficiency of primary decision-making, the larger will be the burden of the appellate docket;

* In a number of jurisdictions courts have established their own internal watchdogs to monitor the throughput of cases. In New South Wales, Chief Justice Gleeson, soon after his appointment,

established a Policy and Planning Committee of the Supreme Court. It meets monthly. It closely watches trends. Out of its work came the "Special Sittings" of the Supreme Court of New South Wales in which virtually every judge took part. It resulted in a major clearance of the backlog of judicial cases in the Common Law Division. More such sittings are planned. In Western Australia, the counterpart was the "August Blitz" of 1993 described as a "month long war to eliminate an embarrassing backlog of civil cases";

* Other innovations are being tried by the courts to improve delivery of their services. For example, the Land and Environment Court of New South Wales recently adopted a procedure by which the parties, by agreement, surrendered the right of cross-examination of expert witnesses in favour of an on site inspection of the disputed *locus* held by the judge and assessor in which the experts, with the aid of models of the proposed development, explained their differing points of view.[35] We will need more innovations of this kind. But we will also need reform of the law to ensure that they can occur within statutes generally drawn with different procedures in mind. Pre-trial conferences, provision of caps on legal costs, the penalty of indemnity costs for rejection of a reasonable settlement, the necessity to reduce a great deal of evidence and advocacy to writing, the more aggressive use of notices to admit and the more energetic superintendence of the trial by the presiding judge point the way to reforms that will reduce court costs and delays.[36] Credit must be given to the Australian Institute of Judicial Administration for keeping these issues constantly before the Australian legal profession and for conducting differential research to establish which

reforms are likely to work in the Australian context;

* Expressed concern about the delays in the provision of judgments has led recently to the adoption of a new procedure announced to the legal profession for the signification of complaints about delays in particular cases.[37] It would appear that this procedure may not fully satisfy the Government of New South Wales. It is anxious to have publicly available standards ("best practice") set either by the judiciary itself or by the AIJA. I support this notion. Allowance must be made for the variation in the judicial workload in different parts of Australia. But the publication of achievable standards for the disposal of reserved judgments may be warranted in some cases. In the New South Wales Court of Appeal, we constantly monitor reserved judgments at meetings of the judges held every fortnight. Each judge must account to his colleagues for delays. The procedure has proved an efficient way of superintending reserved decisions. Other larger courts without the same collegial facility may require different techniques if a serious source of grievance in the delivery of the legal product by the judiciary is to be cured; and

* Within the practising legal profession reforms have already been introduced or are under contemplation throughout Australia. The two counsel rule and the two-thirds fee for junior barristers has long since gone as a matter of rule within the Bar in Australia. But has it disappeared in practice? It is now increasingly noticed that QCs are appearing without juniors in the higher courts in this country. An increasing number of solicitor advocates are appearing. There is much greater flexibility in professional arrangements. The High Court of Australia at the request of

the legal profession amended its rules to permit solicitors to argue special leave cases; sometimes they do. Advertising by lawyers is now permitted, at least for solicitors in some parts of Australia. A system of specialist accreditation has been introduced by the Law Society of New South Wales from July 1993. These changes do indicate that micro-economic reforms in the delivery of legal services, at least at one level, are occurring or are planned.

CASE MANAGEMENT, ALTERNATIVE DISPUTE RESOLUTION AND TECHNOLOGY

Three other developments, important for the more efficient delivery of legal services in Australia, need be noted. The first is improved case management in the Australian courts. There are seven fundamentals to case management. They are judicial commitment and leadership; consultation with the legal profession; court supervision of the case as it progresses; the formulation and publication of standards and goals; the development of a monitoring and information system; the control of listing to achieve creditable trial dates and the control of adjournments.[38] The courts are becoming much more conscious of the need to manage and the progress of matters through their systems. The passive rôle of the judiciary of our tradition is drawing to its close.

Two points of difficulty will have to be noted as this change in the ways of centuries works its way through the Australian courts, as it is already beginning to do.[39] The first has already been mentioned. It is the cost effectiveness of judicial case management. It will not avail the better delivery of legal services in this country if intensive judicial supervision deflects judges from their primary task of judging and adds costs to litigation which add to the problem. The second concern to be watched relates to the need to defend the traditional manifest neutrality of our judiciary.

It would be a tragedy if greater throughput were achieved at a price of unduly damaging the acceptance of the community, litigants and legal profession of the manifest impartiality of the judiciary. The premature expression of opinion, without full knowledge of the facts of the case, and apparent pre-judgment by the judge assigned to manage, and then try, the case could undermine public acceptance of judicial decisions. To some extent, this problem can be met to ensuring that the judge who manages the pre-trial stages of litigation does not conduct the trial if it proceeds. But this will not always be feasible or appropriate, particularly in smaller jurisdictions or in specialised divisions of the courts.

A second development of importance concerns the use of alternative dispute resolution. The use of referees and arbitrators in conjunction with litigation is now well established in many parts of Australia. In a decision which supports this move, the New South Wales the Court of Appeal has held that:[40]

> *"As a broad proposition ... the Court will not reconsider questions of fact where there is factual material sufficient to entitle the referee to reach the conclusions he did, particularly where the disputed questions are in a technical area where the referee enjoys an appropriate expertise."*

In some jurisdictions the facility of conciliation is also provided to attempt to bring forward the procedure of settlement which presently comes, typically, at the last moment when the delay has been suffered and the costs incurred. It seems fairly clear that this should be an important target of attempts to improve the delivery of legal services. But I do not under-estimate the difficulties of achieving success. Lawyers, like litigants, tend to delay absolute realism and concentration upon a case until the hearing is about to commence. Then only does the case have full attention so that its prospects are realistically weighed.

The third area of innovation involves the use of technology. Already technology has infused the judiciary and legal practices in Australia. Word processing is commonplace. Facsimile filing is possible. Direct accessing of legal data and library material is feasible. Many legal problems lend themselves to intelligent systems which will (with alteration of the substantive law) reduce the lawyerly labour component that adds to delay and cost.[41]

Within a number of Federal bodies telecommunications is used to reduce the cost, formality and inconvenience of attending a court or tribunal hearing. The changes go beyond the High Court's video link for special leave applications. Thus the Administrative Appeals Tribunal, for more than a decade, has conducted some hearings by telephone. It seems likely to me that this facility will spread to the higher courts. Already, where necessary, injunctions can be sought and issued by a Supreme Court judge by telephone. An important aspect of the strategy of the New South Wales Department of Courts Administration is to develop and apply information systems supporting the efficient and effective achievement of the departmental goals and priorities. Such systems permit better performance monitoring, the tracing of court and departmental files, the provision of statistics and the identification of trends and problem areas.[42] The provision of better information technology is, in fact, a pre-requisite to improved case management systems. It permits differential case management. It should ensure a much better judicial overview of the performance of the system for the administration of justice. In New South Wales the Judicial Information Technology Committee comprises judges and departmental officials. It is chaired by Justice Cole of the Supreme Court. There are similar developments in other States. In the Federal Sphere the Attorney General (Mr Michael Lavarch) recently announced

that a new electronic system containing updated Federal statutes and statutory rules would be introduced by July 1994. It was intended that this database would improve public and professional access to Federal law.[43]

In Western Australia, the Chief Justice reported on the improved equipment and facilities for video recording of police interviews with suspects in indictable offences. If these facilities reduce extensive *voir dire* and the prolonged trials, as well as the appeals and rehearings that tend to accompany them, they will amount to another contribution by technology for reduction of delay and court log-jams.[44] If cases can be disposed of more quickly, more court days will be available for the speedier throughput of other cases waiting their turn in the list.

Other innovations of a procedural character could be mentioned, including the development of representative procedures.[45] The attempt to prosecute a representative action in New South Wales failed by judicial decision.[46] But legislative - or even judicial - rescue may be at hand.

CONCLUSIONS: TURNING INQUIRIES INTO ACTION

The above review shows some of the many innovations which are under consideration, or which have already been introduced, in Australia for the improvement of the delivery of legal services.

We should not just accept that the laws delays (and one might add costs) are the inescapable burdens of human existence which cannot be made more tolerable. Some delay and cost is certainly inescapable in any justice system. In a system which uses people trained as the Australian legal profession has been, it is clear that many problems of a legal character will not be susceptible to their involvement. But that fact may require changes of substantive law and a broadening of the involvement of non-lawyers in the delivery of

what, until now, have been seen as legal services. It may also require a readjustment of some of the activities of the legal profession to broaden its range of work and to alter its activities so as to make it more accessible to ordinary people. These obligations will also fall upon the judiciary: a fact already recognised in part at least. Not every one can have a day in court. Not all social problems are best solved in a curial setting. But where courts are properly invoked, it is increasingly recognised that they must take a more active rôle in managing the process of litigation so that they provide solutions to conflict and do not become part of the problem.

The best approach to the issues of this paper involves the formulation of policies upon the basis of accurate empirical data. Such data should show accurately how the justice system presently works. This was a point made by Dr Deborah Hensler, a leading analyst from the United States, when she visited Australia recently.[47] An important contribution to a better foundation for the development of strategies, at least in New South Wales, is the decision of the Law Foundation's Board to develop a Research Centre on Civil Justice designed to end the "great trade in myths, perceptions and fictions about the legal system" and to substitute hard data for pre-supposition. Nearly twenty years ago, Sir Garfield Barwick, then Chief Justice of Australia, called for the collection of uniform judicial statistics for this country. Although conditions have changed significantly and some statistics are now available, Sir Garfield Barwick's call remains substantially unanswered.

This is itself a remarkable thing. The courts of Australia are part of the country's system of government. All of the courts operate under the Australian Constitution. The legal profession too is clearly an important actor in the constitutional and legal system

of the country. According to the Chairman of the Trade Practices Commission the legal profession has a turnover of $3 billion and employs more than 55,000 people.[48] The Senate Committee noted that in Australia in 1985 there was one lawyer for each 693 people. This statistic compared with the United States with one lawyer for 418 people and England with one for 1,165 people. There are more than 25,000 lawyers in practice in Australia today. There are 16,000 students currently studying law or legal studies. This last statistic represents an increase of 47% in numbers since 1988. The number of law schools in Australia has more than doubled in the past five years.[49] The number of law graduates in Western Australia has recently been described as a "glut" which will cut starting salaries of young lawyers from $23,000 a year to $15,000.

The challenge before the judges and lawyers of Australia is to turn the many inquiries, political initiatives, legislative reforms and professional and judicial anxieties into practical measures which will improve the delivery of legal services to ordinary citizens of this country. The purpose of this paper has been to suggest that some improvements have already occurred. Some are under active consideration. But most still lie in the future. And meanwhile, the formal legal system operates, for the most part, beyond the reach of many ordinary Australians. This should be a matter of concern to a profession whose mission is the provision of "justice for all" and whose aspiration is still said to be equal justice under law.[50]

FOOTNOTES

* President, New South Wales Court of Appeal. Formerly Chairman of the Australian Law Reform Commission. Chairman of the International Commission of Jurists.

1. Letter G Gell "Administrative Appeals and Lawyer-Bashing" (1991) 29 *Law Soc J* (NSW) #8, 8.
2. "Hannaford Lashes Judges Over Delay". *Sydney Morning Herald*, 20 April 1993, 2.
3. *Ibid*.
4. C Williams in Richard Sproull, "Justice Grinds to a Halt" in *The Australian*, 21 April 1993, 28.
5. The reference is to a much publicized retirement interview with Rogers CJ Comm C by R Ackland.
6. *Courier Mail*, 2 June 1993, 8.
7. T R Cole in *Summary of the Proceedings of the Summit on Accessible Justice* held on 31 July 1992, 15.
8. "New South Wales Supreme Court Special Sittings" (1992) 66 ALJ 693. See also Supreme Court of New South Wales, *Annual Review*, 1992, 8.
9. A M Gleeson (1992) 66 ALJ 270.
10. *Ibid*, 273.
11. *Id*, 274.
12. M Cass and R Sackville *Legal Needs of the Poor*, AGPS, Canberra, 1975.
13. See R Cranston, "Legal Services and Social Policy" in P Cashman (ed) *Research and Delivery of Legal Services*, Law Foundation, Sydney, 1981, 41 at 50.

14. Introduction in *ibid*, at 17.

15. *Id*, 19.

16. W J Dean, "Improving Delivery of *Pro Bono* Services" 199 NYLJ 1 (1988); P Martin, "An Agenda for Change" (1993) 31 *L Soc J* (NSW) #4, 48, 49.

17. See Lawyers' Reform Association (NSW) *Bulletin*, May 1993 ("Civil Legal Aid Axed"). Cf Discussion, J Morton "Reforms in the English Legal System" (1992) 9 *Commonwealth Judicial J* #4, 28.

18. (1979) 143 CLR 575.

19. (1992) 67 ALJR 1 (HC).

20. Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform*, February 1993, AGPS, Canberra, 6.

21. (1993) 31 *L Soc J* (NSW) #4, 68.

22. See eg D Bennett in *Summary of Proceedings* above n 7, 12.

23. (1993) 10 *A Bar Rev*, 1, 9-10.

24. (1992) 8 *Prof Neg* 54, 58.

25. A F Mason, Opening Address, NSW Supreme Court Judges' Conference, 30 April 1993, unpublished, 11.

26. M D Kirby, "Judiciary, Media and Government" in *Journal of Judicial Administration* (forthcoming).

27. G Barns, "Victoria's Barristers Breathe Freely" in *Australian Financial Review*, 5 April 1993, 17; As to changes in South Australia see (1993) 28 *Aust Lawyer* #1, 10.

28. See Press Release by WA Attorney-General Cheryl Edwardes, 21 April 1993.

29. Senate Report above n 20, *ibid*, 17ff (majority report); 35f (dissent).

30. (1993) 28 *Aust Lawyer*, #1, 18.

31. D Bennett in Summary of Proceedings, above n 7, 12.

32. See eg NSW Practice Note No 76 (Court of Criminal Appeal).

33. Don Weatherburn, "Grappling With Court Delay", *Crime and Justice Bulletin; Contemporary Issues in Crime and Justice*; NSW Bureau of Crime Statistics and Research #19; January 1993; see also L Glanfield, "Strategic Planning for the Criminal Justice System", Paper for Criminal Justice Planning and Co-Ordinating Seminar, Canberra, 19-21 April 1993.

34. See A M Gleeson above n 9.

35. See "New Procedure Cuts Court Time", in *Australian Financial Review*, 15 April 1993, 32.

36. M Moynihan, "Towards a More Efficient Trial Process" in Australian Institute of Judicial Administration, *Papers presented at Tenth Annual AIJA Conference*, Adelaide, 7-8 September 1991, p 1.

37. See letter of Chief Justice Gleeson to the Bar Association and Law Society, 28 April 1993.

38. M Solomon, cited P M Lane, *Court Management of Information - A Discussion Paper*, AIJA, Melbourne, 1993, p 4.

39. See K H Marks, "The Interventionist Court and Procedure" (1992) 18 *Monash Uni L Rev* 1; cf Family Court of Australia Case Management Guidelines, 4 June 1993.

40. See eg *Super Pty Limited (Formerly known as Leda Constructions Pty Ltd v SJP Formwork (Aust) Pty Limited*, Common Law Division, unreported, 18 December 1992. For a recent warning about the occasional risks of mediation etc see Sir Lawrence Street, "The courts and mediation - a warning" (1993) 67 ALJ 491.

41. R N Moles, "Logic Programming - An Assessment of its Potential for Artificial Intelligence Applications in Law", (1991) 2 *J*

Law & Info Sci 137; V Harris, "Artificial Intelligence and the Law - Innovation in a Laggard Market" (1992) 3 *J Law & Info Sci* 287.

42. NSW Department of Courts Administration, Corporate Plan 1992-95, Sydney, 1992.

43. M Lavarch, "Major initiatives improve public access to law", *News Release*, 24 June 1993.

44. D Malcolm, 1992 *Court Review*, 23 December 1992, 8. Cf Land Titles Office New South Wales, "Parchments to Passwords - The Story of Land Titles Office Video Cassette" (1992) 3 *J Law & Info Sci*, 311.

45. See eg D M Ryan, "The Development of Representative Proceedings in the Federal Court", unpublished paper for Law Council of Australia, General Practice Section, 30 October 1992 referring to *Federal Court of Australia Amendment* Act 1991 (Cth).

46. *Esanda Finance Corporation Ltd v Carnie & Anor* (1992) 29 NSWLR 382 (CA). Special leave to appeal to the High Court has been sought.

47. (1993) 31 *Law Soc J* (NSW) #1, 86.

48. A Fels cited in D Miles "Profession Must Look at Itself says LCA President" (1992) 27 *Aust Law News* #5, 8.

49. Senate Committee, above n 20, 25.

50. See S Reynolds, "Breaking Down the Myths of Civil Justice", (1993) 31 *Law Soc J* (NSW) #1, 61.