

"A Failure in Our Legal Heartland"

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JUSTICE MICHAEL KIRBY HAS urged lawyers and judges to become more relevant to the legal needs of 'ordinary people'.

A failure in our legal heartland

The absence of the legal profession and the judiciary from many of the initiatives taken to tackle neglect of the legal needs of "ordinary people" has been criticised by the President of the NSW Court of Appeal, Justice Michael Kirby.

He says this absence amounts to a worrying acceptance of the failure of the heartland of legal practice to "deliver the goods" where many people's legal problems are concerned.

Speaking at the Australian Legal Convention in Hobart, Justice Kirby said: "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 continues to erode."

The judge questioned whether lawyers should be providing more services to the disadvantaged people in the community instead of some of the things they were doing.

He said: "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?"

"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.

"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 or assault; and insurance matters relating to the right of entry, refuge, residence and work.

"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. 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

This article is drawn from a lengthy address. In the balance of his address, Justice Kirby discussed a range of steps being taken to enhance the relevance of the legal profession and the courts to the needs of the community.

for a lawyer. Justice Kirby outlined the work of bodies like the Redfern Legal Centre and the Fitzroy Legal Service, 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. He said they often called upon enlightened and idealistic members of the private legal profession, young graduates and even students to help.

Further initiatives included funding of public-interest litigation, and the establishment of bodies such as the Public Interest Advocacy Centre. These were 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.

The judge also mentioned legal aid, the creation of the Office of Public Defender, the work of the specialised legal centres and the work of duty solicitors operating at the courts. He referred also to specialist 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 in New South Wales.

"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," he said. "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-dependent 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 are 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 solicitors' 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."

“Thousands cannot pursue their legal rights”

Justice Kirby (right) at the Convention in Hobart with Sir Iain Gidewell of the UK Court of Appeal.

