PRESS RELEASE

EMBARGO FRIDAY 2 AUGUST 1996, 9 P.M. EST

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MELBOURNE, FRIDAY.

Australian courts should closely consider the report released yesterday in Britain proposing far-reaching legal reforms to the British court system. This was said tonight by Justice Michael Kirby, a judge of the High Court of Australia.

Justice Kirby was addressing the Australian Association of Family Lawyers and Conciliators at a dinner in Melbourne. Attending the dinner was Chief Justice Alastair Nicholson of the Family Court of Australia and many Family Court judges and practitioners. Chief Justice Nicholson is the international Vice-President of the international body of the Association which includes the Australian branch. Its members comprise not only lawyers but also psychologists, psychiatrists, mediators and others working in the field of family law disputes.

Justice Kirby pointed out that the two year inquiry in Britain, chaired by Lord Harry Woolf, had proposed a "new landscape" for civil justice for Britain for the 21st century:

> "Because our legal system is very largely derived from that of England and because we share many of the same

> problems of cost and delay, I have no doubt that there will be lessons in the Woolf Report which will be useful to Australian courts and lawyers." Justice Kirby said.

During the preparation of his 370 page report, Lord Woolf visited Australia and studied the systems of alternative dispute resolution which have been introduced in Australian courts, federal and state, over the past decade. Explaining his proposals, Lord Woolf described as one of the "basic problems" of the adversary trial system that lawyers disregard the rules and "can conduct [litigation] as they wish". One of the main objects of the Woolf Report is to encourage earlier settlement and the use of alternative dispute resolution in Britain before a case comes to court. Cost and other penalties are proposed where cases are subsequently decided for less than was earlier offered. More court supervision of cases by judges is proposed to "manage" proceedings, with the support of computer technology.

Need for care in mediation

Justice Kirby said that many of the proposals in the Woolf Report were already in operation in Australian courts:

> "It seems fairly clear that Lord Woolf has been influenced by what he saw of judicial administration in Australia. It has been substantially changed in the past decade. Judges are now much more active in the supervision of litigation. No longer do they leave the progress of a case entirely to the wishes of the lawyers. Cost rules impose penalties where offers of settlement are made which are higher than the eventual recovery. Judges regularly refer cases out from the court, for conciliation and mediation performed by court appointed officers. But still delay and failure to give firm professional advice mark much of the litigation that takes place in Australia.

In the family law area there are two special concerns. The first is that the deep feelings of hurt and wrong which tend to arise in family disputes especially involving custody of children and division of family property, tend to prolong court hearings. Emotion runs the risk of enlarging litigation beyond the pocket of the litigants, unless legal representatives exercise firm self-control. Lawyers have a duty to advise their clients concerning the accumulating costs of litigation. Courtrooms are rarely satisfactory places to vent emotional feelings. Litigation just costs too much and public as well as private costs are involved.

A second problem arises from the use of mediation. Although it can often save costs of litigation for the parties, it is not always suitable. A court has, or should have, the will to do justice between the parties. Mediation works best where the parties before the mediator have equal power. In family disputes, experience shows that women are often at an economic disadvantage. Unless mediators have the will to attempt to equalise their position, the party with less power may lose out by mediation. The Family Court of Australia takes this consideration into account in determining whether matters are suitable for mediation. But it is something which must be constantly borne in mind.

The global push for privatisation of dispute resolution is, in part, a recognition of the failings of the courts and the formal legal system to deliver their decisions promptly and cheaply. The challenge presented by the Sackville Report in Australia and the Woolf Report in England is clear. We must take advantage of the cheaper, speedier means of resolving disputes. But this cannot be at a price of the withdrawal of the state from its basic obligation to provide independent courts to all citizens. Nor should it be at a price of concentrating on throughput and turnover of cases where that reinforces the inequality of bargaining power, usually to the disadvantage of women and minorities." Justice Kirby said.

The above address will be delivered at the Victoria Club, 41st Floor, 525 Collins Street, Melbourne at about 8 p.m. on Friday 2 August 1996. For further information contact Mr Bill Jackson, Public Affairs Officer of the Family Court of Australia, telephone (03) 9242 5888; fax (03) 9602 2105.

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UK inquiry wants sweeping justice reform

Fred Brenchley
London

A two-year inquiry has proposed a "new landscape" for civil justice for Britain in the 21st century, involving far-reaching legal reforms which will inevitably strike an echo in Australia.

Lord Woolf, Master of the Rolls, has proposed ending the largely lawyer-driven slow and costly system for civil cases, replacing it with fast-track case management including fixed legal costs and financial penalties for delays.

Lord Woolf visited Australia in the preparation of his report, and his inclusion of alternative dispute resolution reflects the enthusiasm for this procedure among many Australian law reformers.

Officials at the Woolf inquiry said that while many of the 300 recommendations were already included in the Australian legal system, the concept of fast-track case management with fixed costs and penalties for delay might set a precedent for Australia to consider.

Unveiling his 370-page report, Lord Woolf said litigation must be conducted not for the convenience of lawyers but for the convenience of the parties.

"The trouble with the present system is that the rules are totally disregarded because the lawyers can conduct it as they wish," he said.

Under Lord Woolf's "new landscape" parties would be encouraged to settle or use alternative dispute resolution before a case came to court. If a litigant made a settlement offer which was refused by a delaying defendant and that offer was matched or exceeded in the eventual court settlement, the defendant could face a 25 per cent interest rate penalty. In the belief that the only way to cut costs is to

"The trouble is that the rules are totally disregarded."

cut the time of cases, Lord Woolf has proposed a three-track approach. The small claims jurisdiction will be extended to $6,000, and cases up to $20,000 will come under a new "fast track" procedure, with fixed costs of up to $5,000 and a 30-week timetable.

Larger and more complex cases will have a multi-track approach, but with judicial case management and timetables set and monitored by the courts.

Judges will be given new powers to "manage" cases through the system, and be equipped with computer technology and video conferencing to do so. Judges will hold pre-trial hearings with the litigants present to ensure they understand procedures.

Surveys conducted for the Woolf inquiry showed that costs in average low-value cases often exceeded the value of the claim. Only in cases above $100,000 is the claim likely to exceed the combined costs of the parties.

Lord Woolf's report is far from being implemented despite a welcome response from the Major Government. Sections of the legal community involved in personal injury cases are already mobilising to kill it, claiming that many could be put out of business, while clients could suffer oppression from bulldozer insurance companies.

Lord Woolf says he has taken these views into account. He says under the present system most cases are settled at the court door, with lawyers the only winners.