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MONASH UNIVERSITY: MICHAEL KIRBY
CENTRE FOR PUBLIC HEALTH AND HUMAN
RIGHTS

THE ALFRED HOSPITAL, MELBOURNE

MAURICE BLACKBURN LAWYERS

LAUNCH OF THE HeLP CLINIC

The Hon. Michael Kirby AC CMG

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SOMETHING ABOUT MAURICE

It is a great privilege for me to participate in the launch of the HeLP Clinic within the Alfred Hospital in Melbourne. I honour the Hospital for its wonderful work for health in the community. It has a outreach to disadvantaged people, which makes it specially precious. The Hospital is, in a sense, the successor to the Fairfield Hospital in Melbourne which looked after people living with HIV and AIDS (PLWHA) in the desperate, dangerous, frightening early years of the HIV epidemic. When the Fairfield Hospital was closed, after 20 years of service to PHWHAs, the Alfred Hospital assumed its place. I honour all those who serve in the Hospital and I thank the Chief Executive of the Alfred Health (Andrew Way) for supporting the initiative that we launch today.

I also honour Maurice Blackburn & Co, a legal firm, originating in Melbourne, which has always had a strong social justice agenda and a determination to stand up for vulnerable people. In the 1990s, I

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launched the HIV/AIDS Legal Service in Melbourne. One of the founding members who participated in that service was the head of the superannuation and insurance practice of Maurice Blackburn (John Berrill). I pay respects to him. Through him and colleagues, Maurice Blackburn has provided free legal advice and assistance to hundreds of PLWHAs. This has been especially availed of in employment, superannuation and insurance law. However, lately the firm has been involved in policy law reform, including the recognition of same-sex couples in a superannuation context and efforts to secure the adoption in Australia of the principle of marriage equality. I thank Maurice Blackburn & Co for doing this.

When I was a young university student, I tried to secure articles of clerkship at all the big legal firms in Sydney. My aunt Lillian typed immaculate applications. In them, I pointed out (as modestly as it was possible consistent with the truth) that I was extremely brilliant, having won top place in the State of New South Wales in two subjects in the 1955 leaving certificate (modern history and general mathematics). And a maximum pass in all other subjects and good results in arts and law. Notwithstanding these protestations, I was rejected by all the big firms.

It is little wonder that they have all changed their names, so that they will not inherit the opprobrium that belongs to them for this grievous error of judgment on their part. But for their lack of judgment, I might well have become an extremely prosperous insolvency lawyer, never to be heard of again.

Instead, I went in search of a firm of modest proportions. It too was named after its principal whose first name was Maurice. Maurice Arthur

Simon. It was M.A. Simon and Co. It was a tiny firm, even by the more modest standards of 1959. I started my journey in law in an internal office which was windowless and occupied by two other young lawyers. One of them also became a judge: Frank Marks, later a judge of the Industrial Commission of New South Wales. The other was Patrick Grimes, alas no longer with us. In this small office we did the work for clients referred by the Labor Council of New South Wales. We saw a parade of injured workers. We brought their cases to the Workers' Compensation Commission and other courts in New South Wales. It was a great training in lawyering on behalf of the vulnerable and poorer segments of society.¹

This experience taught me that poorer people are not simply rich people without money. They have their own different and distinctive problems, including medical problems as well as legal problems.

This, Maurice Simon fully understood. He had one fault, though. He had a perfect sense of weight. He would every day assess the biscuit bowl. Often, when I worked late into the night (emulating the hours now served by insolvency lawyers in great palaces of marble and glass) I survived on *Iced Vovos*. Maurice Simon deeply resented my need for food. In fact, in this respect, he displayed some similarities to the later leader of North Korea, Kim Jong-il. These were, for me the years of the great famine. Yet I endured the Arduous March and came through with wonderful experience at the coal face.

Later, I frequently told astonished conferences from the big end of town that the best preparation I ever had for presiding in a special leave list in

¹ The story is told in A.J. Brown, *Michael Kirby – Paradoxes/Principles*, Federation, Sydney 2010, 45.

the High Court of Australia was in my days as a young lawyer, when I appeared in the Workers' Compensation Commission of New South Wales, juggling five or six cases of wondrous legal and medical factual complexity for Maurice Simon's legal firm.

So there is something about the name of "Maurice", that for me, betokens a commitment to the poor and the vulnerable. I am sure that Maurice Blackburn was equally committed to the same values of service as displayed by Maurice Simon. I can only hope that he was not so parsimonious with his clerks in the matter of biscuit consumption. Perhaps, being charitable, I should acknowledge that Maurice Simon was simply endeavouring to protect me from my undesirable culinary instincts. A diet of biscuits would bring a young consumer quickly enough to a great hospital or other medical advice. Still I am not so sure that Maurice Simon's motivations, in this respect, were quite so noble.

POVERTY LAW AND MEDICINE

Soon after I was appointed a judge in 1975, I was seconded to serve as inaugural chairman of the Australian Law Reform Commission. In that body we were soon conducting enquiries into aspects of the law that concerned the poor and the vulnerable. The earliest projects of the Commission concerned reform of the law on complaints against the police and criminal investigation². Not long after, we were working on a project relating to debt recovery. This involved investigation of the operation of insolvency law, and how we could ensure that it was better targeted to the need of vulnerable people to organise the repayment of

² Australian Law Reform Commission, *Criminal Investigation* (ALRC2 – Interim), 1975.

their debt in regular sums so as to avoid bankruptcy and to survive in hard times³.

Around this period, the Poverty Commission began its investigations into the socio-economic disadvantages of Australians who lived on the brink of poverty. It was through the work of that commission that fresh attention came to be given to the distinctive legal needs of poorer people in our community. Their needs take them but rarely into the rarefied atmosphere of large property contests. They tend to be more basic. Often they involve concerns about social security entitlements; housing, personal relationships, consumer transactions, employment disputes, accidents, personal finance and government payments. These are the realities of the legal problems facing poorer clients⁴.

It can be said truthfully that the law provides a framework for the resolution of a broad range of problems, central to individual and societal welfare⁵. However, the plain fact of the matter is that most people affected by these areas of the law cannot afford to retain a lawyer to secure appropriate advice. It is just too expensive. The training of lawyers, the high overheads and costs of operating a practice, together with the abolition of the protected high income monopolies which they formerly enjoyed, has meant that the cost per hour (or perhaps for each 6 minutes) soon outflanks the amounts at stake in the legal concerns of the poor. Then legal problems may be crucial to their lives, family

³ Australian Law Reform Commission: *Insolvency – The Regular Payment of Debts* (ALRC 6) 1976.

⁴ R. Sackville, “Of Monopolies and Consumers – Conveyancing and the Legal Profession” (1975) *Current Affairs Bulletin*, 306-504; R. Sackville, “Access to Justice: Towards an Integrated Approach” (2011) 10 *Judicial Review* 221.

⁵ Christine Coumarelous, D. Macourt, J. People, H.M. McDonald, Z.Wei, R. Irana and S. Ramsey, “Legal Australia-wide Survey: Legal Needs in Australia”, Law and Justice Foundation of NSW, Sydney, 2012, 2.

welfare and personal happiness⁶. But to pursue them, and to secure advice on them, the marginal cost of engaging a lawyer far outweighs the marginal economic utility of the advice that is then given.

Within my time as a young lawyer and in the years since problems presented by this difficulty of getting clients of modest means to legal advice were solved in various ways:

- * Back in the 1950s and '60s, persons of limited means could go to a chamber magistrate, often a clerk of court, who would be available at the Local Court of Petty Sessions on an assigned roster, to give free legal advice, necessarily within a narrow range of expertise;
- * The client could also consult the Public Solicitor; but the queues were long and areas of talent were likewise narrow, basically confined to criminal and motor traffic cases and the occasional divorce;
- * In my day, it was not at all unusual, at least in workers' compensation and damages cases, for lawyers, certainly those referred by the Labor Council, to act on a 'no win, no costs' basis. This was all that the ordinary working man and woman could afford. It was understood by the lawyers and sometimes clients possibly thought that the Labor Council was underwriting the solicitors' advice. True, the Council would sometimes help to defray the outlay of disbursements in major cases of litigation

⁶ S. Burris, I. Kawachi and A. Sarat, "Integrating Law and Social Epidemiology", (2002) 30 *Journal of Law, Medicine and Ethics*, 510.

running up to the High Court, especially where the case was lost. But usually, the lawyers absorbed the costs of the *losses* in the profits made by the *wins*. Orthodox and conservative lawyers sometimes condemned such arrangements as champerty. But if that system had not been in place, countless workers and vulnerable people with viable and arguable cases would never have arrived at justice. They would have been turned away at the door;

- * Then came a larger system of legal aid, introduced by initiatives undertaken at the Federal level by Senator Lionel Murphy. Not only was the Australian Legal Aid Office established. Aboriginal Legal Aid was created. It helped to provide legal representation for the disproportionate numbers of indigenous people facing the criminal justice system;
- * Later Citizens' Advice Bureaux and Networks were established in the 1970s and 80s to give forms of combined advice to poorer people with legal problems. Advice that would stray from the areas of criminal justice into occasional civil suits on behalf of consumers. As the protective legislation of the '70s and '80s was enacted, expectations were raised that ordinary people might perhaps sometimes have access to the law;
- * In the 1970s, the High Court of Australia, reversing an earlier decision in *McInnis v The Queen*⁷ held in *Dietrich v The Queen*⁸ that, if a person facing serious criminal charges could not afford to

⁷ *McInnis v The Queen* (1979) 143 CLR 575.

⁸ (1992) 177 CLR 292.

defend him or herself, courts could stay the prosecution of those charges until the state provided appropriate legal aid. This beneficial decision ensured that at least serious criminal trials would not proceed without the provision of appropriate legal assistance;

- * Civil society organisations also began to intrude. These included bodies that gave advice to war veterans. Student advice bodies and voluntary work by former student politicians like myself ensured that many impoverished students would have representation in fare evasion and like cases by the generosity of those who shortly before were students (but not evaders) themselves;
- * In the late 1970s, the innovations in administrative law, pioneered by the Fraser Government, introduced access to approachable, low key, inexpensive public remedies, such as the Ombudsman and administrative tribunals. This allowed many people to initiate and prosecute their own claims in more informal bodies attuned to (and not so hostile towards) people representing their own legal interest;
- * Class actions were then developed, after a model proposed by the Australian Law Reform Commission. These allowed multiple claims to be grouped together. They were forever being criticised by industry and conservative lawyers. But they tended to even-up the power balances in litigation. And to provide remedies to those who could never afford to fund a big case for themselves; and

- * In recent times, litigation funders have come onto the scene. They too are commonly criticized and they have not had an easy road in the courts⁹. However, again, they may be the only way by which a large test case can be prosecuted when ordinary citizens individually cannot afford to take the risks of doing so, at the peril of their family home or other modest assets.

These are the realities of the legal problems of people with low means. They depend upon adjustments to traditional legal procedures and facilities, simply because of the unit cost of prosecuting or defending their legal interests. Although the legal profession often describes, in language of self-congratulation, the importance of the rule of law and of equality before the law, the fact is that, in many cases, for poorer people in Australia, these are illusions and fictions. They have little reality unless there are adjustments in the institutions, practices and facilities to make the law more approachable. And this is where the Centre which we inaugurate today comes in.

JOINT MEDICO-LEGAL FACILITIES

The experience of many out-patient hospital facilities, local medical practices and other places of health care access is that a number of patients present who have a complex mixture of poor health connected with (and possibly exacerbated by) legal problems which the health care worker feels incompetent to solve. Where a person with poor health has, or feels they have, a legal problem this of itself can precipitate mental and physical health conditions, simply because of the unmet

⁹ *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. P. Pleasence and N.J. Blamer, "Mental Health and the Experience of Social Problems Involving Rights: Findings from the United Kingdom and New Zealand" (2009) 16 *Psychiatry, Psychology and the Law*, 123.

need for legal advice. Social workers may try to help to resolve the legal problem, particularly if it involves representations to a government agency. But, as such, they do not normally have expertise. Nor normally do they have someone to help them with the resolution of the legal difficulties.

Such legal difficulties present in many of the typical problems faced by patients of limited socio-economic means. Rarely do such persons come into a health system with a single problem related only to health care. Often they face ancillary issues. These may involve a pending court appearance; a domestic violence dispute; issues over guardianship of themselves or of family members; a conflict with a neighbour may have escalated into violence; family law problems; and contests over traffic infringements or minor criminal cases.

The response to the multi-faceted character of problems of many disadvantaged people has been a growing recognition of the necessity somehow to combine, in the same facility (or close by) the sources of advice that can address both long term illness and disability and any legal problems that may be coinciding with that predicament:

- * In the United Kingdom, community legal service partnerships began to emerge in order to provide a seamless source of advice for people with both legal and medical difficulties. As Christine Coumarelous and her colleagues recently explained:¹⁰

¹⁰. See C. Coumarelous, P. Pleasence and Z. Wei, "Law and Disorders: Illness/Disability and the Experience of Everyday Problems Involving the Law" (2013) Law and Justice Foundation (NSW) *Justice Issues*, 2013 at 3.

“Doctors in the United Kingdom have resorted to sometimes ‘prescribe’ legal advice rather than conventional medication; through efforts to formally integrate aspects of service delivery through local community Legal Service Partnerships and health action zones. Recent cuts in public spending have impacted these initiatives. But they built on a good idea”

- * In the United States of America, there are now 275 examples of formal medical/legal partnerships ‘involving legal advocacy to health care to securing access to benefits and protections’¹¹. In 2007 the American Bar Association began to encourage law firms to co-operate in this way with appropriate medical practitioners. In 2010, the American Medical Association encouraged medical practitioners to enter partnerships with lawyers and proposed amendments to State laws to permit this to happen; and
- * In Australia, early experiments in bringing together medical and legal advice and help occurred in the HIV/AIDS legal services established in Melbourne, Sydney and elsewhere. By the time the present century began, the need for such facilities was made clearer by the National Mental Health Policy in 2008¹². Certainly, in the context of mental illness, experience showed that ‘each episode may have economic and social repercussions, jeopardising education, job and housing security and disrupting relationships. Commentaries in medical journals acknowledge that ‘virtually all legal needs (ranging from housing issues to domestic

¹¹ M.L. Minow, Foreword, “Medico-Legal Partnerships Raise the Bar for Health and Justice” in E. Tobin Tyler, E. Lawton, K. Conroy, M. Sandel and B. Zuckerman (eds.), *Poverty, Health and Law*, Carolina Academic Press, Durham, 2011, xv.

¹² Australia, Department of Health and Ageing, 2009, *National Mental Health Policy*, 2008, Department of Health and Ageing, Canberra, 2009, 15.

violence) are directly or proximally connected to health status. As Parmet, Smith and Benedict remarked in 2011:¹³

“Law is one of the most important social determinants of health. It helps establish the framework in which individuals and populations live, face disease and injury and eventually die... Law is one factor that helps determine other social determinants”

Responding to these acknowledged needs, improvisations have been adopted. These included the co-location of medical and health care advisory facilities for vulnerable people in West Heidelberg in Melbourne; the Baker and McKenzie cancer patients’ legal clinic, also in Melbourne; and now the HeLP Clinic at the Alfred Hospital.

THE DREAM OF EQUAL JUSTICE

So this is why we join to witness the launch of new HeLP Clinic at the Alfred Hospital Melbourne. It recognises the importance of co-locating expertise. It will ensure operation of a triage system which will involve the classification of patients, where appropriate, by people with the appropriate expertise in recognising at least the broad contours of any legal problems. This will ensure that such problems do not disappear under the radar. Patients in need will be seen, observed and referred to appropriate channelling where any legal problems that emerge can be resolved quickly and professionally.

It is in keeping with the commitment to vulnerable people without means that Maurice Blackburn & Co has accepted the obligation to give

¹³ W.E. Parmet, L.A. Smith and M.A. Benedict, “Social Determinants, Health Disparities and the Role of Law” in E. Tobin Tyler and ors above, at 21.

leadership and to provide skilled personnel for this facility. Integrating it within the services provided by the hospital is the best means to bring all relevant talent to the one place. Where the lawyer on duty at the clinic cannot resolve the issue, because it is outside his or her field of expertise, other legal offices will be invited, within their own pro-bono programs, to lend assistance. Early results are encouraging that this initiative will work.

Maurice Blackburn, like Maurice Simon, claimed an early reputation in injury compensation cases and in acting for trade unions. He did this much earlier than Maurice Simon, starting in Melbourne in 1919. This built up a firm with a strong social justice practice, extending now far beyond compensation cases into consumer protection, human rights, refugee claims, indigenous issues and employment law rights.

In addition to litigation involving the legal needs of vulnerable and disadvantaged people, Maurice Blackburn has been involved in a number of important test cases and representative actions which seek to protect, and advance the legal interests, of people who, alone, could never afford to prosecute such claims for themselves. These cases have involved:

- * Challenges to the validity of a patent granted in respect of breast cancer tests;
- * Class actions on behalf of people with disabilities;
- * A class action involving the employment rights of thousands of workers with intellectual disabilities;

- * Claims concerning the health rights of refugee applicants; and
- * Cases involving to attempts block the introduction of poker machines in Castlemaine.

It is not my purpose to consider the merits of any of these cases. They constitute an indication of the way in which, sometimes, by new procedures and the organisation and marshalling of litigants, it may be possible for individuals to pursue claims collectively which they could never afford to undertake individually.

It has been agreed that Maurice Blackburn & Co will not represent litigants in any proceedings that may arise against the Hospital. Any such claims, if they arise, will be outsourced and pursued appropriately by other lawyers. HeLP is an experimental initiative. If the experiences in the United Kingdom and the United States are any guide, it will succeed. Certainly, it will bring law and justice to many people who are presently outside any realistic access to these objectives. Equally certainly, many people who come to the Alfred Hospital for assistance experience mixed health and legal problems which this new initiative may help to resolve, in a one stop shop.

I congratulate the three participants in this initiative. I am particularly proud that the initiative has been facilitated by Associate Professor Bebe Loff, the Director of the Centre that bears my name in Monash University. I am proud of its concern with the poor and the vulnerable. Both in the law and medicine. Within the inevitable constraints of practicality and economic reality our society must do more to make the

rule of law a reality. And to make access to the law possible for the poor and vulnerable, not only for the rich and powerful.