Social Equity, Legal Aid and the Rule of Law

Legal Aid Queensland 40th Anniversary

The Hon Robert French AC

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Somebody once said that history is just one damn thing after another. Today that sequence of things is compressed to the point of sensory overload with hourly news cycles across multiple outlets and the incessant hyperactivity of social media. In an era of far too many damn things, of unprecedented global change and disruption, and in a year in which Game of Thrones has finally come to an end — we ask the question — why have so many people turned up in the Banco Court to celebrate the 40th Anniversary of Legal Aid Queensland? The short answer is that this is not just a celebration it is an affirmation of the value of equal justice and its foundational role in our societal infrastructure and the part played by Legal Aid Queensland in advancing that value.

Before returning to aspirational thoughts about equal justice, it is helpful to recall a little of the history that brings us here. Long before Legal Aid Queensland came on the scene, members of the legal profession had represented disadvantaged clients for no fee or at reduced rates. In or about 1916 the office of Public Defender was established in the newly created Public Curator's Office. Its first occupant was William Flood Webb who was, eventually, in 1946, to be appointed to the High Court. He was Public Defender for a short time, becoming Crown Solicitor in 1917 and being succeeded by William Salkeld. The office of Public Defender continued until 1991 when it merged with Legal Aid Queensland.[1]

A first step on the path to tonight's event was taken in 1961 following negotiations between the Queensland Government and the Queensland Law Society, brokered by the Attorney-General, Sir Peter Delamothe. A *Legal Assistance Act* was passed through the Queensland Parliament. It created a statutory body, The Legal Assistance Commission, to administer a legal aid scheme funded by interest from solicitors' trust accounts. It provided for legal aid representation in civil matters and for some representation at committal hearings.

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1 M Shanahan, '100 Years of the Public Defender in Queensland' (Supreme Court Library, Queensland, 11 November 2016).

A second major step was the entry of the Commonwealth into the field in 1974 with the establishment of the Australian Legal Aid Office as a provider of legal assistance on matters of Commonwealth law and in all matters, Commonwealth and State, where the applicant was someone to whom the Commonwealth had a special responsibility, such as Aboriginal persons, pensioners and ex-servicemen. At that time there were already in existence in a number of States of Australia newly established Aboriginal Legal Services supported by Commonwealth funding and providing representation and advice across a range of matters to Indigenous people.

The Australian Legal Aid Office opened an office in Brisbane and in a number of regional towns in Queensland. It was established administratively rather than by statute and involved direct Commonwealth expenditure long before awkward questions began to be raised in Queensland about the constitutional propriety of that kind of executive action. I interpolate that in 1974 the Australian Legal Aid Office also opened an office in Perth with a local legal practitioner as its Regional Director. My wife applied for a job there and was told she had it but waited so long for her appointment to be processed by the bureaucrats in Canberra that she gave up waiting and went to the Independent Bar in Western Australia and, in so doing, became the first woman to sign the Bar Roll in that State. So Legal Aid played an important part in her career history.

Following the dismissal of the Whitlam Government and the election of a coalition government, cooperative federalism began to flower and resulted in a National Legal Aid Scheme supported by Commonwealth and State intergovernmental agreements. A Commonwealth Legal Aid Commission was constituted in 1977. It later became known as the Legal Aid Council. States and Territories created statutory bodies to administer legal aid schemes in both State and Commonwealth matters. So it was that the Legal Aid Commission of Queensland was created by the *Legal Aid Act 1978* (Qld) and met for the first time 40 years ago on 11 July 1979 under the chairmanship of Sir John Rowell. Its funds were derived from interest on solicitors' trust accounts in relation to State matters and, in federal matters, from the Commonwealth. The headquarters of the Commission or the Legal Aid Office (Queensland) as it became known, were opened by the Commonwealth Attorney-General Senator Peter Durack, and the State Attorney-General, W D Lickiss, in the benign presence of the then Premier, Sir Joh Bjelke Petersen on 24 January 1980. A long history of growth

and service began, which is detailed in the 'History of Legal Aid Queensland' published under the title *Enhancing Access to Justice* and written by Kay Cohen.[2]

In 1991, the Legal Aid Office Queensland and the Public Defender's Office were merged. In November 1992, there was an important judicial development which had an impact on legal aid schemes across the country. That was the judgment of the High Court in *Dietrich v The Queen*.[3] The decision turned upon the common law concept of a 'fair trial'. It was authority for the proposition that absent exceptional circumstances, a judge faced with an application for an adjournment or stay by an indigent accused charged with a serious offence who, without fault, was unable to obtain legal representation, should adjourn, postpone or stay the trial until such representation were available. If the trial went ahead and, because of lack of representation, was not fair, any conviction would have to be quashed.[4]

The decision did not establish a common law right of an accused to be provided with counsel at public expense.[5] It did, however, put pressure on Legal Aid Commissions to provide representation in serious criminal cases. It also rested upon a narrow application of the fair trial concept to serious matters in which the accused had entered a plea of not guilty. As a recent review of the decision in the *Melbourne University Law Review* observes, the decision did not deal with accessibility to legal representation prior to trial or for continuing pre-trial preparation or in relation to persons pleading guilty.[6] It was focussed on a very small subset of the requirements of equal justice to which I will turn in a moment.

In June 1997, the existing Commonwealth/State Legal Aid Agreement ceased. New terms proposed by the Commonwealth involved substantially reduced funding and nominated areas for funding with priority given to children's interests and to the use of alternative dispute resolution services. A Government submission to an Australian Senate Legal Constitutional References Committee Inquiry into Legal Aid set out influences on the demand for legal assistance including the effects of *Dietrich*. The submission also pointed to the unmet need for services for women, ethnic communities, mentally and physically disadvantaged people, Aborigines and children. In the event, a new Commonwealth/State Agreement was signed and, as an incident of that agreement and discussions with the

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2 K T Cohen, *Enhancing Access to Justice – the History of Legal Aid Queensland – 1979-2004* (Legal Aid Queensland, 2004).

3 (1992) 177 CLR 292.

4 Ibid 297–8 (Mason CJ, McHugh J).

5 Ibid 323 (Mason CJ, McHugh J).

6 A Flynn, J Hodgson, J McCulloch and B Naylor, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' (2016) 40 *Melbourne University Law Review* 207.

Commonwealth, the *Legal Aid Queensland Act 1997* was enacted. Under that Act, the Legal Aid Office (Queensland) became Legal Aid Queensland and the Legal Aid Commission became its Board.

The developments which I have sketched out were reflective of a long history of change and restructuring and adjustment to change on the part of the staff and leadership of Legal Aid Queensland as well as on the part of the profession generally. 1997-98 led to reviews, evaluations and strategic planning necessary to demonstrate Legal Aid Queensland's capacity to adjust to change and to deliver its services economically and efficiently and to benchmark quality standards.[7]

Kay Cohen observed in 2004:

> From its start as a small organisation providing legal assistance for a restricted clientele, LAQ has evolved into an efficient, high quality deliverer of comprehensive legal assistance services. It is characterised by a commitment to its role that has survived a number of serious setbacks. On each occasion, the collective organisation took a step back, assessed its strengths and weaknesses, directed its energies to making the necessary changes, and emerged as a highly efficient operation without compromising its quality of service.[8]

Today, 15 years after that history, Legal Aid Queensland's services include community legal education, information and referral, legal advice and legal task services, duty lawyer services, lawyer-assisted dispute resolution and legal representation. The areas covered include crime, families, child protection, child support, domestic and family violence, social security, consumer protection, employment and anti-discrimination law. The Service is funded by the State and the Federal Governments under the National Partnership Agreement on Legal Assistance Services.

The organisation has a head office in Brisbane and 13 regional offices. Under the governance of its Board, which is chaired by the Hon Margaret McMurdo AC, Legal Aid Queensland in 2017-18[9] provided information and referral services on 262,744 matters and

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7 Cohen (n 2) 37.

8 Ibid 'Specialists and Partners in a Changing Environment: Patterns and Trends' 35.

9 Legal Aid Queensland, *Annual Report 2017–18* (Report, 31 August 2018) <http://www.legalaid.qld.gov.au/files/assets/public/publications/about-us/corporate-publicatons/annual-reports/2017-18/laq-annual-report-2018.pdf>.

38,943 legal advice and legal task services.[10] Those and the other statistics disclosed in the Annual Report speak for themselves. This is a mature and substantial organisation providing a wide range of services to a wide range of disadvantaged Queenslanders and so, within the limits of its resources, advancing the foundational value of equal justice.

As we come to 2019 and look back upon the history of Legal Aid Queensland we can return to the question — why is it important to mark this anniversary? It is important because it reflects a commitment by this organisation and those who support it, including the profession, to equal justice and, as an incident of equal justice, access to justice.

The concept of equal justice is to be distinguished from the formal concept of equality before the law. Many, if not most of you, will be familiar with the searing observation of Anatole France:

> The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.[11]

That is not an observation bound to a particular time. There are many people sleeping rough on the streets throughout Australian cities today. The 2016 Census supported a finding of about 1 in 14 homeless people in Australia who are sleeping rough and who are beset by constellations of intersecting problems including legal issues.[12] They are a subset, as at 2016, of 116,000 homeless Australians.

In its Justice Project Report published in 2018, the Law Council of Australia examined access to justice issues across a range of disadvantaged people and, taking the particular case of homelessness, the Report found:

> People who are homeless or at risk of homelessness often experience multifaceted disadvantage and are amongst the most marginalised people in society. Lack of affordable, safe and stable accommodation is a structural cause of homelessness and contributes to and exacerbates poor justice outcomes. It can increase the likelihood of a person being denied bail and instead being placed on remand. It can prevent a

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10 Ibid 28.

11 *The Red Lilly* (Le Lys Rouge) (1894) Ch 7.

12 Australian Institute of Health and Welfare, Parliament of Australia, *Sleeping rough: A Profile of Specialist Homelessness Services clients*' (2018).

> person from escaping family violence. It can also increase the risk of recidivism amongst recently released prisoners.[13]

The Report went on to observe that complex housing laws and policies:

> such as 'three strikes' policies with respect to evictions from public housing, the enforcement of public housing debt against victims of family violence and negative former tenancy classifications, can make it more difficult for vulnerable persons to maintain precarious tenancy arrangements and/or re-enter public housing.[14]

Reverting to Anatole France, what he said about the inadequacy of formal equality before the law is as valid today as it was when he wrote those words. As Justices Crennan and Keifel and I observed in 2011 in *Green v The Queen*:

> "Equal justice" embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law … It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.[15]

Those words were written in the context of a judgment about the parity principle in sentencing. But the idea of equal justice, embodying equality before the law in a substantive rather than merely formal sense extends well beyond the field of sentencing. It requires that people not be unfairly disadvantaged in their interaction with our legal system by reason of factors over which they have no control. It is necessarily a great societal work in progress. It reflects the aspiration that all people should have equal opportunities to exercise their rights and enjoy their freedoms according to law and to receive equal treatment by our legal system and before our courts. It therefore requires equality in access to justice, in access to information about the legal system, and advice and support and, where necessary, representation. The Law Council's Report concerned inequality in access to justice in Australia and what could be done to reduce it. Legal assistance to those who, without it, will be denied equal access is a foundational requirement.

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13 Law Council of Australia, *The Justice Project Final Report* (Final Report, August 2018) 36–37.

14 Ibid 37.

15 (2011) 244 CLR 462, 472–73 [28] (footnotes omitted).

Of course, it does require expenditure by governments, but there are substantial hidden costs flowing from failures to properly resource legal assistance services as was recognised by the Productivity Commission in 2014.[16] In its findings, which underpinned a recommendation for an urgent interim injection of $200 million per annum in legal assistance services for civil matters alone, it said:

> unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure.[17]

The Commission quoted former Chief Justice Murray Gleeson:

> The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.[18]

Legal aid is not just about legal representation in civil or criminal litigation. Early access to advice may assist in avoiding the escalation of a minor legal problem into a major one and perhaps the compounding of legal problems, which inevitably impose burdens not only upon individuals but the society which ultimately has to do something about it. This is particularly acute in, but by no means limited to, the functioning of the criminal justice system.

The provision of legal assistance for persons charged with criminal offences has long been recognised internationally as an aspect of fundamental human rights and freedoms. That recognition is found in Article 14 of the *International Covenant on Civil and Political*

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16 Productivity Commission Inquiry, Parliament of Australia, *Access to Justice Arrangements* (Report No 72, 5 September 2014).

17 Ibid 30–31.

18 Ibid quoting Murray Gleeson 'The State of the Judicature' (Speech delivered at the Australian Legal Convention , Canberra, 10 October 1999).

Rights.[19] Similar references will be found in other international Declarations and Statements of Principle. In 2012, the General Assembly of the United Nations adopted a Statement of Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems as a framework to guide member states on the principles on which a legal aid system in criminal justice should be based.[20]

The Principles and Guidelines identified legal aid as 'an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law' and 'a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights … and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.'[21]

The significance of fairness in the criminal justice process and beyond that in access to justice generally cannot be overstated because fairness underpins public trust in the criminal justice process particularly, and the justice system generally. Absent that trust, and the availability of the benefits of the rule of law to all in our society, those who cannot access justice will have little reason to place faith in the democratic process. That concern extends beyond the categories of serious disadvantage considered by the Law Council in its Report to what is sometimes called 'the missing middle' — those who lead economically sustainable lives but for whom engagement with the legal system is potentially an economic disaster. For people in those categories, it can be the case that early advice will avert a catastrophic compounding of legal problems.

For all of these reasons, we may conclude that the 40th Anniversary of Legal Aid Queensland is not just another damn event in the crowded parade of events including anniversaries of various kinds that pass before us every day. It provides us with the opportunity to reflect upon the importance of equal justice and access to justice as part of that societal infrastructure, which provides the space for people to enjoy their freedoms, exercise their rights, develop their capacities and pursue their opportunities.

Legal Aid Queensland is one of a number of such organisations around Australia and in many other jurisdictions around the world. In one sense its importance is local because it

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19 *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, (entered into force 23 March 1976).

20 United Nationals Office on Drugs and Crime, *United Nations Principles and Guidelines on Access of Legal Aid in Criminal Justice Systems* (New York, 2013).

21 Ibid 5.

serves a particular community, the people who live in the State of Queensland. But in serving that community it supports values of universal significance. It is right and proper therefore that we celebrate this anniversary and congratulate Legal Aid Queensland and those who govern it and work in it for their service to the people.