



Law Council
OF AUSTRALIA

The hard-fought arc to justice: Opening Address to the National Access to Justice and Pro Bono Conference

Speech delivered by Arthur Moses SC, President, Law Council of Australia at the 7th National Access to Justice and Pro Bono Conference, Hotel Realm, Canberra.

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Distinguished guests, ladies and gentlemen.

I proudly acknowledge the traditional custodians of the land on which we meet, the Ngunnawal People, and pay my respect to their Elders – past, present and emerging.

I recognise that Ngunnawal country has been a place of meeting, congregation and community for hundreds of years. I also acknowledge and welcome Aboriginal and Torres Strait Islander peoples attending the conference today from around Australia.

Thank-you Chief Justice Murrell for your warm introduction.

It is a privilege to open the National Access to Justice and Pro Bono Conference today. I look forward to sharing with you what I have no doubt will be a fulfilling few days of shared learning and fruitful discussion as to how we can work to drive meaningful change together.

This biennial conference provides an important forum to develop, test and share ideas and perspectives on access to justice and pro bono matters.

This is the first year the conference has been held in Canberra, and with a federal election looming, it is a fitting time to be discussing access to justice, just down the hill from Parliament House.

In early 1901, a newly federated Australia was preparing to go to the polls for the first time. In his campaign speech, the nation's first Prime Minister Edmund Barton spoke of the importance of raising up institutions. Institutions, he said, "Under which justice shall be done to all".

Barton's Australia needed a nation-building agenda. 118 years and 45 Parliaments later, as we prepare for the 2019 Federal Election, Australia needs a restorative agenda. An agenda to restore public confidence and faith in our traditional institutions, from our parliaments to our justice system, our courts, our judiciary and even our legal profession. Because we know the unfortunate reality is that justice is not accessible to all Australians today.

Legal assistance in Australia is in a dire state, and in need of urgent review and reform. Some of our most vulnerable people are slipping through the cracks. With your help, we at Law Council are committed to working with you to change that reality. We know this is no easy feat but it must be done.

Civil rights advocate Martin Luther King Jr. is often quoted, with good reason, but one of his most-quoted phrases is that "the arc of the moral universe is long, but it bends toward justice".

It is a saying much beloved, including by US President Barack Obama who famously had the phrase woven into a rug in the Oval Office.

But it is also an imperfect saying, because it captures an incomplete truth. The reality is that while we yearn for and desire rule of law and justice in our community, these values are hard-won and easily thrown off course. They must be zealously advanced and vigilantly defended.

One of the most inspiring advocates for equality and justice in the 21st century, US Supreme Court Justice Ruth Bader Ginsburg, referred to this phrase in her dissent to a 2013 Supreme Court Opinion in *Shelby County v Holder*. Handing down her oral opinion, Justice Ginsburg quoted King's famous words but added the caveat "if there is a steadfast commitment to see the task through to completion".

As lawyers, we owe duties to the administration of justice and to promote the rule of law. These duties compel us to shoulder our share of that steadfast commitment, and to strive to promote access to justice for all Australians.

I am honoured to serve the profession as President of Law Council this year. In the lead up to the April budget and federal election, my commitment to you is this.

The Law Council will not let our elected officials forget what it means to serve the Australian people. We will remind our governments of the values that ground our institutions. And we will prosecute urgent policy priorities to ensure that justice is done and accessible to all Australians.

Our critical policy priorities this year include:

- To advocate for increased federal legal assistance funding for civil and criminal matters, because justice should be affordable for all Australians;
- To promote and support access to justice and lawyers working in rural, regional and remote Australia. Because all Australians deserve justice, no matter where they live;
- To promote increased resourcing of the Federal Courts; and
- To advocate for the implementation of recommendations from the Justice Project and the Australian Law Reform Commission's Pathways to Justice Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples.

Each of the four publicly funded legal assistance services – Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services – plays an important, unique and complementary role in providing legal help across Australia. It is critical those who work on the hill are aware of the tremendous work that you do, and the huge constraints imposed on you.

Regrettably, it will be no surprise to those in this room that the legal assistance sector in Australia is chronically underfunded. The percentage of Commonwealth contributions to legal aid funding is at its lowest in 20 years. In 1997, the Federal Government spent \$11.22 per capita. Today, it is spending less than \$8 per capita. Many living under the poverty line are ineligible.

In 2015/16, community legal centres reported turning away almost 170,000 people due to a lack of resourcing. More people than would fill Manuka Oval 12 times.

Disadvantaged Australians are not the only ones impacted by the shortfall. Many simply can't afford legal representation and if required to attend court, are forced to appear alone. Lives are being destroyed because successive governments have failed to invest in critical social justice infrastructure.

This cannot continue.

The Law Council made the case for change in our 2019-20 Pre-Budget Submission released last week.

We argued that at least \$310 million a year is needed to provide adequate funding for frontline legal services to increase civil legal assistance and come close to restoring the Commonwealth's share of funding for Legal Aid Commissions to 50 per cent.

We called for an urgent boost of \$120 million per annum for civil legal assistance services; and \$190 million per annum for other services provided by Legal Aid Commissions.

To be clear, this is not just about more money for legal services, although that is of course important. This is also about ensuring equitable access to legal assistance for the sectors of our society that are missing out, who face significant marginalisation and disadvantage, circumstances often exacerbated by barriers in access to justice.

We called for the Australian Government to engage and consult with the legal assistance sector to develop a sustainable funding model for the future, to provide not just funding but certainty of funding.

We called for additional funding to introduce justice impact tests and establish a national justice interpreter scheme.

We called for urgent additional funding of the federal courts, especially the Family Court of Australia and Federal Circuit Court of Australia, where families and children are having to wait up to three years, in many cases more, to have matters heard. Approximately one in four cases before the family courts involve at least one party that is unrepresented.

The Law Council also called on the government to commission a review of the resourcing needs of federal courts and tribunals in consultation with the community and stakeholders.

Advocating for improved resourcing of the legal assistance sector and the courts is not new for the Law Council – it has been a core pillar of our work for many years.

This year, however, we have the great advantage of being able to draw upon a compelling piece of evidence and a remarkable body of work to assist in our advocacy, the Justice Project.

Justice Ginsburg was once asked what advice she would give to the many young lawyers who looked up to her. Her Honour answered “My advice is fight for the things that you care about. But do it in a way that will lead others to join you”.

The Justice Project is a powerful, compelling, empathetic and forensic case for change.

It leads by example, by listening to the voices of those who are being denied justice.

It has far-reaching implications for those practicing in the legal assistance sector, those entrusted to develop policy, and most importantly, those in our community who interact with the justice system each day – and face significant uphill battles in doing so.

Quite simply, the Justice Project arms us with a wealth of evidence, analysis and personal stories we can draw on to make the case to address unmet legal need in Australia.

The Justice Project began in 2017 as an ambitious initiative of the then President of the Law Council, Fiona McLeod SC. Fiona explained that the genesis for the project was:

The realisation of a simple truth – that despite our lofty commitment to equality before the law, for many tens of thousands of Australians, equality, and justice, remain out of reach.

We accept this situation as inevitable when it is not. We do so perhaps because we consider the cost of access to justice for all is too high. Or perhaps because we do not understand the devastating impact of injustice upon lives, because the voices of those denied justice are not heard.

In order for the Justice Project to give a voice to the voiceless, it was crucial to listen to the personal experiences of those affected by barriers within the justice system. And listen is exactly what the Justice Project team did.

The team undertook some 150 consultations, including with government agencies and non-government organisations, advocacy and peak bodies, legal assistance services, court and tribunal personnel, practitioners, academics, subject matter experts and community elders.

Consultations involved formal discussions, site visits and teleconferences, across urban, regional and remote locations.

The project was informed by 129 written submissions, including from many organisations and individuals in this room today. I wish to take this opportunity to thank each of you who contributed to this process. Without your insights, the report would not be the quality, critical piece of work that it is.

We consider the Justice Project to be the most comprehensive national review into the state of access to justice in Australia since Ronald Sackville's Royal Commission into poverty and law forty years ago.

The project exposes flaws in the system of access to justice and identifies systemic weaknesses and gaps. In doing so it breaks down barriers of ignorance and understanding – and provides a strong foundation for us to build bridges to a better future.

The Justice Project's Final Report was launched in August last year at Parliament House.

Unfortunately, that same day, the government was in the throes of a leadership spill. While politicians and media frantically charged around the halls, in a quiet corner of the building former Chief Justice of the High Court Robert French AC launched the project.

The former Chief Justice rightly observed that 'there is no group of people of whom we can say that their access to justice does not matter'. In this spirit, the report reveals the true crisis of justice access through the lens of lived experience.

The Justice Project centred on real people deprived of access to justice, and of opportunities to fulfil their potential.

It gathered the stories of real people to make the case for urgent reform through their voices. Voices of individuals that face significant disadvantage, including:

- People with Disability;
- People Experiencing Economic Disadvantage;
- LGBTI+ People;
- Prisoners and Detainees;
- Aboriginal and Torres Strait Islander Peoples;
- People who Experience Family Violence;
- People who have been Trafficked or Exploited;
- Recent Arrivals to Australia;
- Children and Young People;
- Rural, Regional and Remote Australians;
- Asylum Seekers;
- Older Persons; and

- People who are experiencing homelessness.

This list is by no means exhaustive. The justice system remains inaccessible to many Australians.

But the project does not just focus on what is broken. It also identifies what is working and highlights the considerable innovation that exists within the justice sector despite major resourcing pressures.

Overall, the Justice Project shines a light on those in our community that face significant barriers when interacting with the justice system

Importantly, the project also charts a path forward. It makes 59 recommendations and identifies further priorities contained in some 1,500 pages.

There are four particular themes from the project that I would like to discuss with you this morning:

1. The need to improve resourcing of the legal assistance sector;
2. The need to address the challenges of the 'missing middle';
3. The role of joined-up services and holistic approaches to legal assistance; and
4. The need to better identify and respond to downstream pressures placed on the justice system by shifts in policy.

Turning to the first issue, as you know, there are many valuable reviews, resources and reports on gaps in the justice system which have been, and continue to be, essential tools for policy development.

A recurring theme in this literature is the dire under-resourcing of legal aid commissions, community legal centres and specialist Aboriginal legal services. The sector has been underfunded for a generation and we are poor by international standards.

Unsurprisingly, a key recommendation of the Justice Project was the need to address this chronic under-resourcing.

The Law Council is calling for all governments to invest significant resources to address critical civil and criminal legal assistance service gaps, including as I mentioned before, a minimum \$310 million per annum from the Commonwealth simply to get the legal assistance system back on its feet.

It is not just the quantum of funding that is important: it is also how the funding is administered and designed to address need. For this reason, the Justice Project also calls for Commonwealth, state and territory government funding for a transparent and evidence-based funding model to determine and provide adequate, predictable and sustainable funding for services on the frontline of legal need.

We believe regular, government-funded surveys of the legal needs of Australia's population are required to underpin these models and ensure well-targeted service delivery.

The funding models for each of legal assistance subsectors have undergone independent review in the past year. I look forward to hearing from these subsectors in the next session

of the conference, including their thoughts as to what an effective funding model could look like in future.

A direct corollary of inadequate funding is the increasing need for frontline services to prioritise demand, both in terms of who can be assisted, and the types of matters that can be responded to.

Another key finding of the Justice Project is that further work must be undertaken in relation to what the Productivity Commission has termed the 'missing middle' – individuals with legal issues who may be unable to afford to access private legal advice or representation, but are ineligible for a legal aid grant.

Fourteen percent of Australians live under the poverty line but just eight per cent of Australians are eligible for legal aid funding. Strict legal aid grant eligibility rules mean that people who are asset rich, but money poor, cannot receive legal aid. This includes many older people and rural families.

It also includes ordinary working Australians who cannot afford legal representation for legal concerns like commercial matters, family law and injury compensation, yet are ineligible for government funded legal assistance. This leads to high levels of self-representation, which imposes great stress and often significant adverse implications for these individuals and their families.

Increased rates of self-represented litigants also create challenges for judges and our courts, as those appearing without legal counsel inevitably require additional support and assistance to navigate the system.

As highlighted during consultations by National Legal Aid, 'justice in these circumstances is no more than theoretically available to this group of people.'

Quite rightly, legal aid's primary focus is on criminal matters. Less than three per cent of grant approvals went to civil law matters in 2016-2017. However, the Justice Project reinforced that many disadvantaged groups also need civil legal assistance.

I don't need to tell anyone here that this situation results in enormous pressures being placed on community legal centres and the pro bono sector. For example, the National Association of Community Legal Centres reported that credit and debt issues are amongst the top five legal problems the centres deal with. They estimate around 240,000 financially disadvantaged people face these kinds of issues per year.

The government's own Productivity Commission has recognised and recommended that an additional \$200 million per annum is needed to better meet the legal needs of disadvantaged Australians. Focusing on civil law needs, the Productivity Commission in its 2014 inquiry into Access to Justice Arrangements report, found that Australians experiencing disadvantage were more susceptible to, and less equipped to deal with, legal disputes. It emphasised governments' important role in assisting these individuals, given the net benefits to the community of providing publicly funded legal assistance services.

Further research is needed into how the private legal profession, working alongside others, can improve access to justice for the 'missing middle'.

The Law Council will progress this work this year and beyond, as we recognise that without action, Australia's "missing middle" will continue to fall through the cracks.

The Productivity Commission also recognised that not providing legal assistance for civil matters 'can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection'.

A clear message from the Justice Project is that access to justice and legal assistance needs must be discussed beyond the narrow confines of law enforcement, courts and legal services.

Access to justice issues have far-reaching implications for policy-makers across different portfolios and governments. These issues are integral to addressing disadvantage. Broader portfolios both depend on and contribute to justice outcomes.

The Justice Project's research findings and case studies comprehensively demonstrate the personal, community, social and economic costs of inaccessible justice. These include:

- A greater likelihood of incarceration, including in circumstances in which charges and arrest were unwarranted;
- Family violence victims being evicted for reasons which are not their fault, such as damage to the rental home by the perpetrator;
- An inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness, as well as deteriorating mental and physical health, and in some jurisdictions, imprisonment;
- An inability to access a person's entitlements, such as unpaid wages, income support or a pension, resulting in destitution;
- An inability to seek redress as a victim of crime, to address workplace exploitation or discrimination;
- People remaining at risk of harm, violence and exploitation – such as family violence victims, elder abuse victims, people with disability who are abused by carers, and people who are trafficked or subject to forced marriages;
- Families being split when children are unnecessarily removed from their parents;
- A greater likelihood of people being returned to their countries of origin to face persecution, torture or death; and
- Unresolved problems escalating from civil, to family, to criminal matters.

These scenarios clearly have broader cost implications to other areas. These also entrench disadvantage, and contribute to intergenerational cycles of poverty, violence and harm – with opportunity costs to all Australians given the loss of healthy, productive and vibrant communities.

Former High Court Chief Justice Murray Gleeson said 'Providing legal aid is costly, however, so is not providing legal aid'. This sentiment easily extends beyond just our legal aid commissions and is almost certainly true for funding of all participants in the legal assistance sector.

When advocating to influence policy on legal assistance matters, we must engage with attorneys-general. But in order to influence real change, justice issues must be raised with policy-makers across portfolios and governments, to address disadvantage and overcome continued failures to meet access to justice challenges.

There must be a whole-of-government approach to reform and an increased awareness within the executive that embeds access to justice in multi-disciplinary policy and funding frameworks.

A promising recognition of holistic approaches to justice seems to be increasingly present in the legal assistance sector. In the health-justice space we are seeing more initiatives that co-locate lawyers with the doctor, the nurse, the community nurse, the social worker, the mental health professional. Together these experts provide advice and support to the people who come through the door. Policy frameworks that link justice, health and social outcomes are critical, and we need to work diligently to build this recognition.

The Justice Project recommended that governments support multi-disciplinary collaborations which address legal and non-legal needs, including health-justice partnerships and culturally-safe holistic models, and we continue to support these initiatives.

Legal practice does not operate in a vacuum, and I am pleased that conversations about joined-up service models feature in this conference program. The pioneering work of those involved in the rise of health-justice partnerships in Australia is a testament to the value in recognising that the law is but one hurdle that many in our society face. By rethinking how we deliver legal services we can better respond to community needs.

Finally, I would like to mention the Justice Project's call for justice impact tests. Time and time again we see laws introduced, or policies changed, which have significant downstream impacts on the demands for legal assistance and the capacity of the court systems.

Justice impact tests are now in place in the UK and are a useful tool to build whole-of-government thinking. Every government policy process must factor in how new policies impact on the justice system, from health to welfare and from education to housing. If implemented, we hope this will prompt a whole-of-government approach to dealing with the pressures on the justice system and avoid unintended consequences which may have life-altering impacts on Australians.

We need decision-makers to stop and ask: How would this policy affect access to justice and the legal system? And how much will it cost the system?

Only then will there be proper recognition of the knock-on effects that policy development has on the legal system. This will assist in ensuring that whenever reform is undertaken, due consideration is given to properly funding those in the justice system who will be called upon to respond.

In conclusion, the Justice Project is already having a practical impact. Last month the Federal Opposition announced its Financial Rights Access to Justice Package, which would see a \$120 million contribution over four years from the Banking Fairness Fund to increase the number of financial rights legal assistance lawyers from 40 to 240.

The Shadow Attorney-General, the Hon Mark Dreyfus QC MP, has credited Law Council's Justice Project for this announcement, highlighting how it shows that unmet legal need in Australia is large, particularly in the area of financial advice and access to skilled lawyers at community legal centres.

The Justice Project does not just shine a light on what is broken. It also highlights areas in which we as a profession are making inroads. Through innovation and cooperation, the legal assistance sector has demonstrated it is often the first to embrace new ways of doing things and use innovation to break down barriers to accessing justice.

But there is more to be done and we are committed to working with you to progress this. The Justice Project is not a panacea. But using the Justice Project allows us as a profession to speak truth to power and chart a new arc towards reforms that are long overdue.

Advocating to improve access to justice requires passion, coordination, well-reasoned and long-term advocacy, and each of us has a role to play.

Work such as the Justice Project provides an evidence-based business case for change. But in the words of Justice Ginsburg, we also need a steadfast commitment to see the task through to completion.

Thank you to each of you for your tireless work and contribution to the administration of justice. As former High Court judge, Justice Michael Kirby once observed, “The law knows no finer hour than when it defends the rights of the marginalised and the unpopular”.

I look forward to discussing these important issues with you, and working with you in the days and months ahead to advance our shared commitment to making justice accessible for every Australian.

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