PANDORA'S BOX

2023: THE LAW AND THE LAYPERSON

Cover: Zoe Osborne

Pandora's Box

2023

The Law and the Layperson

Editors

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FOREWORD

Rick Bigwood

I often reflect on the law and laypeople. Even us lawyers were laypeople once. And we remain laypeople with respect to those professions to which we do not belong — home surgery, anyone? Moreover, as lawyers, we all have friends, family members or acquaintances who, from time-to-time, experience legal issues. It is not unusual for them to approach us, as legally trained individuals, to provide a helpful – and free – steer in the hope of resolving their problems. These encounters, at least for me, underscore the oftentimes complex, mysterious and inaccessible nature of the law, even for those who might notionally have the resources to pursue a formal justice solution to their issues. I, too, know this phenomenon as an erstwhile party to legal proceedings where I learned – even as a legally trained person – that a significant disjuncture can sometimes lie between real justice and the justice that the law, with all its inherent uncertainties and compromises, is ultimately capable of delivering on the day.

Take for example a friend of mine, who had sacrificed well over a decade of his working life to instead care for his elderly parents in their own home before they each eventually died. His brother, on the other hand, pursued his own life as normal: he was married, ran a profitable business, owned a high-value property in a desirable suburb of Brisbane, and spent time sailing his yacht around Australia. Successive wills signed by my friend's father – after the mother had died – left my friend the parental home, with the residue of the estate – that is, cash – going to the brother. The brother knew this result was coming all along – his father had repeatedly told him so while he, the

father, was still alive – and he was most unhappy about it. He tried, unsuccessfully, to persuade the father into changing the will. Still, none of this caused him to spend any more time with his father, or even visit him on his deathbed after being forewarned that the end was imminent.

My friend knew nothing about family provision claims. Naïvely, he thought that wills were worth the paper they were written on. Having defended – albeit poorly – a family provision claim myself once, I started to tell him about how the law works. I told him about the possibility of the father making an *inter vivos* gift of the house to my friend before he – the father – died, which was something the father himself had suggested doing. The house would then be removed from the estate and hence, at least in Queensland, be immune from a family provision claim. To be subject to such a claim, the gift would first have to be successfully challenged by the brother, hence returning it to the disposable estate. I told my friend about the law of undue influence, and that because he held an enduring power of attorney over the father, he would have to, if called upon to do so, rebut a statutory presumption of undue influence by virtue of section 87 of the *Powers of Attorney Act 1998* (Qld). I explained that the only practical way for him to rebut that presumption, so as to sustain any substantial gift that had been made to him, was to have convincing evidence that his father had acted of his own volition and that he had been competently advised as to the wisdom of the proposed transaction before going ahead with it. At that point, my friend said that he didn't even know how to enlist a lawyer, let alone instruct one as to what he wanted and needed. He was overwhelmed by the prospect of even engaging with a legal practitioner who would be able to implement his father's wishes.

I was at least able to assist by putting my friend in touch with a wills and estates firm that I found by searching online, and which seemed to offer the services needed. I even spoke over the phone with a lawyer from the firm to explain my friend's situation, so that when he eventually did contact her, she would have a fair idea of the services being sought. And so the transaction was done: my friend's father was independently advised, and all the requisite file notes were taken; and the transfer was prepared and lodged with Titles Queensland, who promptly issued an indefeasible title in the name of my friend as the registered owner of the property. In turn, a fresh will was executed by the father to reflect the new asset landscape. The professional fees charged by the firm for all this were quite sizable, but nevertheless correctly calculated in accordance with the fee arrangement that had been agreed in advance.

Some two years later, my friend's father passed away. Things turned nasty rather quickly after that. The brother promptly filed a family provision claim and issued a statement of claim alleging undue influence on the part of my friend over his father. My friend could not believe how the law could allow his father's last wishes simply to be ignored in this way. How could the father's will and *inter vivos* transaction not be watertight after everything had been so carefully orchestrated? How could the law even entertain such an undesirable and unmeritorious claimant as my friend's brother – his words (expletives deleted), not mine – and allow him to extract some sort of settlement under the threat of protracted litigation, all paid for – notionally – by the estate?

My friend was distraught and angry, to put it mildly. He thought the legal system was a joke. I tried to explain, repeatedly, the policy justifications

behind family provision laws, as not all parents provide for their offspring in their will as they should. I tried to explain, similarly, the policy justifications behind the statutory presumption of undue influence in section 87 of the *Powers of Attorney Act* – that not all attorneys are able to withstand the natural human tendency to succumb to temptation when they enjoy virtually unsupervised access to the assets of their principal. I tried to explain, finally, that the reason for the independent advice and explanation that his father had received – all of which was properly documented – was to allow my friend to defend a claim of undue influence *ex post*, that is, if the brother should raise the objection; it couldn't function, as my friend insisted it should, to prevent the brother from exercising his ordinary right to raise such an objection in the first place.

None of this was helped by the law firm who, having advised the father and facilitated the impugned transaction for a professional fee, was now advising my friend to mediate a solution with his brother because they were uncertain as to whether enough had been done to rebut the statutory presumption of undue influence. 'You have a "better-than-even" chance', he was advised. My friend was expecting something much more ironclad than that.

My friend, having paid a small fortune from the estate to carry the dispute through to a mediated solution, and having then paid his brother the quite hefty amount that had been agreed, was left with his father's former home. But such an outcome was of little relief. The title was now encumbered with a registered mortgage securing a sum that had to be borrowed to make the brother go away. My friend could not, for the life of him, understand how the law could countenance such a solution to his problem. He felt let down by the civil-justice system. Granted, the lawyers who advised him, and I too,

understood perfectly well what was happening and why. But two years later, my friend has never stopped lamenting about the legal system and lawyers.

My friend is, I suppose, a member of what Margaret Castles, in her contribution to this year's issue of *Pandora's Box*, calls the 'missing middle.' Her essay is a thought-provoking foray into the plight of this (increasingly culturally diverse – see in the interview with the Honourable Wayne Martin AC KC) layer of the population with respect to accessing formal justice solutions, and reading it made me immediately think of my friend, and doubtless many others like him. Rightly or wrongly, my friend's experience of the legal system, and the lawyers that function within it, shaped – adversely – his confidence in the system's ability to deliver on what he perceived to be the true justice of his situation. Granted, his judgement might have been shaped by his own lack of objectivity around the full range of interests and entitlements that impinged upon his case, including those of his brother. Regardless, his confidence in the law and lawyers was consequently eroded, and this is an important theme that is developed in Megan Mahon's contribution to this issue of *Pandora's Box*, in 'Having Confidence in Queensland's Legal Profession.' Of course, an important function of the Legal Services Commission, of which Megan is the current Commissioner, is to ensure that laypeople – which extends broadly not only to my friend, but to the perpetrators and victims of crime as well (see Stan Winford's contribution to this issue) – can remain confident that those who are admitted to practice in Queensland are not only fit to be so admitted, but also that their fitness to practice is monitored and maintained on an ongoing basis. And while such fitness for practice starts with our law schools, it does not end there. The role of legal education in the transformation of law students into 'effective legal practitioners' is an enduring one, which is a message developed

in Faye Austen-Brown's contribution to this collection of essays and interviews.

The editors of this year's *Pandora's Box* are to be congratulated on their selection of the theme for the 2023 issue, as well as on the essayists and interviewees who have been assembled to deliver on that theme. I have mentioned only some of those contributions above. In addition, Stephen Grace, in his interview with Sam Vecchi, focuses mainly on the access-to-justice plight of those who typically fall well below the 'missing middle.' These members of our society are certainly catered for to some extent – albeit by a notoriously under-resourced community legal sector, including generalist and specialist advocacy agencies and services – but as Grace emphasises, until more systemic problems can be addressed in the lives of the least advantaged, especially the housing and cost-of-living crises, reform solutions to justice-access barriers for those who are both subject to the law and served by it are likely to remain deficient. Margaret Thornton's reflections during her interview on the effects of citizenship on an individual's experience with the legal system are also interesting, and they concern a dimension of law and the layperson that I have not thought much about previously.

In the meantime, I shall avoid discussing the law and lawyers with my friend. That conversation never travels in a profitable direction. But the experience I witnessed him endure at the hands of the law and the legal system does underscore the importance of the ongoing discourse that is at the heart of the valuable contributions to this year's issue of *Pandora's Box*. And for that ongoing discourse we should all be grateful.

EDITORIAL

Welcome to the 2023 edition of *Pandora's Box*.

This year's theme, 'The Law and The Layperson,' delves into the everyday interactions between individuals without a professional background in the law, and the legal system. In a society that continues to grow in legal complexity, the importance of this theme cannot be understated.

To provide a comprehensive exploration of this topic, we have assembled a diverse group of contributors with various positions in the legal field. Their contributions offer a wide range of perspectives for our exploration.

In the interview with Margaret Thornton, she considers the important role of citizenship in defining an 'ordinary person.' She underscores the great influence it can have on an individual's engagement with the legal system.

Faye Austen-Brown investigates the transition of a layperson into a legal practitioner in her article 'The Role of Education in Transforming Law Students into Effective Legal Practitioners: The Deconstruction and Reconstruction of Legal Gobbledygook.' She reflects upon the importance of a lawyer considering themselves as no different from a layperson, and the avoidance of using overly complex legal jargon that makes the law inaccessible.

Megan Mahon's article, 'Having Confidence in Queensland's Legal Profession' serves as a pertinent reminder of the challenges faced by

laypeople when seeking to engage qualified legal practitioners. Her work not only explores the regulatory framework governing legal practice, but also delves into how this framework serves to safeguard the interests of the public.

Then, in the interview with the Honourable Wayne Martin AC KC, the intersection between cultural background and legal outcome is explored. While investigating necessary avenues for reform, he highlights the particular areas in which laypeople most frequently interact with the justice system.

Margaret Castles' 'The Missing Middle: A Blip on the Landscape or a Justice Access Challenge for the Long Haul?' contemplates the 'missing middle' – those who lack the financial means to hire a lawyer, yet do not fall within the income criteria for legal aid eligibility. In her article, she investigates both the historical context of this phenomenon, and the distinct challenges it presents in the 21st Century.

In 'Hearing Victims' Voices: Public Prosecutors and the Participation of Victims in Criminal Trials,' Stan Winford explores the difficult roles played by laypeople when they become entangled in the criminal justice system. Drawing on his previous empirical research, he highlights the difficulty in reconciling fairness and due process in the criminal trial with the need to facilitate victims' justice needs.

In the interview with Stephen Grace, he offers valuable insights into justice access issues. He emphasises that addressing the concerns of laypeople extends beyond just law reform. Instead, to provide a comprehensive solution, the law must be considered in its broader social context.

Finally, the 2023 Justice and the Law Society Student Paper Competition was won by Nickolas Sofios, with his paper 'Left Behind? Legal Representation and Access to Justice for the "Missing Middle" in Contemporary Australia.' In this essay, he delves into the implications and consequences arising from the absence of a positive right in Australia guaranteeing legal representation funded by the State.

All these contributors' diverse viewpoints coalesce around one fundamental truth: no matter the area, the primary recipient of the law is always the layperson.

We express our sincere thanks to Zoe Osborne for designing the cover art of this year's edition.

We are also thankful for the support of James Arthur, Asha Varghese, Clarissa Zhong, Charlene Ko, and the rest of the Justice and the Law Society. The publication and launch of this year's edition would not have been possible without them.

The Justice and the Law Society acknowledges that this journal was produced on Turrbal and Jagera land, and pays respects to their elders, past, present, and emerging. We acknowledge that Indigenous sovereignty has bever been ceded or extinguished. and pay tribute to its laws which sustain and survive.

Samuel Vecchi and Anna Harisson – 2023 Editors, *Pandora's Box*

ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal of the University of Queensland's Justice and the Law Society. Published annually since 1994, it aims to bring academic discussion of legal, social justice and political issues to a wider audience. The journal is not so named because of the classical interpretation of the story: that of a woman's weakness and disobedience unleashing evils upon the world. Instead, we regard Pandora as the heroine of the story – an individual with an open and inquisitive mind – and thus encourage readers to approach the complex and challenging topics contained within through a balanced and critical eye.

Pandora's Box was previously launched each year at the Justice and the Law Society's Annual Professional Breakfast. Since 2021, it has instead been launched at a separate launch event, including a panel discussion with some of the contributors from the latest edition of the journal.

Pandora's Box is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit* and EBSCO. Additional copies of the journal, including previous editions, are also available. Contact secretary@jatl.org for more information, or go online at http://www/jatl.org/pandoras-box to find the digitised versions.

THE LOST ISSUES OF PANDORA'S BOX: REVISITED

The inaugural issue of *Pandora's Box* was published 29 years ago. In the time since, the journal has fiercely upheld its fundamental aim of bringing academic discussion of social, political, and legal issues to a wider audience. Along the way, through whatever unfortunate circumstances, issues of *Pandora's Box* have gone missing, lost principally in a time before the ubiquity of online publishing.

In the 2009 issue of *Pandora's Box*, the Editors elucidated these circumstances by way of a letter entitled 'The Lost Issues of *Pandora's Box*.' The letter outlined that in the time since 1994, the '95, '96, and '97 issues of *Pandora's Box* had gone missing. Fortunately, the letter goes on to reveal that the Editors subsequently received a package from the Supreme Court Library of Queensland. This package contained a copy of the missing 1996 issue, returned alongside several publications loaned to the Library for the November 2000 'Women in Law' exhibition. Soon afterwards, the 1995 issue was also sighted, in the Walter Harrison Law Library at the University of Queensland. This left only the 1997 issue still missing.

14 years later, and regrettably the 1997 still eludes the Justice and the Law Society. Alongside the Supreme Court Library of Queensland, efforts were made to track down the remaining issue, but were unfortunately to no avail. Finding this issue is a matter of great significance to JATL. Not only does the issue embody the history and heritage of *Pandora's Box*, but also the values the journal strives to uphold. This significance is heightened by the fact that 2024

will mark the 30th anniversary of *Pandora's Box*. Completing JATL's own collection would be an immensely symbolic way of celebrating the pioneering history of the journal.

And so, the search continues. To you, dear reader, I extend a heartfelt appeal. If you have information as to the whereabouts of the elusive 1997 issue, please do not hesitate to contact the Justice and the Law Society and share your insights. Your collaboration may solve a mystery decades in the making.

Samuel Vecchi – 2023 Editor, *Pandora's Box*

ABOUT THE CONTRIBUTORS

Rick Bigwood

Professor Rick Bigwood is the Academic Dean of the TC Beirne School of Law at the University of Queensland. Before this, Rick taught at Bond University for 5 years, from 2011 to 2015. Rick also taught at the University of Auckland for 16 years, from 1995 to 2010. Here, Rick was also the Director of the Research Centre for Business Law.

Previously, Rick held the position of General Editor for the New Zealand Universities Law Review, and served as Editor from 2002 to 2008. Presently, he continues his involvement as a member of the editorial boards for the New Zealand Universities Law Review, and the Journal of Contract Law.

Rick's many publications have appeared in prominent international journals, covering various topics within contract, equity, and property law. Additionally, he has been invited as a keynote speaker to international conferences focusing on contract law. His catalogue of published work includes: *Legal Method in New Zealand* (Butterworths, 2001), *The Statute: Making and Meaning* (LexisNexis, 2004) and *Exploitative Contracts* (Oxford University Press, 2003), which was awarded the JF Northey Memorial Book Award for 2003.

Rick's teaching abilities have earned him numerous awards, prizes, and honours across several tertiary institutions in various countries. Notably, in

New Zealand, he was granted a National Tertiary Teaching Excellence Award in 2006.

Margaret Thornton

Margaret Thornton is an Emerita Professor of Law at the Australian National University. Her work on the legal academy and the legal profession has garnered international recognition, leading to frequent invitations for her participation in various global projects.

Margaret is a prolific author in the field of discrimination and the law, with a substantial body of published work. Her book *The Liberal Promise: Anti-Discrimination Law in Australia* (Oxford, 1990) stands as the singular critical examination of discrimination law in Australia. Similarly*, Dissonance and Distrust: Women in the Legal Profession* (Oxford, 1996) represents the sole comprehensive exploration of women within Australia's legal profession.

Formerly, Margaret held the Richard McGarvie Chair of Socio-Legal studies at La Trobe University. There, she also served as Head of School, Director of Research and Professorial Member of the University Council. Her dedication to the field of law is evident through her substantial contributions, including her role as a member of the Australian Research Council and her position as the Chair of the Federal Government Advisory Committee for the Gender Issues in the Law Curriculum Project.

Margaret is a Fellow of the Academy of Social Sciences in Australia, as well as a Foundation Fellow of the Australian Academy of Law. She has also

received an Australian Research Council Professorial Fellowship, alongside several international fellowships.

Faye Austen-Brown

Faye Austen-Brown is the Practitioner-in-Residence at the University of Queensland's Pro Bono Centre. Before working at the Pro Bono Centre, Faye was a lawyer at Caxton Legal Centre's Human Rights and Civil Law Practice. From May to November 2016, Faye worked at the Queensland Public Interest Law Clearing House, now known as LawRight Qld. For over 7 years, Faye was a solicitor at the Aboriginal Legal Service (NSW/ACT), where she was principally involved in criminal defence matters.

Faye has over a decade of experience in both civil and criminal law across multiple jurisdictions. She has advocated for marginalized clients in a wide spectrum of cases, spanning from minor traffic violations to serious murder charges. Her expertise also extends to handling discrimination claims and matters concerning guardianship.

Faye studied Law at the University of Sydney, and holds a Postgraduate Diploma in Law from The University of Law, London, Bloomsbury.

Megan Mahon

Megan Mahon is the Commissioner of the Legal Services Commission Queensland. Here, Megan oversees the operations of the Legal Services Commission in fulfilling its statutory obligations, in addition to ensuring a

thorough, just, and transparent approach to addressing complaints lodged with the Commission.

Megan's previous experience in private legal practice spans over two decades, as a Partner at Murdoch Lawyers, and as Legal Practitioner Director at Mahon Legal. Furthermore, Megan was honoured as the Women Lawyers Association of Queensland 2009 Woman Lawyer of the Year, and acknowledged in 2017 with the Queensland Law Society President's Medal.

Megan was the President of the Queensland Law Society for an extended term, and was Executive Director of the Law Council of Australia.

Megan is a Fellow of the Australian Academy of Law, the Australian and New Zealand College of Notaries, and the Governance Institute of Australia.

The Honourable Wayne Martin AC KC

Wayne Martin was the Chief Justice of Western Australia from 2006 until 2018, hearing cases in all areas of the court's jurisdiction. From 2009 to 2019, Wayne was Lieutenant-Governor of Western Australia, and was Acting Governor on numerous occasions.

Wayne previously served as the Chairman of the Law Law Reform Commission of Western Australia, was President of the Administrative Review Council, and was president of the Western Australian Bar Association. Furthermore, he was president of the Law Society of Western Australia, and was the inaugural Chair of the Judicial Council on Cultural Diversity. He holds many other honorary positions and awards.

Throughout his time as Chief Justice, Wayne displayed a strong dedication to community engagement, publishing approximately 150 speeches and papers across a diverse range of topics related to the justice system.

In 2012, Wayne was appointed a Companion in the General Division of the Order of Australia. This was in recognition of his distinguished contributions to the judiciary and the legal field, particularly during his tenure as Chief Justice. Additionally, his commendable efforts in legal reform, education, and community service were also recognised.

Wayne currently practises as an arbitrator and mediator at Francis Burt Chambers, and at 39 Essex Chambers.

Margaret Castles

Margaret Castles is a Senior Lecturer at the University of Adelaide Law School. She specialises in teaching final year subjects such as Civil Procedure, Evidence and Alternative Dispute Resolution. Additionally, Margaret is Director of the Clinical Legal Education program. In this role, she works closely with courts, students, and other organisations to facilitate law reform initiatives in the community.

Margaret is passionate about the incorporation of a multidisciplinary methodology into her teaching, an endeavour in which she invites specialists from diverse fields to engage with her classroom. As an academic, Margaret's research interests encompass various domains, including education, procedural law reform, applied legal ethics, alternative dispute resolution,

student well-being, and inventive approaches to enhancing access to justice. Margaret is also intrigued by perceptions of law, and the human experience in the societies of tomorrow. In this vein, she is interested in the intersection between law and science, investigating policy reform avenues to develop resilience and informed conservation decision-making as the impacts of climate change become ever more threatening.

Margaret is admitted as a barrister and solicitor of the High Court of Australia, and the Supreme Court of South Australia. She is also an accredited Mediator under the National Mediator Accreditation System. Margaret holds a Bachelor of Laws with Honours from the University of Adelaide, as well as a Graduate Diploma in International Law from the Australian National University.

Stan Winford

Stan Winford is the Associate Director of Research Innovation Reform at the Centre for Innovative Justice, Royal Melbourne Institute of Technology (RMIT) University. Prior to his appointment as Associate Director, Stan was as the Principal Coordinator of Legal Programs at the Centre.

Stan's current work at the Centre focuses principally on the justice process itself, with a view to innovation and reform, including user centred design and applications for restorative and therapeutic justice in both criminal and civil law. Stan has published extensively on justice issues, and has appeared in national and international media as a legal commentator.

Stan is also a practising solicitor, who has held senior positions in government legal services. From 2007 until 2010, Stan was the Senior Legal Advisor to the Honourable Rob Hulls MP, the Attorney-General and Deputy Premier of Victoria. While occupying this position, Stan played a crucial role in orchestrating significant transformations to Victorian law. He also played a pivotal part in shaping solution-focused courts, notably contributing to the establishment of initiatives like the Assessment and Referral Court List.

Previously, Stan served as the Principal Lawyer and Legal Projects Officer at Fitzroy Legal Service. In this role, he spearheaded campaigns for legal reform and undertook public interest litigation efforts. At Fitzroy Legal Service, he also assumed the role of Drug Outreach Lawyer, advocating for numerous clients whose involvement with the justice system was intertwined with issues such as homelessness, disability, mental health challenges, family violence, instances of physical and sexual abuse, as well as substance use disorders.

Stephen Grace

Stephen Grace is Manager of Homeless Law at Justice Connect; a Victorian community legal centre dedicated to closing the justice gap. His work at Justice Connect focuses on providing legal assistance to people experiencing homelessness, and using the law to resolve everyday issues. Through Justice Connect, Stephen made submissions to the Inquiry into the rental and housing affordability crisis in Victoria.

From 2011 to early 2023, he worked at LawRight Qld ('LawRight'), previously known as the Queensland Public Interest Law Clearing House. At LawRight, he transitioned through many roles, beginning as a paralegal in the Self

Representation Service. Subsequently, he worked as a solicitor with the Homeless Persons' Legal Clinics, a department he would eventually go on to co-ordinate in 2016. From 2018, Stephen was the managing lawyer for the Community and Health Justice Partnerships.

Stephen is a graduate of the TC Beirne School of Law at the University of Queensland, and holds a Graduate Diploma in Legal Practice from the Australian National University.

Nickolas Sofios

Nickolas Sofios is an undergraduate student at the TC Beirne School of Law at the University of Queensland. He is in his fourth year of studying a Bachelor of Laws with Honours and a Bachelor of Business Management, majoring in International Business. His research interests are centred around public law.

Nickolas' essay 'Left Behind? Legal Representation and Access to Justice for the "Missing Middle" in Contemporary Australia' won the 2023 JATL Student Paper Competition.

Pandora's Box

2023: The Law and the Layperson

AN INTERVIEW WITH MARGARET THORNTON*

Samuel Vecchi

In this interview, Margaret Thornton details the effects of citizenship on an individual's experience with the legal system. She stresses that discussions of citizenship, in order to be truly effective, must be contextualised through relevant political issues, and considered in light of other discriminators. Through this she argues that citizenship, and what it means to be a citizen, are topics that warrant further interrogation among the Australian public as a whole.

PB: Margaret, first of all thank you so much for taking the time to speak with me today. Indeed welcome back! I know it's been quite a while since you last dealt with *Pandora's Box*, and the editorial team is very excited to have you with us once again.[1]

MT: Thank you.

PB: I wanted to start off by asking whether you think citizenship, and its attached social and legal implications, is something that we really talk about enough, both within academia, and also in more popular discourses?

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* Margaret Thornton is an Emerita Professor of law at the Australian National University (ANU).

[1] Margaret Thornton contributed to the 2008 edition of *Pandora's Box*, by way of an article entitled 'The Fleeting History of Feminism in the Legal Academy.'

MT: No, we don't talk about it at all really. People only think about citizenship when their passport has expired, and when they want to go overseas! I did actually go to a citizenship ceremony only a couple of months ago. That was the first time I've been to one. Because I'm Australian-born, I didn't have to go through that process. My colleague was allowed to invite one guest, and invited me to attend, so that was interesting. People took it seriously, but it's really quite formalistic. They have to satisfy certain requirements and answer questions. It's no longer about batting scores, which I think John Howard tried to introduce at one stage! They are supposed to have some knowledge of Australia, but it's really fairly minimal. There were images of kangaroos and native fauna, and some Indigenous people sang at the ceremony but that was about it; then, my colleague and others received their certificates. The important thing is that she's now eligible to vote. And that's really the key thing that a naturalisation ceremony enables. So my experience and that of the participants was as close to the idea of active citizenship that most people actually come.

I am very interested in Kant's idea of the distinction between passive and active citizenship. He wrote about that in the Eighteenth Century.[2] At that stage, women were citizens in a

[2] Immanuel Kant was an Eighteenth-Century German philosopher and Enlightenment thinker. His principal discussions of citizenship are found in his 1793

sense, but only passive citizens, which meant that they could play no active role; they couldn't vote or do anything else. I was interested in the movement from passive to active citizenship that men experienced. But even in Australia, when women were enfranchised – all women in 1902, and in some states a little bit before that[3] – they still had trouble in transitioning to the active category because when they applied to be admitted to legal practice, for example, even though they'd passed the exams and done all the other things necessary, the various courts and admitting authorities would say 'No.'[4] This seemed to me really extraordinary as they were being treated as passive citizens, non-citizens really, when they were entitled to be able to do the sort of things that were taken as a matter of course by white, male citizens.

Of course, Indigenous people too suffered incredibly. And I did write a piece some years ago about the idea of Indigenous people being seen as 'subject citizens.'[5] They were even below the idea of the passive citizen that I mentioned, at the lowest level of a hierarchy.[6]

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essay *Theory and Practice*, and in his 1797 work the *Doctrine of Right*. See Jacob Weinrib, 'Kant on Citizenship and Universal Independence' (2008) 33(1) *Australian Journal of Legal Philosophy* 1, 2.

[3] Women were first enfranchised in South Australia in 1894, with the passing of the *Constitutional Amendment (Adult Suffrage) Act 1894* (SA).

[4] Margaret Thornton, 'Challenging the Legal Profession A Century On: The Case of Edith Haynes' (2018) 44(1) *University of Western Australia Law Review* 1, 1.

[5] Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *University of New South Wales Law Journal* 647, 652.

[6] Ibid.

I think it's interesting in terms of the Voice,[7] for example, which is on the agenda at the moment, that we're not talking about it in terms of citizenship, which I think is illustrative of the point that citizenship is virtually a non-issue when it's really crucial. I think that if the Voice were to be discussed in terms of citizenship and citizenship entitlements, it would mean that we would have to look at Indigenous people as active citizens. Surely this would be an important dimension of having a voice to Parliament, which other people have, at least theoretically, as a matter of course. Providing some mechanism for that is really important, but we haven't talked about the relevance of citizenship. In fact, I haven't seen any reference whatsoever to citizenship in conjunction with the Voice. Maybe it's appeared somewhere, but I haven't seen it.

PB: In preparing for this interview, I tried to think back to when the last time I really considered citizenship was. It probably would have been in 2017, when there was that big crisis with politicians being ruled ineligible to sit in Parliament because of their dual citizenship.[8] But since then, it does seem to have been this sort of non-issue, that hasn't come up at all.

MT: Yes, that's the only time it's really come up. That was one of the reasons I wrote, some years ago, on the issue of what it

[7] The Aboriginal and Torres Strait Islander Voice is a proposed federal advisory body comprised of First Nations peoples, representing the views of Indigenous communities: The Voice, 'Voice Principles,' (Web Page, 3 April 2023) <https://voice.gov.au/about-voice/voice-principles#voice-principle-3>.

[8] The Editor here refers to the '2017-18 Australian Parliamentary Eligibility Crisis.'

meant to be a citizen or, if one were a dual citizen and wished to stand for Parliament, whether they should actually have to renounce their citizenship (of birth).[9] But even renunciation wasn't enough and there was quite a to-do about that, which focused attention on the issue, but that's the only time.

It's really a question of in or out. Are you 'in' or 'out'? If you're 'in', there's no issue about it. It's unproblematic, and you're entitled to vote, which is the main thing. The other dimension of citizenship is to engage in jury service. Now, that doesn't apply if you're legally qualified, but for other people, that is one of the implied duties of the citizen. But otherwise, there really aren't any duties, apart from obeying and upholding the laws.

However, we did have an issue at the time of ISIS. I don't know how many people were actually deported and had their acquired citizenship revoked by the Minister.[10] I don't know what happened to them and whether they were rendered stateless. That was rather strange as it was the first time I've known it to happen but, again, that's a variation of this issue of 'in' or 'out.' If you're on the cusp, and you've done

[9] Margaret Thornton, 'The Legocentric Citizen: Exploring Notions of Citizenship in Multicultural Australia' (1996) 21(2) *Alternative Law Journal* 72, 73.

[10] A particularly controversial example of this was the case of Suhayra Aden: Rayner Thwaites, 'How Australia Stripped Alleged ISIS Fighter of Citizenship Without Evaluating Her Case', *The Guardian* (online, 11 March 2021) <https://www.theguardian.com/australia-news/2021/mar/11/how-australia-stripped-alleged-isis-fighter-of-citizenship-without-evaluating-her-case>.

something that seems to be totally against the interests of the state, virtually amounting to treason, then there's an issue about the viability of acquired citizenship.

Otherwise, if you're within the community, and you commit crimes, that's all right! You can be charged, and you'll pay the price within the country, and the state will actually pay for your upkeep while you're in prison. You're not thrown out for a violation, unless you happen to be from New Zealand or somewhere else and you're living here as a permanent resident, then your status is a little bit more parlous than that of a citizen by birth.[11]

It's all about status. If you look at the *Citizenship Act*,[12] you see that it's very formalistic with rules about in and out, and 'qualified,' and so on. There isn't a substantive explanation about what's expected of you to be a good citizen. That's left to philosophers to write about. And often we rely on philosophers from the distant past, such as Aristotle, from Ancient Greece.[13]

[11] Under s 201 of the *Migration Act 1958* (Cth), the Minister may order the deportation of a 'non-citizen' if they are convicted of a serious offence, and have lived in Australia for less than 10 years.
[12] *Australian Citizenship Act 2007* (Cth).
[13] Aristotle's writings on citizenship are found principally in his Fourth-Century BC work *Politics*: Duygu Karagöl, 'Analyzing the Concept of Citizenship and Freedom in Aristotle's Theory of Constitution' (2015) 35(1) *Süleyman Demirel University Faculty of Arts and Sciences Journal of Social Sciences* 197, 197.

And there is this other strange, weird idea dating from federation that citizenship belongs to people in other countries, not Australia. There was something a little bit weird about the concept because it reminded people of Republican Rome: because we weren't a republic, we weren't citizens; we were actually subjects, and we still are, which I think is probably another complication. We are supposed to bend the knee as subjects of the British monarch, which is odd after more than 200 years. We're hesitant about embracing the idea of the citizen, who is still associated with republicanism and countries other than Australia, even though, theoretically, we've moved towards an incipient concept of citizenship. Since 1948,[14] we've made this grudging step, but it's tokenistic; it's not really about the substance of being a good citizen, or interrogating what it might mean.

PB: That brings me quite nicely to the next question I had, which you touched on briefly through that 'in group/out group distinction.' I was interested if you see this sort of citizen/non-citizen dynamic really influencing an individual's experience with the legal system, beyond other discriminators like gender, ability, or cultural background.

MT: Has citizenship made a difference? Well, I did write a piece some years ago, when I was writing about these issues, looking at Indigenous people, and the idea of instituting civil

[14] Thornton here refers to the passing of the *Nationality and Citizenship Act 1948* (Cth).

proceedings.[15] And I did another one in terms of gender as well. And I argued that the idea of being able to assert rights civilly through litigation was a dimension of being an active citizen; if you're unable to do that, you're just a 'subject,' which is somewhat limited. And I thought that was quite interesting and to see the assertion of rights as a dimension of citizenship.

But no one actually took it up, I think, or related to it, or agreed with me or disagreed with me on that! But I think it was a valid point. And it was particularly important in the case of Indigenous people who had been denied rights for so long. There were some cases where parents were trying to regain custody of their children who had been moved elsewhere and, in all that awful history, it was interesting to see that they were endeavouring to assert their citizenship rights through the legal system.

And similarly, it was also the case with women. There wasn't very much litigation instituted by women in the 19th Century as they had very limited rights (pre-enfranchisement). But there was a very peculiar action that I looked at called 'breach of promise.'[16] If a man agreed to marry a woman and then he jilted her at the altar, then she could institute action against him. And there were dozens of actions; it was amazing how

[15] Thornton and Luker (n 5) 654.
[16] Margaret Thornton, 'Historicising Citizenship: Remembering Broken Promises' (1996) 20(4) *Melbourne University Law Review* 1072, 1080.

many, and they were reported in the main newspaper from Melbourne, *The Argus*.[17] They weren't formal court reports, but there was a lot of interest in these cases. People would line up to attend the hearings because they were so fascinating: what had happened, who said what to whom, and where was the ring and the presents? I thought these cases were an interesting dimension of active citizenship, in an assertion of what women thought was a legal right. The action has now been abolished; it's not in the *Family Law Act*[18] anymore, but it's a very curious action, and a rare instance of women asserting their legal rights prior to enfranchisement.

PB: It's been nearly three decades since your paper 'The Legocentric Citizen'[19] was published. In the time since, have you seen any changes with regards to the substantive character of citizenship? Do you feel that it's been imbued with any more substance, or not really?

MT: Not really. I think the main reason for that is because we don't have a Bill of Rights. There have been several abortive attempts to establish a Bill of Rights. Quite recently, the Australian Human Rights Commission has been looking at this issue and has put it on the agenda.[20] Whenever we see

[17] Ibid.
[18] *Family Law Act 1975* (Cth).
[19] Thornton, (n 9) 72.
[20] The Australian Human Rights Commission has recently launched a proposed model for a national Human Rights Act: Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, 7 March 2023).

some violation of rights, people come out and say, 'Oh, well, this is the problem; we don't have a Bill of Rights.' And so they argue that we should have one. Frank Brennan advocated for a Bill of Rights some years ago,[21] but each attempt has become progressively weaker as time goes on: it's going to be entrenched, then it's going to be any ordinary piece of legislation, then it's going to be this weak thing that's going to be hortatory rather than mandatory, and so on, but the really important point is that we don't have a Bill of Rights of any description.[22]

If we compare our situation with the US, where the Bill of Rights is a very important part of the Constitution, guaranteeing freedom of speech, equality, and so on, and where it's a very important dimension of litigation as well. I think that those rights – individual rights that are enshrined within the Constitution – make a huge difference. We don't have that, so it means that we are subject to the whims of the legislature and for a long time it was the British legislature, not even the Australian Parliament, just as the Constitution is not really our own document, it's a product of the British Parliament.[23]

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[21] Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia? A Provocative and Timely Proposal to Balance the Public Good with Individual Freedom* (University of Queensland Press, 1998).

[22] For an outline of Australia's historical attempts to protect fundamental rights, see George Williams, 'Legislating for a Bill of Rights Now' (Department of the Senate Occasional Lecture Series, Parliament House, 17 March 2000).

[23] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

From time to time, we have had some desultory conversation about having a Bill of Rights.[24] I think if we did have one, people would be much more conscious of what it meant to be a citizen, whereas at the moment, it's really a vacuous concept. It's really only about overseas travel and people who might be infringing the laws that operate at the borders, and things like that.

Of course, it's also important in terms of refugees; there's no question about that. We've treated people seeking asylum in Australia very badly because underpinning that, although not usually articulated, is concern about citizenship, which lies at the basis of that ill-treatment. Citizenship is something we're jealously clutching to our bosoms, and we're excluding others who we think don't fit in – they've come by boat or there is something we regard as irregular or improper about them. We have treated those people very badly; it's really horrendous what we did in keeping people on Nauru,[25] and all the other things that we've done, but we haven't articulated that treatment in terms of citizenship, even though it might be implied. The implied rationale at the basis of their mistreatment, suggests that citizenship is about privileging us; it's not about them.

[24] See, for example, Williams (n 22).

[25] Amnesty International, 'Australia: Appalling Abuse, Neglect of Refugees on Nauru' (Web Page, 2 August 2016) <https://www.amnesty.org/en/latest/press-release/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>.

So citizenship emphasises the dividing line between us and them, which I think has become the important dimension of citizenship; it's got nothing to do with substance. It's all about the form, and that's what we've been obsessed with.

PB: Do you think, as a nation, we might start to interrogate citizenship and the attached implications more?

MT: Well, we haven't done much of that. You'd think we might have done it after 1948.[26] Now we might have another chance because the Prime Minister has said that he's interested in the idea of a republic.[27] But of course, that's contingent on the Voice getting through, that is, the referendum passing and that's looking a bit dicey at the moment. We don't really know, particularly in Queensland, what's happening with it unfortunately, but I think if it were successful and the Republic were on the agenda, that would invite more discussion about citizenship.

There was a bit about that with our last referendum in 1999 that failed, but the focus wasn't really on the idea of the citizen but what sort of leader we would have if we weren't going to

[26] See n 14.

[27] Paul Sakkal, 'Listening Tour the Government's First Step Towards Republic Referendum', *The Sydney Morning Herald* (online, 30 October 2022) <https://www.smh.com.au/national/listening-tour-the-government-s-first-step-towards-republic-referendum-20221029-p5btym.html>.

have a Governor-General answerable to the Crown.[28] The issue became side-tracked, just as the Voice has become side-tracked on all sorts of issues that really have nothing to do with the substance.

And that could well happen again, since these issues have become so politicised. I think that's partly a post-Trump manifestation of what's going on in politics; it's much harder to have sensible and sustained discussions today, so I don't know what will happen. It's impossible for me to say, given the weird turn of events that we've had, and the issues that have been brought up in terms of opposition to the Voice. To start with, any hope of getting a referendum through (on a republic) really has to be bipartisan; that's very hard at the moment. I'm not really hopeful about that, but I would say that's the way it would have to go.

We would have to have the debate in a sensible way to be able to talk about citizenship, which doesn't have a common meaning, and doesn't mean much at all, as we said, to ordinary people. I think someone said that the percentage of people in Australia who know we've got a Constitution is 40-something percent, which is really tragic. If people don't know that we have a Constitution, how are they going to recognise what it is to be a citizen? We need much more information and

[28] John Higley and Rhonda Evans Case, 'Australia: The Politics of Becoming a Republic' (2000) 11(3) *Journal of Democracy* 136, 137.

discussion about this, which is very hard in the days of TikTok and other platforms that don't lend themselves very well to sensible and sustained debate about issues that are really quite complex.

PB: It sounds like any discussions surrounding citizenship is difficult to have in a vacuum. It seems like it has to be attached to, as you mentioned, other political matters like the Voice or some other referendum.

MT: Well, yes, I think that's so. If you had a poll and you asked people in the street, what would they say? I don't know. Probably many people would recognise the importance of a passport, visas and so on, but beyond that, they might have nothing to say, but I don't know. I shouldn't be second-guessing what they would say about it. A colleague of mine is doing some research. She's been going along to citizenship ceremonies and asking people about this, so maybe she would have a little bit more information, but of course the people at citizenship ceremonies may not be the people you want to target – the ordinary people in the street.

So yes, I think it's very hard without a context. If you have a context about would-be politicians, and whether they are eligible to stand or not, that's something people understand. They want an issue to be grounded in a particular way; it's hard to talk about citizenship in an abstract theoretical way.

PB: To finish up, what was it like to revisit something you wrote so long ago?[29]

MT: Well, I'd forgotten I'd published this, and so I had to look it up! I have had a few things that people revisit and actually conduct seminars and workshops on; there was one recently in Melbourne based on something I had done earlier in the Century. So I've had a bit of experience with that. And so I think there comes a time when people say, oh, twenty-five years have passed; we should be celebrating this, when they feel that something I said in the past is insightful and relevant.

And when I read the article again, I thought, well, that does seem to be on point. I don't know that things have changed much, so you're probably right there. Just because the date is last century, that doesn't mean the substance is antediluvian if the issue hasn't changed. Apart from the fact that we've had many more asylum seekers, we haven't really discussed citizenship much in that context, so you can't say that the debate has moved on positively. We don't have a Bill of Rights, so we haven't made any sort of advance there, so I don't think there has been much of a change.

So, in answering your question and going back to look at the article, I thought, 'Yes, that's certainly still relevant and we haven't changed,' so I can't be overly optimistic. We like to

[29] The Editor here refers to Thornton's 1996 paper 'The Legocentric Citizen.'

have a progressivist view about law, and think things are always moving forward, but that is not necessarily the case; sometimes they go backwards. However, in this case, while I don't think that we are going backwards, I cannot see any sign of positive and optimistic steps forward.

PB: That makes me glad that I haven't brought up any old skeletons that you'd rather forget!

MT: Well you must have found it somewhere, so I appreciate that.

PB: Margaret, thank you so much for your time.

MT: You're very welcome.

THE ROLE OF EDUCATION IN TRANSFORMING LAW STUDENTS INTO EFFECTIVE LEGAL PRACTITIONERS: THE DECONSTRUCTION AND RECONSTRUCTION OF 'LEGAL GOBBLEDYGOOK'

Faye Austen-Brown[*]

I wish to acknowledge the traditional owners of the lands on which I write this piece. I acknowledge the Jagera people and the Turrbal people of Meanjin and pay my respects to elders both past and present. I recognise the role which law played in the traditional societies of Australia's First Nations Peoples – the first legal systems of our country and acknowledge that sovereignty was never ceded. I acknowledge the importance of the Uluru Statement from the Heart and support the First Nations Voice.

I Introduction

This paper reflects on the educative route required for a law student to transform themselves into an effective lawyer, whilst acknowledging the tension between academic and vocational aspects of law teaching. I also note, as a relevant disclaimer, that I am not an academic and do not hold any qualifications in education. My interest in legal education stems from fifteen years as a human rights lawyer and my current role as Practitioner-in-

Residence at the UQ Pro Bono Centre. It is therefore written through a professional lens rather than an intellectual one, so any insights offered are practical rather than eruditely scholarly.

'Ending Legal Gobbledygook?' is a forty-year-old paper by His Honour Justice Michael Kirby, in in which he espoused the need for the simplification of the law and set a challenge to graduating students.[1] The challenge has yet to be met. The phrase does not relate to the Latin or Old English phrases (which are technical but appropriate terms), but modern language that sounds important and official yet is difficult to understand.[2] The tendency begins as a student and continues through the ranks. Take, for example, this extract from a single, 192-word-long sentence in a judgment of the former Chief Justice of India delivered in March 2015:

> The present appeal projects and frescoes a scenario which is not only disturbing but also has the potentiality to create a stir compelling one to ponder in a perturbed state how some unscrupulous, unprincipled and deviant litigants can ingeniously and innovatively design in a nonchalant manner to knock at the doors of the Court, as if, it is a laboratory where multifarious experiments can take place and such skilful persons can adroitly abuse the process of the Court at their own will and desire by painting a canvas of agony by assiduous assertions...[3]

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[*] Faye Austen-Brown is the Practitioner-in-Residence at the UQ Pro Bono Centre.

[1] Michael Kirby, 'Ending Legal Gobbledygook?' (Speech, University of Wollongong Graduation Ceremony, 7 May 1981).

[2] Cambridge Dictionary definition. The Oxford English Dictionary definition is 'complicated language that is difficult to understand, especially when used in official documents'.

[3] The sentence continues: 'made in the application though the real intention is to harass the statutory authorities, without any remote remorse, with the inventive design primarily to create a mental pressure on the said officials as individuals, for

Anyone with a passion for language cannot help but dabble in it and law students are susceptible to its charms. It is used as a shield and as a way of removing themselves from the 'layperson,' giving the impression of professionalism. Law students will have to read gobbledygook, regurgitate it, simplify it, and then potentially recomplicate it, in a vicious lifelong cycle of learning. Rather like the path to effective legal practice.

II Roadmap – The Practical Steps to Admission

There are specific qualifications required for admission to the legal profession in Australia. The traditional structure of a law degree is the Bachelor of Laws (LLB), which is a four-year degree, or a five-year program if combined with another discipline. An alternative option is a graduate entry law degree, where students complete a full undergraduate degree in any discipline before commencing their law studies. This is designated as a graduate LLB or Juris Doctor (JD).

Once a law degree is completed, the next requirement is a Practical Legal Training (PLT) course, either through the College of Law or alternative

they would not like to be dragged to a court of law to face in criminal cases, and further pressurize in such a fashion so that financial institution which they represent would ultimately be constrained to accept the request for "one-time settlement" with the fond hope that the obstinate defaulters who had borrowed money from it would withdraw the cases instituted against them'. See Judgment of Chief Justice of India Dipak Misra, delivered in 2015 and quoted from Apoorva Mandhani, 'SC slams Bombay HC for 'unintelligible' order, but courts are full of convoluted rulings', *The Print* (online, 7 November 2019) <https://theprint.in/judiciary/sc-slams-bombay-hc-unintelligible-order-courts-full-of-convoluted-rulings/317171/>.

institutions.[4] PLT must be provided at a level equivalent to post-graduate training and is designed to build on the academic knowledge, skills, and values about the law, the legal system and legal practice that a graduate of a first tertiary qualification in law should have acquired in the course of that qualification.[5] The College of Law course, for example, is divided into components of coursework (consisting of five compulsory subjects and two electives), work experience (usually 75 days), and continuing professional education (CPE).[6] The CPE component consists of ten online modules focusing on business and technological skills. The subjects studied aim to give graduates a broad view of the kinds of legal work they can encounter in their professional roles as lawyers.[7]

Once admitted,[8] lawyers will be subject to a restricted practising certificate for two years. Essentially, this means that they are under supervision of a more senior practitioner during this period. The design is similar to the soon-to-be-obsolete training contract in the United Kingdom. It is notable that the changing landscape of legal education has led to a complete overhaul in the Legal Practice Course and training contract system in the UK, enabling lawyers to qualify through a more affordable route.[9] However, these changes

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[4] Leo Cussen and Queensland University of Technology (QUT) also offer a Graduate Diploma in Legal Practice.

[5] *Supreme Court (Admission) Rules 2004* (Qld) s 6.

[6] 'Practical Legal Training Programs', *College of Law* (Web Page) <https://www.collaw.edu.au/learn-with-us/our-programs/practical-legal-training-programs>.

[7] In the New South Wales and Victorian contexts, note the competency standards for entry-level lawyers set out in the *Legal Profession Uniform Admission Rules 2015*.

[8] In Queensland, s 30 of the *Legal Profession Act 2007* sets out the eligibility criteria for admission.

[9] There are transitional arrangements in place up to 2032 but the Solicitors Qualifying Examination is replacing the Legal Practice Course. Students must also register two years' 'qualifying work experience.' Rather than a training contract (of which there

have taken so long to come to fruition that the landscape is already shifting again.

III Course Structure

Any structure needs to integrate core skills, but the debate rages as to at which point in a qualifying journey these should be offered. A complete legal education would encompass the 'know' (theoretical knowledge), 'understand' (the skills and practical knowledge), and the 'do' learning model. The 'know' is traditionally seen as being obtained through a law degree, the 'understand' through post-university PLT, and the 'do' through professional working life. However, these sources of knowledge are essentially complementary, and the skills underpinning them are increasingly being interwoven.[10]

The structure of every LLB and Juris Doctor program in Australia prioritises law student employability by ensuring that students complete the eleven areas of knowledge required to satisfy the academic requirements for admission as a legal practitioner.[11] Despite criticism, the 'Priestley 11,' as they are known, have changed very little since their inception. On one hand, there is a commitment to developing students' critical faculties, but on the other hand,

were a limited supply), a student could work as a paralegal for 18 months and carry out 6 months of pro bono work at a university law clinic.

[10] In Māori culture, for example, effective education focuses on 'know,' 'do,' and then 'understand.' Historically the apprenticeship model of pathways to practice began with 'do,' 'know,' and ultimately 'understand.'

[11] The 'Priestley 11' include contract, tort, real and personal property law, equity (including trusts), criminal law and procedure, civil procedure, evidence, professional conduct, administrative law, Federal and State constitutional law, and company law. See Consultative Committee of State and Territorial Law Admitting Authorities, *Uniform Admission Requirements: Discussion Paper and Recommendations* (Report, 1992) 24-5.

the profession remains conservatively focused on what makes a 'good lawyer,' reasoning that critical legal education is too theoretical and impractical for legal practice.[12]

Notwithstanding, the central goals of a successful legal education should be to teach students the foundations, namely the key doctrinal areas that constitute our legal system, and to also teach students how to think and learn effectively. This ought to be done by developing their intellectual skills of reasoning, logic, research, independent thought and critical enquiry. The challenge for law schools is balancing the two goals, particularly considering that the time and ability to actively engage with and interrogate the material that underpins our entire legal system 'with theoretical rigour'[13] is only possible whilst at university. This duality has been recognised in Council of Australian Law Deans Standards,[14] updated in 2020, that require knowledge and understanding of fundamental doctrines, concepts and values of Australian law, fundamental areas of substantive law, the sources of law, how it is made and developed, and the institutions within which law is administered, as well as the theory, philosophy, and role of law.[15]

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[12] Mary Keyes and Richard Johnston, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future,' (2004) 26(4) *Sydney Law Review* 537.

[13] Nickolas James, 'More than merely work-ready: Vocationalism versus professionalism in Legal Education,' (2017) 40(1) *UNSW Law Journal* 186.

[14] Council of Australian Law Deans, *Australian Law School Standards with Guidance Notes* (30 July 2020).

[15] Ibid. See in particular Standard 2.3.3: 'The curriculum seeks to develop: knowledge and understanding of the broader context in which legal issues arise; international and comparative perspectives on Australian law; international legal development; the principles of ethical conduct; and the role and responsibilities of lawyers, including pro bono obligations.'

Legal education must also include professional skill-building in areas such as oral and written communication, dispute resolution, teamwork, client interviewing, advocacy, technology, ethical problems, and online security. Some of these are organically acquired during a university degree but were traditionally seen to be the purview of post-graduation PLT. This notion of 'professionalism' or professional skill training is now creeping in at the undergraduate level. According to Roy Stuckey, professionalism incorporates 'a commitment to justice, respect for the rule of law, honour, integrity, fair play, truthfulness and candour, sensitivity and effectiveness with diverse clients and colleagues, and nurturing quality of life.'[16] All skill mastery requires practice, so the profession's pressure that professional skills,[17] in particular, start as early as possible in a student's law journey is understandable. In other words: 'Legal education … needs to combine the elements of professionalism – conceptual knowledge, skill, and moral discernment – into the capacity for judgment guided by a sense of professional responsibility.'[18]

Competence and professional ethics are necessary objectives of any legal education. For example, if a court lambasts a lawyer for their argument being 'untethered from the truth'[19] or 'absurd,' 'rubbish' and an 'attempt to delay

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[16] Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007) 79-91.

[17] The Council of Australian Law Deans Standards refer to skills, including the intellectual and practical skills needed to research and analyse the law from primary sources and to apply the findings of such work to the solution of legal problems. The ability to communicate such findings, in oral and in written form, is also included. Awareness and sensitivity to the values underpinning the principles of ethical conduct, professional responsibility and community service are specifically mentioned.

[18] William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) 8.

[19] *Zhang v Zhang* [2022] BCSC 2156 ('*Zhang*').

proceedings'[20] and the court is left to 'weave as best it could through a labyrinth of irrelevant evidence and dealings that defied common sense,'[21] then an essential part of skill based training has been missed – effective legal training has failed and gobbledygook has won.

There are a range of skills and attitudes necessary for law graduates to thrive in an increasingly interdisciplinary legal setting, including a growth mindset, adaptiveness, resilience, innovation, risk taking and proactiveness. All summed up in that most YouTubed/TED Talked of words: 'Grit.'[22] The next challenge is how to teach it creatively and innovatively.

IV Delivery Methods

Effective law teaching should enable students to achieve a broad range of objectives through a pedagogically rich learning environment. Law schools generally provide lectures and tutorials but even within a law program, each subject or unit might be taught applying a different delivery system. Teaching methods have been broadened by a range of audio and visual learning methods such as video segments, engaging commentary, and informative diagrams, all of which are essential to be able to hold a decreasing attention

[20] Toby Crockford, 'Magistrate slams lawyer for using Wikipedia in case of alleged plot to kill Samoan PM', *Brisbane Times* (online, 9 July 2021) <https://www.brisbanetimes.com.au/national/queensland/magistrate-slams-lawyer-for-using-wikipedia-in-case-of-alleged-plot-to-kill-samoan-pm-20210709-p588cd.html>.

[21] *Zhang* (n 19) [2] (Weatherill J).

[22] Angela Lee Duckworth, 'Grit: the power of passion and perseverance', *TED* (TED Talks Education, April 2013) <https://www.ted.com/talks/angela_lee_duckworth_grit_the_power_of_passion_and_perseverance?language=en>.

span.[23] There is also a growth in subjects being taught over the summer and winter breaks, and a range of delivery from entirely online or entirely face to face – though generally a hybrid of both, known as 'blended learning' is preferred, at least by students.[24]

The most successful injection of applied knowledge is through clinical legal education programs. Many law schools provide their students with the opportunity to engage in clinical legal education by volunteering (or participating for course credit) in law clinics and community legal centres:

> Clinical Legal Education and more generally Justice Education, has always demonstrated its potential to confront crucial practical legal problems societies face and to find innovative responses to them. Many of these legal education programs have enhanced social justice worldwide in many different ways, both directly and through the emphasis on socially relevant legal education.[25]

The importance of training potential lawyers to become cross-culturally adept is evident in the emphasis placed on it by progressive lawyering and within

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[23] Amanda J Pooley and Kristy Goodwin, 'Managing Students Attention in an Age of Digital Distractions', *Research Institute for Children and Adolescents* (Web Page, 21 August 2021) <https://www.rica.nsw.edu.au/resources/managing-students-attention-in-an-age-of-digital-distractions/>.

[24] Lavina Sharma and Sonal Shree, 'Exploring the Online and Blended Modes of Learning for Post-COVID-19: A Study of Higher Education Institutions,' (2023) 13(2) *Education Sciences* 142.

[25] Global Alliance for Justice Education (GAJE), 'Turning Challenges into Opportunities: Justice Education in Times of Crises' (Worldwide Online Conference Hosted by Northumbria University, 16-8 June 2021) <https://www.gaje.org/page-18104>.

clinical education. Any client centred approach to law practice acknowledges that:

> in the heterogeneous and stratified society in which we live, differences such as race, class, gender, national origin, language, immigration status, sexual orientation and religion continue to have significance and must be recognised, appreciated, respected and traversed.[26]

The earlier the exposure, the greater the benefit. The now established international student exchange programs, where credit is given for overseas law studied at approved universities, also contributes to this essential area of education.

My current role as the inaugural Practitioner-In-Residence is an example of UQ using an innovative strategy to give students an opportunity to engage with, and learn practical skills from, a practitioner whilst still at undergraduate level. Any mentoring and skills workshops are extra-curricular rather than part of the curriculum, but the 'resource' augments the overall learning opportunities for students. The challenge from my part is working out ways of teaching the practical knowledge I hold. Through workshops, as in a student legal clinic, the intention is to teach by 'doing' and demonstrating that you can practice law without using gobbledygook.

[26] Ascanio Piomelli, 'Cross-Cultural Lawyering by the book: the latest clinical texts and a sketch of a future agenda' (2006) 4(1) *UC Law Journal of Race and Economic Justice* 131.

V Conclusion

The many years of study and the conferral of a law degree is only the first step. The staircase to becoming an 'effective lawyer' is continual. Being an effective lawyer will always be a work in progress and 'effectiveness' itself is subjective. I have been practising since the noughties and continue to learn from clients and colleagues daily. Most lawyers will be honest enough to admit that some days they are more effective than others, and clients often surprise you by being happy or grateful for a result which, on the face of it, is a trouncing.

Legal education, its content, and its provision is evolving and transforming, and the speed at which it needs to will only increase with the advent and proliferation of Artificial Intelligence (AI). It is a constant state of flux. All I can really be confident about is that any assumptions will be usurped, and change is the only constant.

In closing, the key is to not think of yourself as any different to a layperson. And to avoid gobbledygook.

HAVING CONFIDENCE IN QUEENSLAND'S LEGAL PROFESSION

Megan Mahon[*]

I The Law of the Gods

According to Greek mythology, Themis was the Titan goddess of divine law – the oracle on Earth of the laws of the gods, including laws of justice and morality. In Greek, the word 'Themis' referred to divine law, those rules of conduct long established by custom.

Themis created the divine laws that govern everything, and indeed those laws were above even the gods themselves.[1]

In comparatively modern times, such as in the days of Emperor Tiberius, in the early decades of the Roman Christian Era, she was considered a goddess with her Latin name being *Justitia* (or *Iustitia*), which is translated to 'Lady Justice,' the name that is more commonly used nowadays.

Today, statutes and other depictions of Themis more often show her blindfolded, and holding the scales of justice in one hand and a sword in the other. They are symbols that the independence and the integrity of law have

[*] Megan Mahon is the Queensland Legal Services Commissioner. She is responsible for the Legal Services Commission's discharge of its statutory duties, and ensures that complaints to the Commission are dealt with fairly, thoroughly, and transparently.

[1] Nicola Reggiani, 'Themis' in Andrew Erskine, David B Hollander and Arietta Papaconstantinou (eds) *The Encyclopaedia of Ancient History* (John Wiley & Sons, 2018).

always held dear, and remain so even today by cultures where the rule of law is paramount.

The blindfold[2] demonstrates impartiality – representative of there being no fear nor favour in the dispensation of the law (part of the oath still taken at the swearing in of all judges of our courts), and that justice is free from bias or prejudice. Justice is applied according to the law and without influence from a person's status, beliefs, wealth or power.

The scales[3] suggest a pragmatic and balanced outlook. A long-standing symbol of the principles of equity and fairness, the scales remind us of the need for the law to remain fair and objective. They demonstrate the weighing up of the evidence to ensure decisions are arrived at only after careful consideration of the facts before the court.

The sword[4] represents authority, protection and power. Privileges that themselves can have inherent conflict, and so require balance and accountability to remain in check. Like any double-edged sword, it can at times provide protection and at other times issue punishment; but must be wielded without fear nor favour.

Together, these symbols represent the fair but final power of the authority of the law, and remind us that all persons are equal before it. No person (even

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[2] Pamela Donleavy and Ann Shearer, *From Ancient Myth to Modern Healing – Themis: Goddess of Heart-Soul, Justice and Reconciliation* (Taylor & Francis, 2008) 83.
[3] Ibid.
[4] Ibid.

the gods in Themis' time) is above the law. Justice is required to be applied according to the law, and only according to the law.

And while equality before the law of all those who come before the courts is still a fundamental principle, in a perfect world, that would mean equal access to justice for all as well. Unfortunately, the harsh reality is that access to justice is difficult for many. While society still believes it is important to have accessible justice (hence why there is public funding of organisations such as Legal Aid and other community legal service providers), the reality for many is that the cost of comprehensive legal advice is simply out of reach.

In addition to these dedicated organisations, there are many practitioners who, on a daily basis, provide legal services to vulnerable Queenslanders for either no fee, or substantially reduced fees. They give their time and knowledge for the betterment of their community and in support of just outcomes.

II The Commission

The Legal Services Commission ('the Commission') was established in 2004 and continues its existence pursuant to the *Legal Profession Act 2007* (Qld) ('the Act'). A core purpose of the Act is consumer protection.[5] The Act also aims to promote public confidence in a strong and independent legal profession.[6]

[5] *Legal Profession Act 2007* (Qld) s 3.
[6] Ibid chs 3-4.

In Queensland, regulation of the profession is undertaken by way of a co-regulatory model. While the Commission is primarily responsible for disciplinary and prosecutorial functions, other functions are overseen by a number of different bodies, including:

- the Supreme Court of Queensland, which maintains inherent jurisdiction over all lawyers and regulates the admission of persons to the legal profession;[7]
- the Legal Practitioners Admissions Board,[8] who supports the Supreme Court in the admission process;
- the Bar Association of Queensland ('the BAQ),[9] who issue practising certificates to the State's barristers; and
- the Queensland Law Society ('the QLS'),[10] who issues practising certificates to the State's solicitors and is also responsible for monitoring and auditing trust accounts and other general practice requirements.[11]

As the Legal Services Commissioner, I am responsible for overseeing the work of the Commission and discharging the powers and responsibilities under the Act to regulate the legal profession.[12] I must ensure that the

[7] See especially part 3 of the *Supreme Court (Admission) Rules 2004* (Qld).
[8] 'Legal Practitioners Admissions Board', *Queensland Law Society* (Web Page) < https://www.qls.com.au/Legal-Practitioners-Admissions-Board>. See also ch 7 pt 7.5 of the Act.
[9] 'About the Bar', *Bar Association of Queensland* (Web Page) <https://qldbar.asn.au/baq-cms/about-the-bar>.
[10] 'About Us', *Queensland Law Society* (Web Page) <https://www.qls.com.au/About-us>.
[11] The functions of the Queensland Law Society are found under section 680 of the *Legal profession Act* (n 5).
[12] *Legal Profession Act* (n 5) s 591(3).

Commission discharges its functions under the Act in the interests of justice, and for the protection of consumers of legal services and the public generally.

Supported by the staff of the Commission, those functions include receiving and, where appropriate, investigating complaints about the conduct of lawyers, practitioners, their employees, and unlawful operators in relation to the provision of legal services in Queensland. Our obligation is to act in the public interest by ensuring members of the public receive sound legal advice from competent, qualified legal practitioners and are safeguarded from those engaging in legal practice when they are not qualified nor entitled to do so.

Having started my career in the law as an articled clerk, and subsequently transitioning to practise as a solicitor, those first three decades of my career, together with my time as Commissioner, have meant that I have seen the many ways in which 'the law and the layperson' interact, and how these interactions affect their lives. Through the work of the Commission, I also see the different perceptions the layperson has of the legal system, and of the solicitors and barristers that operate within it.

Regulating the profession is more than simply investigating and disciplining legal practitioners who fall short of the standards expected of them, and thereby reinforcing the maintenance of professional standards. It is also discharging the Commission's functions and obligations that go towards maintaining and building public trust and confidence in the administration of justice, which includes ensuring that those in need of legal services have access to qualified and competent practitioners.

There are many ways the interactions of the layperson and the law occur, and for the average person seeking legal advice or assistance, there are a huge range of factors that are a priority for them, and can impact their level of satisfaction with the service received. Notably, things such as affordability, accessibility, communication and, of course, outcome, are key priorities. These priorities can be impacted by the standards of the legal profession.

III Innovation, Accessibility, and the Issue Presented

When a person seeks the assistance of a legal practitioner, it is because they are in need of a qualified individual, with the requisite knowledge and expertise, to navigate what can be complex, lengthy and difficult legal terrain. In many cases, the consumers of legal services are facing a difficult period in their lives that may be related to this need for legal services. Accessibility for those in need of assistance can be a particular concern, and there are many barriers to access.

In recent times, technology and innovation in the legal services arena has seen accessibility become a matter of focus. Novel ways of finding and accessing legal services are becoming increasingly more common and coincide with efforts to reduce the potential barrier that legal costs can present. Examples of this include the rise of virtual practices and offerings of 'legal products,' such as wills, shareholder agreements, and non-disclosure agreements without the need to expressly consult with a practitioner or attend at an office. These types of offerings attempt to cut the costs associated with legal services,

by reducing various overheads and presenting consumers with alternatives to the traditional model of the provision of legal services.[13]

Legal practitioners now advertise and make their services available by way of a myriad of platforms. While this kind of innovation can also be a way of delivering more affordable legal solutions, such legal services are still required to be provided by 'Australian legal practitioners.'[14] There is therefore significant risk where such services are offered by unlawful operators,[15] who are exploiting those seeking the assistance of a lawyer on these online platforms.

This form of advertising and engagement enables unlawful operators to advertise their services amongst those who are legitimate Australian legal practitioners. By hiding themselves in plain sight, these operators gain easy access to a whole cohort of potential new 'clients.' It is for this reason that the Commission also monitors such forums, as and when resources permit. Given the enormity of that task, it is important that members of the profession and the public report suspected breaches to the Commission so that they may be investigated.

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[13] For an examination of the 'commercialisation' of legal practice, see T F Bathurst, 'Commercialisation of Legal Practice: Conflict *Ab Initio*; Conflict *De Futuro*' (Conference Paper, Commonwealth Law Association Regional Conference, 12 April 2012).

[14] 'Australian legal practitioner' is defined under section 6(1) of the *Legal Profession Act* (n 5) as an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.

[15] 'Unlawful operator' is defined in Schedule 2 of the *Legal Profession Act* (n 5) as a person who engages in legal practice even though the person must not do so under section 24; or a person who represents or advertises that the person is entitled to engage in legal practice even though the person must not do so under section 25.

IV Unlawful Operators

Unlawful operators are persons who are not qualified to engage in legal practice who nonetheless purport to engage in legal practice or hold themselves out as entitled to engage in practice.[16]

It is a criminal offence for a person to engage in legal practice in Queensland when they are not an Australian legal practitioner.[17] It is also a criminal offence for a person[18] or a corporation[19] to represent or advertise an entitlement to engage in legal practice when not entitled to do so.

Matters involving unlawful operators represent a relatively small, but nonetheless concerning percentage of complaints and investigations undertaken by the Commission. However, the potential harm that can ensue is immeasurable; not only to the consumers of unlawful operators, but also to the reputation of the legal profession. This is often because the difference between a fully qualified and licensed practitioner and the confident and convincing (albeit illegal) unlawful operator is not always understood or appreciated by a layperson. They expect that the person offering legal assistance is qualified to do so, as the law requires.

The risk to consumers of these unlawful legal services is varied and can be significant, and it is often only when it is too late that the problems are realised. While rogue operators may seem to provide a solution to those who

[16] See n 15. For incorporated legal practices the relevant sections are sections 114 and 115 of the Act.
[17] *Legal Profession Act* (n 5) s 24(1).
[18] Ibid s 25.
[19] Ibid s 114, 115.

can't afford to engage a qualified practitioner, often their impact is far more serious.

An example is where an unlawful operator provides assistance with the drafting of a will or an agreement of some kind. On its face, to an unqualified consumer, the document may appear correct. It won't be until later – and sometimes many years later – that any deficiency in the document is realised, and must be resolved by others. Rectification of documents or resultant circumstances can sometimes be at a much more significant cost than the original cost would have been to engage a qualified legal practitioner to prepare the document.

For another example, consider a person dealing with a criminal matter before the courts, reliant on an unlawful operator's advice. Processes often aren't followed, and deadlines are missed. The outcome can be detrimental to the person who has relied on this unqualified (and indeed illegal) advice.

Not only may this have resulted in potentially life-altering adverse outcomes for the person, but it may also deter them from seeking proper legal assistance in the future if it is required. It may taint any future engagements with a solicitor or barrister, and ultimately overall confidence in the legal system.

In the current climate, where access to legal services remains a prevalent issue, unlawful operators seek to take advantage of the new methods of access to legal services presented to consumers. Many of these avenues for access

include social media and other web-based applications.[20] It is these online forums that give avenues for people seeking more 'affordable' options for legal advice and, unfortunately, they provide opportunities for unqualified persons to step in and provide advice when they are not entitled nor qualified to do so.

While unlawful are not members of the profession, to the layperson who knows no better and has sought the help from who they believe is a legal practitioner, their experience and any adverse consequences that ensue all contribute to damaging the reputation of the profession. Gone is the trust in the profession by those 'clients,' and inevitably others.

Ensuring that legal services are only provided by competent, qualified and insured[21] legal practitioners provides fundamental consumer protections. These regulatory requirements are supplemented by the ability to have potential access to make a claim from the fidelity fund[22] if necessary.

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[20] For example, the QLS released a statement warning consumers about the use of 'Air Tasker' to engage legal practitioners: Stafford Shepherd, 'Engaging in Legal Practice – The Use of Air Tasker', *Queensland Law Society* (Web Page, 20 August 2020) <https://www.qls.com.au/Content-Collections/News/2020/Engaging-in-legal-practice-the-use-of-Air-Tasker>.

[21] *Legal Profession Act* (n 5) s 175. See also s 354 of the Act. For incorporated legal practices, see s 121 of the Act.

[22] Fidelity cover is found under ch 3 pt 3.6 of the *Legal Profession Act* (n 5). The fidelity fund itself is established under s 359 of the Act. The fund's purpose, found under s 355 of the Act, is to 'establish and keep a fund to provide a source of compensation for defaults by law practices arising from, or constituted by, acts or omissions of associates.

V What is Required to Practice Law in Queensland?

What is required to lawfully practise law in Queensland, and the offences for unlawful operation, are both prescribed under the Act.

While there is further relevant detail, to engage in legal practice in Queensland, there are four broad requirements:

- completion of approved legal studies, such as a Bachelor of Laws, or a Juris Doctor;[23]
- completion of an approved practical legal training course or approved traineeship;[24]
- admission to the legal profession by the Supreme Court of Queensland,[25] following which one's name is added to the roll of all those admitted as lawyers[26] – at which point one becomes an 'officer of the court'[27] and swears their commitment to it; and

[23] *Legal Profession Act* (n 5) s 30(1)(b). The specific nature of 'approved academic qualifications' for Australian courses is elucidated under ss 6-6A of the *Supreme Court (Admission) Rules* (n 7).
[24] *Legal Profession Act* (n 5) s 30(1)(c). 'Approved practical legal training requirements' for Australian courses is explained further under ss 7-7B of the *Supreme Court (Admission) Rules* (n 7).
[25] *Legal Profession Act* (n 5) s 35.
[26] Ibid s 37.
[27] Ibid s 38.

- the holding of a current practising certificate,[28] which in Queensland are issued by the BAQ for barristers,[29] or the QLS for solicitors,[30] following successful application.

Admission as a lawyer is a serious matter, and brings with it a comprehensive process that ensures only qualified persons who are considered 'fit and proper'[31] to join the profession are admitted. The successful culmination of this is that one makes an affirmation or oath of allegiance and of office, including that one '…do[es] sincerely promise and affirm (*or swear*) that [one] will truly and honestly conduct [one]self, in the practice of a lawyer of this court, according to law to the best of [their] knowledge and ability. (*So help [them] God.*)'[32]

Upon making such affirmation or oath, and completing the admission process, you are considered to be an officer of the court and your highest priority, from that day forward, is to the court.[33] It is an oath that should not

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[28] Ibid pt 2.4.

[29] 'Practising Certificates', *Bar Association of Queensland* (Web Page) <https://qldbar.asn.au/baq-cms/practising-certificate>.

[30] 'Practising Certificates', *Queensland Law Society* (Web Page) <https://www.qls.com.au/Practising-law-in-Qld/Regulation/Practising-Certificates>.

[31] Explicit reference is made to the language of 'fit and proper' under section 31 of the *Legal Profession Act* (n 5). Determining whether an individual is fit and proper is made by reference to the 'Suitability matters' under s 9 of the Act, alongside other matters the Supreme Court considers relevant.

[32] For all oaths and affirmations on admission see: 'Oaths and Affirmations – Admission', *Queensland Courts* (Web Page, 18 October 2022) <https://www.courts.qld.gov.au/court-users/practitioners/admissions/oaths-and-affirmations>.

[33] Conflicts arising under this duty are always to be resolved in favour of the court. See, eg, Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 3.1; Bar Association of Queensland, *Barristers' Conduct Rules* (at 23 February 2018) r 5.

be taken lightly, and one that must be honoured at all times. Admission to the roll of lawyers is considered to be the endorsement of the court as to your fitness.[34] Failing to live up to one's commitment of one's professional responsibilities can see them removed from the roll or, in more common parlance, 'struck off' the roll.

Each branch of the profession has further requirements in relation to supervision and other conditions depending on the stage and type of practice. There are also ongoing obligations imposed on all practitioners (such as minimum requirements for ongoing professional development)[35] that ensure appropriate standards are maintained. Suitability matters are also considered throughout your career, with annual renewals of practising certificates requiring recommitment to the minimum professional obligations and checks of suitability. It is imperative to the confidence and reputation of the legal profession that all practitioners remain fit and proper to be members of the profession.

When all requirements are fulfilled, such qualified persons are entitled to call themselves Australian legal practitioners, which is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.[36]

Without fulfilling all the requirements, a person must not engage in legal practice in Queensland.[37] The only exception to the requirements is that a

[34] *Legal Services Commissioner v Shand* [2018] QCA 66, [55].
[35] See, eg, Queensland Law Society, *Queensland Law Society Administration Rule 2005* pt 6.
[36] *Legal Profession Act* (n 5) s 6(1).
[37] Ibid s 24.

government legal officer is not required to hold a current practising certificate; they are permitted to engage in the practice of law without such a certificate, but can only provide legal services to the government and other prescribed entities.[38]

VI What Does It Mean to 'Engage in Legal Practice?'

The phrase 'engage in legal practice' is not defined by the Act.

In *Cornall v Nagle*, JD Phillips J opined the meaning of acting or practising as a solicitor in the following way:

> … I conclude that a person who is neither admitted to practise nor enrolled as a barrister and solicitor may 'act or practise as a solicitor' in any of the following ways:
>
> (1) by doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. This is the test in *Sanderson.*[39]
>
> (2) by doing something that is positively proscribed by the Act or by Rules of Court unless done by a duly qualified legal practitioner. Examples of such prohibitions in a statute are s

[38] Ibid s 12.
[39] *Re Sanderson; Ex parte Law Institute (Vic)* [1927] VLR 394.

93 and s 111 of the LPPA.[40]

(3) by doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law. For present purposes, it is unnecessary to go beyond the example of the giving of legal advice as part of a course of conduct and for reward.[41]

In *Felman v Law Institute of Victoria*, Kenny JA said:

> In my opinion, the expression to 'engage in legal practice' in s 314 and elsewhere signifies 'to carry on or exercise the profession of law.' Reference to the definitions of 'engage' and 'practice' in the *Oxford English Dictionary* supports the view that this is the ordinary and natural meaning of the expression. The carrying on of the profession of law is done by none other than a 'legal practitioner.' Accordingly, in my view, the expression 'engage in legal practice' means 'engage in legal practice as a *legal practitioner*,' the italicised words being implicit in the notion of legal practice.[42]

In *Legal Services Commissioner v Bradshaw*, Fryberg J opined:

> One would look for evidence of continuity, of repeated acts; one would look for evidence of payment for those acts; one would look for evidence of seeking business from members of the public, or at least from other

[40] Here, JD Phillips J refers to the *Legal Profession Practice Act 1958* (Vic).
[41] *Cornall v Nagle* [1995] 2 VR 188, [210].
[42] *Felman v Law Institute of Victoria [1998] 4 VR 324, [352].*

> lawyers; one would look for evidence of a business system; one would look for evidence of maintaining books and records consistent with the existence of a practice; one would look for evidence of a multiplicity of clients. None of those things is in evidence before me.[43]

In *Legal Services Commissioner v Walter* ('*Walter*') Daubney J, in part, disagreed with Fryberg J that to practice law you needed to carry on a business. Daubney J said:

> For my part, I would respectfully disagree with the equation of practising law with the carrying on of a business. I prefer the formulation of Kenny JA, and would hold that the terms 'engage in legal practice' and 'practise law' in the LPA invoke the notion of carrying on or exercising the *profession* of law, not the 'business' of law.[44]

Further in *Walter*, Daubney J found that conduct such as advising parties to litigation about matters of law and procedure, drafting court documents on behalf of parties to litigation, and drafting legal correspondence on behalf of parties to litigation, were matters that 'lie near the very centre of the practice of litigation law.'[45]

In *Legal Services Commissioner v Raghoobar*, Martin SJA agreed with Daubney J's approach in *Walter*:

> I agree with Daubney J's formulation, that is, that one looks to whether or not a person has been exercising the profession of law. But, in

[43] *Legal Service Commissioner v Bradshaw* [2009] LPT 21, [14].
[44] *Legal Services Commissioner v Walter* [2011] QSC 132, [18].
[45] Ibid [28].

> examining the activities of a person alleged to have breached s 24 LPA, one should bear in mind the indicia listed by Fryberg J as they can assist in the assessment of the activities of such a person.[46]

Given the very nature of the practice of law, the evolution of the laws themselves, changing societal values, and continuing technological advancements, it would be incredibly difficult to arrive at a precise definition of what exactly is the practice of law or a legal service. Notwithstanding, the parameters set by the courts over the years give good guidance for establishing what remains the restricted domain of qualified legal practitioners. This restriction is important to enable proper regulation and accountability for the professional responsibilities of all lawyers as officers of the court.

VII What Can the Layperson Do to Check They Are Engaging an Australian Legal Practitioner?

There are steps that anyone seeking to engage a legal practitioner can take to shield themselves from unlawful operators – especially when seeking them out on online platforms.

Such steps can include checking with the BAQ or the QLS, who are required to keep a register of the names of the Australian lawyers to whom they issue a practising certificate.[47]

The Commission is required to keep a discipline register, regarding

[46] *Legal Services Commissioner v Raghoobar* [2023] QSC 41, [16].
[47] *Legal Profession Act* (n 5) s 81(1).

disciplinary action taken under the Act against an Australian legal practitioner or in relation to a law practice employee.[48] Regulators in each jurisdiction of Australia also keep similar registers. The Queensland discipline register also includes disciplinary action taken under a corresponding interstate law against an Australia legal practitioner who is or was admitted to the legal profession in Queensland under the *Legal Profession Act 2007* or a previous Act or practising in this jurisdiction.[49] The discipline register is available on the Commission's website.[50]

VIII Confidence in Qualified Practitioners

As at 30 June 2022,[51] there were 15,792 legal practitioners in Queensland.[52] Of that number, 14,631 were solicitors, and 1,161 were barristers.

Each year, the Commission receives around 1,200 complaints.[53] Of those complaints, on average 25 matters proceed to a disciplinary proceeding. This equates to proceedings being brought against 0.15% of practitioners across Queensland.

[48] Ibid s 472(1)(a).
[49] Ibid s 472(1)(b).
[50] 'Queensland Discipline Register', *Legal Services Commission Queensland* (Web Page) <https://www.lsc.qld.gov.au/the-commission/services/discipline/queensland-discipline-register>.
[51] This is the date of the last published data by the Commission in its 2021-2022 Annual Report. At the time of writing, the 2023 data had not yet been published.
[52] This number does not include those government lawyers who don't hold a practising certificate.
[53] As reported in the Legal Services Commission's Annual Reports for reporting periods 2019 to 2022, complaints for those years numbered between 832 to 1,214.

While these are necessary proceedings for maintaining professional standards and ensuring only those who remain fit and proper to practise do so, it demonstrates that the vast majority of lawyers and legal practitioners throughout Queensland are hard-working, ethical people, doing the best they can to ensure justice is served and that their clients' interests are protected.

IX Conclusion

Greek mythology believed the divine law of the gods applied and was administered by a goddess named Themis. The Romans considered Justitia to be mortal, but still administered divine laws. Today, the administrators of our laws are very human, as are all those who have come before them.

While I don't have the answers for accessible justice for all, I can assure all readers that the legal profession in Queensland is robust, ethical, and honourable. And while, being human, we can all make mistakes, the role of the Commission through supporting the legal profession – in upholding its professional responsibilities, the prosecution of unlawful operators and the handling of complaints – contributes to the public having confidence in the legal profession and, by extension, confidence in the administration of justice for all.

AN INTERVIEW WITH THE HONOURABLE WAYNE MARTIN AC KC*

Samuel Vecchi

In this interview, Wayne Martin discusses the intersection between cultural backgrounds and legal outcomes. With an eye to the future, he also highlights areas in which reform is necessary. He first, however, discusses the role of administrative tribunals, and the significance they have for ordinary people in their interactions with the justice system.

PB: Wayne, thank you very much for taking the time to speak with me today, I can only imagine how much you could be charging me for this!

WM: Don't worry!

PB: I wanted to start things off today by talking about administrative tribunals, and the role they play in this endeavour of providing 'equal justice for all.' What can you tell me about this role, and how does it compare with that of the courts?[1]

* Wayne Martin was the Chief Justice of Western Australia from 1 May 2006 to 27 July 2018.

1 For an excellent overview of the similarities and distinctions between administrative tribunals and courts, see: Garry Downes, 'The Role of Courts and Tribunals' (Speech, University of Sydney, 19 March 2007).

WM: Well, administrative tribunals I think offer a number of significant advantages when compared to the courts. Of course, with some exceptions, they perform different functions. Courts are primarily concerned with two things: disputes between citizens and the government on the one hand in relation to rights and obligations, and the enforcement of the criminal law on the other.[2]

Administrative tribunals, on the other hand, are usually concerned with relationships only between the citizen and the government. There are a couple of important exceptions, though. There are a number of tribunals which have been set up to deal with things like small claims between people,[3] and also with high volume, recurrent areas of dispute, like landlord and tenant claims.[4] In those areas, administrative tribunals are much more analogous to the role played by a court, but generally they are concerned with relations between citizen and government.

The advantages they offer, I think, could be all headed under the area of 'access,' because administrative tribunals are

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[2] Ibid.

[3] In Queensland, 'minor civil disputes' are within the purview of the Queensland Civil and Administrative Tribunal ('QCAT'): *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('*QCAT Act*') sch 3 (definition of 'minor civil dispute').

[4] In Queensland, residential tenancy disputes are first administered by the Queensland Residential Tenancies Authority's dispute resolution service: 'Dispute Resolution', *Queensland Government – Residential Tenancies Authority* (Web Page) <https://www.rta.qld.gov.au/disputes/applying-for-dispute-resolution>. If this service proves unsuccessful, the matter may be referred to QCAT: Ibid (n 3) sch 3 (definition of 'tenancy matter').

generally more accessible than courts. They generally have lower cost structures,[5] the fees are generally significantly lower,[6] and there are typically no party-party costs, in that the unsuccessful party usually doesn't end up paying the other party's costs.[7] Lawyers are often not required,[8] so you can go to an administrative tribunal without a lawyer and save a lot of money that way.

They have other advantages too. They tend to be less adversarial. The courts operate primarily on the 'adversarial' basis, this old-fashioned idea of sending two Roman gladiators into an arena and seeing which is the last one standing. Tribunals don't operate that way. They operate on what's called a more 'inquisitorial' basis. Now, that sounds a bit scary if you think about the Spanish Inquisition, but basically all it means is that unlike a court, the tribunal's function is to find out the truth. And you'd think courts should be doing that, but of course courts determine a version of the truth based on the evidence that is produced to them by the parties, and they don't have any capacity to go outside that evidence.[9] Tribunals, on the other hand, can, and

[5] See, eg, *QCAT Act* (n 3) div 6.

[6] In Queensland, QCAT's administrative fees are part of legislated tribunal operations: *QCAT Act* (n 3) ss 229-230. QCAT also provides a free online resource detailing fees and allowances: 'Fees and Allowances', *Queensland Civil and Administrative Tribunal* (Web Page, 1 July 2023) <https://www.qcat.qld.gov.au/resources/fees-and-allowances>.

[7] *QCAT Act* (n 3) s 100.

[8] Ibid s 43.

[9] In Queensland, the laws surrounding evidential process are governed principally by the *Evidence Act 1977* (Qld).

sometimes do, conduct their own investigations.[10] They can cause the relevant government departments to make inquiries. So the tribunal is more in charge of the process, and it is not totally dependent upon the parties to gather information.

Tribunals also tend to have the capacity for a much more flexible procedure. They can adopt a procedure that fits the circumstances of the particular case.[11] So if you take a tribunal like the Commonwealth Administrative Appeals Tribunal,[12] which has a big range of jurisdiction, some of it is really, really important, dealing with large amounts in issue, like revenue cases or immigration cases.[13] And when the subject matter is important like that, then the tribunal has the capacity to adopt what I might call a more 'formal' process, to make sure that there is no risk to procedural fairness, and that everybody has their rights and has the opportunity to have their say.[14] But in high volume, lower subject matter value areas, then the tribunal – the same kind of tribunal – can adopt a much more

[10] For example, in Queensland, QCAT may authorise the taking of evidence, or otherwise require a witness to attend or produce a document or thing: *QCAT Act* (n 3) ss 96-97.

[11] QCAT, for example, has explicit capacity to provide relief from procedural requirements: Ibid s 61.

[12] At the time of writing, the Commonwealth Administrative Appeals Tribunal ('the AAT') had yet to be replaced by the announced new federal administrative review body: 'A New System of Federal Administrative Review', *Australian Government – Attorney-General's Department* (Web Page) <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

[13] The AAT's jurisdiction is administered across 'Divisions,' which include the Taxation and Commercial Division, the Migration and Refugee Division, and others: *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') s 17A.

[14] Ibid div 5.

flexible approach, and get through the work a bit quicker, adopting whatever procedures are appropriate to the particular case.[15]

Tribunals also tend, I think, to be more user friendly. There's more likelihood of the people in the tribunal using plain English, rather than 'Legalese,' which I think is an advantage in terms of accessibility.

And there's also greater flexibility of outcome. A court determines what the rights and obligations are. That's all they can do. There is no capacity to move outside the determination of rights and obligations.[16] Administrative tribunals often have discretion to exercise, and so they can fashion the outcome that suits the merits of the case more readily, perhaps, than a court can. And to that extent, they're also involved in policy development, so that they can say – for example – that there is an area of policy where the current government approach is deficient.

There's also, I think, greater capacity to have greater diversity amongst tribunal members. Courts tend to be staffed with lawyers who've been in the job for 20 years or more, and seen as very senior. And that tends to be people who've gone

[15] See especially Ibid s 33(1)(b). See also Garry Downes, 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal' (Conference Paper, Land and Environment Court Annual Conference, 5 May 2011).
[16] Downes, 'The Role of Courts and Tribunals' (n 1).

through university, who tend to have better educational backgrounds, and indeed more privileged backgrounds often.[17] And they tend to be a much more homogenous group in both gender, culture and the like.[18] Whereas with tribunals, you can have a much greater diversity of people. You can appoint people with expertise in the particular area, and they don't have to be a lawyer.[19] If it's an immigration tribunal, you can have somebody who knows about immigration.[20]

So there are, I think, lots of advantages to tribunals. And the other advantage in the area of diversity, is that unfortunately studies have shown that migrants to Australia tend to have relatively low confidence in our court system.[21] And that's probably because it is populated by a homogenous group that doesn't include them.[22] Whereas if you have a tribunal

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[17] Ray Steinwall, 'Addressing Cultural Diversity in the Australian Judiciary', *Diversity Council Australia* (Web Page, 30 April 2014) <https://www.dca.org.au/blog/addressing-cultural-diversity-australian-judiciary>.

[18] This homogeneity, it has been argued, reduces public confidence in the impartiality of the judiciary: Michael McHugh, 'Women Justices for the High Court' (Speech, High Court Dinner, 27 October 2004).

[19] For example, in Queensland, appointment to QCAT as an ordinary member may be based on a person's 'special knowledge, expertise or experience relating to a class of matter for which functions may be exercised by the tribunal:' *QCAT Act* (n 3) s 183(4)(b).

[20] With regards to the AAT, appointment as a senior member or other member may be based on a person's 'special knowledge or skills relevant to the duties of a senior member or member:' *AAT Act* (n 12) s 7(3)(b).

[21] In fact, migrants to Australia tend to have higher levels of confidence in police than in courts: Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2014* (Report, 2014) 35. See also Wayne Martin, 'Access to Justice in Multicultural Australia' (Conference Paper, Judicial Council on Cultural Diversity: Cultural Diversity and the Law Conference, 13 March 2015) 5.

[22] Steinwall, 'Addressing Cultural Diversity' (n 16).

structure, and you can increase the diversity on that tribunal, and the tribunal perhaps has greater capacity to reach out to culturally diverse groups, then there might be greater confidence in the tribunal.

So to sum up, each of them have their roles. Tribunals will never replace courts, because courts have their basic functions I referred to earlier. But within the area, and the area given to tribunals is increasing, probably because of some of the advantages I've referred to, and they tend to be cheaper to run as well. So I think we're going to see tribunals expand, and they will have all the advantages to which I've referred. But they will never take over from the courts, because the courts have that basic irreducible function that you can't delegate out.[23] And, of course, they're protected by the *Constitution* too.[24]

PB: That comment you made about the ability of those who sit on tribunals to be more diverse I think is really important, particularly in the context of what we're talking about today. And that's this intersection between cultural background and legal outcome. You've mentioned that you believe it's more the role of the legislature to tackle the public policy issues

[23] Downes, 'The Role of Courts and Tribunals' (n 1).
[24] The Judicature and its constituent elements are explicitly enshrined in ch III of the *Australian Constitution*. Courts, in particular, are protected under s 71 of the *Australian Constitution*.

surrounding this intersection.[25] But can the pre-existing judicial avenues still be adequate?

WM: I think there are things that can be done by the judiciary. But I think there comes a point probably where you have to involve the legislature because you get quite important policy decisions that really need to be made by the elected representatives of the people rather than the judges.

I'll try and illustrate what I mean there, but before I do, I might just pick up on your point about diversity. We're making progress in relation to greater cultural diversity amongst the judiciary,[26] but we've still got a long way to go.[27] We have judges from different culturally diverse backgrounds, which is great. But they're very much a minority. Australia is now undoubtedly, I think, a truly multicultural society,[28] which is great. I think it's been one of the great joys of my lifetime to see Australia turn into a truly multicultural society. And I think we do it pretty well. We're not perfect, but I think when you look at other countries, we actually do multiculturalism pretty well in Australia. But unfortunately, because of the lead time to train a judge, most judges were

[25] The Editor here refers to Wayne Martin, 'Access to Justice in Multicultural Australia' (2017) 44(8) *Brief* 22, 25.
[26] Martin, 'Access to Justice in Multicultural Australia' (n 21) 3.
[27] Ibid.
[28] Australian Bureau of Statistics, '2021 Census Highlights Increasing Cultural Diversity' (Media Release, 20 September 2022). Martin, however, cautions against strict reference to statistics as an indicator of multiculturalism: Martin, 'Access to Justice in Multicultural Australia' (n 25) 22, 24.

trained, generally speaking, twenty-five or thirty years ago. And a lot of our multiculturalism has occurred over that period. And so if you're looking back in time to thirty years ago, we had a less multicultural society than we do now. That's the society from which judges are drawn. So there is a time gap between the demographic structure of the judiciary now, and the demographic structure of society. And that's unfortunate. And I think it behoves the judiciary to take steps to make sure that that mismatch doesn't adversely impact outcomes.

But let's get back to the question you asked, which is concerned about the extent to which things can be done by the judiciary, and things needing to be done by the legislature. And perhaps if I could start – at the risk of starting at a rather odd place – by talking about the nature of equality. And equality sounds like a simple concept, but it can actually be quite difficult when you unpack it. The basic, Aristotelian definition of equality is that like things are treated alike, and different things are treated differently.[29] That's the approach that is taken by the law.

So if you take *Bugmy v The Queen*,[30] which is the leading high court decision about sentencing Aboriginal offenders, they said, well, obviously an Aboriginal person and a non-

[29] Aristotle, *The Nicomachean Ethics*, tr Adam Beresford (Penguin, 2003).
[30] [2013] HCA 37.

Aboriginal person are not the same. But the question is, are they different in a material respect? Or are they alike in a material respect? And what they said was Aboriginality itself is irrelevant to the sentencing process.[31] What is relevant though, is social deprivation, family dysfunction, a life of hardship, and all of those sorts of things that are common to Aboriginal people.[32] So their view was that Aboriginality – of itself – was not a relevant factor to the sentencing process.[33] But if somebody had been brought up in a remote Aboriginal community, in circumstances of social deprivation, had very limited education, had limited access to employment, all of those things were relevant to the sentencing process.[34]

Now by contrast in Canada, the Supreme Court of Canada took a rather different approach. They looked at the figures. In Canada, like Australia, Indigenous people are grossly overrepresented in the criminal justice system.[35] There are far too many of them in Canadian prisons,[36] just as there are in

[31] Ibid [37]. Here French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ quote – with approval – Simpson J in *Kennedy v The Queen* [2010] NSWCCA 260, [53]. In *Kennedy*, Simpson J was explaining the significance of statements made in *R v Fernando* (1992) 76 A Crim R 58.
[32] *Bugmy* (n 30) [37].
[33] Ibid.
[34] Ibid [37]-[44].
[35] Jean-Denis David and Megan Mitchell, 'Contacts with Police and the Over-Representation of Indigenous Peoples in the Canadian Criminal Justice System' (2021) 63(2) *Canadian Journal of Criminology and Criminal Justice* 23.
[36] Ibid.

Australian prisons.[37] And they said, well, that calls for special treatment. So they said it's appropriate, before sentencing an Indigenous Canadian for a significant offence, to have a full report on the background of that person. That was a case called *Gladue*,[38] and they're now called '*Gladue* reports.'[39] And in Canada, the legislature picked up on that and inserted a provision in the Criminal Code of Canada, because in Canada, crime is a national responsibility rather than a provincial responsibility. So there's a provision in the Canadian legislation which requires a report to be written in relation to Indigenous offenders before they are sentenced, because they are Indigenous.[40]

So those are two different approaches taken by the courts. And let me try and go a bit further on this topic of equality. If you take the legal approach to equality, and you look at something like bail legislation, Bail Acts don't discriminate on the basis of race. But what they do say is that when you are considering whether or not to grant bail, you must take into account the person's prior convictions, the extent to which

[37] In 2016, Aboriginal and Torres Strait Islander people constituted just 2% of the Australian adult population but comprised 27% of the national adult prison population: Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, 28 March 2018) 21.

[38] *R v Gladue* [1999] 1 SCR 688.

[39] A *Gladue* report is a specialist Aboriginal sentencing report intended to promote a better understanding of the underlying causes of the offending, including the historic and cultural context of an offender: *Pathways to Justice* (n 37) 202.

[40] *Gladue*, and subsequent cases such as *R v Ipeelee* [2012] 1 SCR 433, all pertain to *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

they've lived at the same address for a long period of time, the extent to which they're in employment, the extent to which they are fine upstanding members of the community, et cetera.[41] So the criteria that a court is required to take into account are all criteria that are going to work adversely against some groups in our community, particularly, for example, Aboriginal people. They're much more likely to have a significant prior record.[42] They're less likely to have been in stable employment.[43] They're less likely to have been in stable residential accommodation.[44] So the Bail Act doesn't discriminate against Aboriginal people, but a lot less Aboriginal people get bail, because of the criteria specified in the Bail Act.

So then the question is, well, should the courts do something about that? Should the courts ignore those criteria or apply them more flexibly when we're dealing with Aboriginal people? Under the law as it presently stands, that's not really an option that's open to the courts, unless the legislature specifically provides that discretion.[45] That's something that can obviously only be done by the legislature. So I think a

[41] In Queensland, the granting and refusal of bail is administered under *Bail Act 1980* (Qld) ('*Bail Act*') s 16. Under s 16(2)(b) of the *Bail Act*, consideration of 'the character, antecedents, associations, home environment, employment and background of the defendant' is to be had.
[42] *Pathways to Justice* (n 37) 120.
[43] Ibid 149.
[44] Ibid.
[45] S 16(2)(e) of the *Bail Act* allows a court or police officer to hear submissions made by a representative of a defendant's community when deciding whether to grant bail, if the defendant is an Aboriginal or Torres Strait Islander person.

lawyer's Aristotelian approach to equality would say, well, the mere fact that there's more Aboriginal people in Australian prisons by a factor of ten times as many non-Aboriginal people per capita, that doesn't mean that there's discrimination or that there's adverse treatment of Aboriginal people. But a sociologist would probably say, well, hang on, that's not right, there's obviously something going wrong with the system or the structure.

But there are things that courts can do, particularly in the procedural area. The High Court said many years ago in a case called *Tuckiar v The King*[46] that if an accused person doesn't have an interpreter, and they don't understand English, then the trial is invalid.[47] And so courts can, and should, insist upon procedures than enable everybody to have a fair hearing. And if the person doesn't speak English, then the court must insist that they get an interpreter in criminal cases.[48] This doesn't apply so much in civil cases, because that's *inter partes*. Generally in civil cases, parties have to provide their own interpreters.[49] But in criminal cases, it's the court's obligation

[46] (1934) 52 CLR 335.
[47] Ibid 354 (Starke J).
[48] While there is no 'right' to an interpreter in criminal trials, the accused nonetheless has a right to a fair trial: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14. In *Ebatarinja v Deland* (1988) 194 CLR 444 the court stated at [27] that if the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial.
[49] In Queensland, parties to civil proceedings that requires the services of an interpreter must engage the interpreter themselves and bear the associated costs:

to make sure than an accused person has an interpreter. And similarly, of course, if there are going to be witnesses called who are not fluent in English, again, the court's obligation is to provide interpreters.

And courts have a role in insisting that those standards are met and insisting on adequate standards of interpretation,[50] which can be difficult in some parts of remote Australia. There may only be a limited number of people speaking a particular Aboriginal language. So getting somebody who is a good interpreter and who isn't connected to one of the parties can be extremely difficult. Sometimes there just is no practical option other than to let those standards slip. But courts have an important role there.

There are other things that courts can do in relation to the common law, because courts interpret the common law of Australia and apply it. I'll draw an example from the law of provocation, which in a lot of states is common law.[51] There

'Getting an Interpreter', *Queensland Courts* (Web Page, 27 July 2023) <https://www.courts.qld.gov.au/services/getting-an-interpreter>.

[50] The relevant Australian national standards and certifying authority for interpreters and translators is the National Accreditation Authority for Translators and Interpreters ('NAATI'). NAATI certification is the only officially accepted qualification for interpreters and translators in Australia: Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2nd ed, 2022) 2. The Judicial Council on Cultural Diversity's *Recommended National Standards* have been endorsed by the Council of Chief Justices, and adopted and implemented in various ways across Australia's States and Territories: at 1.

[51] While common law authorities nonetheless inform an examination of the accused's conduct, in Queensland, the definition of provocation (with regards to

are two limbs to the law of provocation.[52] The first limb is whether the conduct that is said to be provoking was conduct of a kind that would cause loss of control.[53] The second is whether the actual response to that conduct was reasonable in the sense that it was a reasonable and appropriate response to the conduct.[54] And so what the High Court has said in relation to the second limb – that is the accused's actual loss of control – is that the only relevant factor is age. So you can't look at anything other than the age of the accused.[55] You can't look at the cultural background of the accused, you must ignore that and just look at their age.[56] And that's in a case called *Masciantonio*.[57] Whereas in *Moffa*,[58] in relation to the first limb, the High Court went the other way and said that you could take account of the cultural background of the alleged offender when assessing the impact which the conduct would likely have upon them.[59] And so the proposition basically was

offences of which assault is an element) is found under s 269 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code*'). With regards to killing on provocation, the relevant section is s 304 *Criminal Code*.

52 *Criminal Code* (n 51) s 269(1).

53 In Queensland, a person must be 'deprived by the provocation of the power of self-control': Ibid.

54 In Queensland, the force use by the person in response to the provocative conduct must be 'not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm': Ibid.

55 *Masciantonio v The Queen* (1995) 129 ALR 575, [27] (Brennan, Deane, Dawson and Gaudron JJ).

56 Ibid [28] (Brennan, Deane, Dawson and Gaudron JJ).

57 Ibid.

58 *Moffa v The Queen* (1977) 138 CLR 601.

59 Ibid.

that if a particular form of conduct was particularly offensive to a particular culture, then that was relevant.[60]

And Justice Kirby went around saying this is great, this is the court reflecting multicultural Australia and acknowledging cultural difference.[61] But there are a lot of people critical of it and saying well, really what that case was about was provocation through the infidelity of the wife of an Italian man who then killed her.[62] So what the court was really saying was that if you're a hot-blooded Italian man who reacts in a particularly strong way to infidelity, then you're going to get a lesser penalty because provocation is a defence.[63] They're saying, well, why should we as Australia allow standards from other cultures to determine what is acceptable conduct in Australia?

So it's quite a difficult area. And I think it's in those sorts of areas the legislature has a role to play. The legislature really has to come in and say, well, what as a community do we think is the right answer to that conundrum? Do we excuse conduct on the part of people from particular cultural backgrounds who have different attitudes, say, compared to our

[60] Ibid [9] (Mason J).
[61] Michael Kirby, 'The "Reasonable Man" in Multicultural Australia' (Seminar Paper, Ethnic Communities Council of Tasmania, 28 July 1982).
[62] Greta Bird, 'Power, Politics and the Location of "The Other" in Multicultural Australia' (Conference Paper, Australian Institute of Criminology Conference: Migrants and the Criminal Justice System, May 1993) 5.
[63] Ibid.

contemporary attitude towards women? Do we say, okay, that is a relevant factor to assessing the criminality of their conduct? I think there are a lot of problems with that, because I think women in Australia are entitled to be treated with some minimum standards of treatment, that in turn the law has to ensure that all women receive irrespective of their cultural background. And I think that means you can't always take account of culture if you're going to give proper protection.

So that's difficult. And there are also areas, for example, in relation to Aboriginal customary law, which is a very difficult area to talk about, because of course there's no single Aboriginal language.[64] Unlike Māori, there's no single Aboriginal culture. For every different language group, there's different cultures and there's different principles and different laws. And at the time of settlement, there were around 300 different language groups. So we're not talking about a single, divisible, identifiable Aboriginal customary law. But what we do know is that most Aboriginal customary legal systems – what you would, the closest you get to what we recognise as a legal system – involve physical punishment because that was

[64] The Australian Institute of Aboriginal and Torres Strait Islander Studies estimates that there are more than 250 Indigenous languages, including around 800 dialects: 'Languages Alive', *Australian Institute of Aboriginal and Torres Strait Island Studies* (Web Page) <https://aiatsis.gov.au/explore/languages-alive>.

the only punishment they had available to them.[65] As a society, we don't tolerate physical punishment any longer. So when you say, well, because that's the tradition of Aboriginal people, do we tolerate the imposition of physical punishment by Aboriginal people and allow them to have their customary law?

I don't think that's a decision the courts can take. I think that has to be a decision for the legislature. Only the legislature can say, well, we're going to tolerate effectively two systems of law running alongside each other.[66] And there are cultures, societies, countries around the world where they do have parallel legal systems. Sharia law quite commonly. For example, in Malaysia, they have a Sharia law system and they have a non-Sharia law system.[67] And so you've got those two parallel systems. But whether or not you have that is a

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[65] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report No 31, 12 June 1986) [500]. This report details extensively the consideration which ought to be paid to Aboriginal customary legal systems and their associated punishments.

[66] Of necessary consideration here is the potential danger of 'double jeopardy,' whereby an offender suffers punishment under both an Aboriginal customary legal system, and the Australian colonial legal system: *Recognition of Aboriginal Customary Laws* (n 65) [508]. However, punishment considerations within both legal systems can reflexively inform each other: Deborah Bird Rose, 'Dingo Makes Us Human: Being and Purpose in Australian Aboriginal Culture' (PhD Thesis, Bryn Mawr College, 1984); *R v Reggie Goodwin* (Supreme Court of the Northern Territory, Forster J, 8 September 1975).

[67] Azhar Bin Mohamed, 'The Impact of Parallel Legal Systems on Fundamental Liberties in Multi-Religious Societies' (Research Paper, University of London, 31 May 2016) 3.

decision, I think, for the people, through their elected representatives, rather than for the courts.

But again, it's nuanced. For example, one of the issues that does arise from time to time in places like Western Australia, and I expect in Queensland as well, is how you deal with the likelihood of tribal punishment being imposed when you are sentencing an offender.[68] So, if you've got an Aboriginal person who has committed an offence that is likely to result in tribal punishment, do you say, well, I'll take into account the fact that when this person gets released from prison, they will be dealt with by their community? Do you take that into account in reducing the sentence, and if so, how? It's easy if the offender has already been dealt with by their community.[69] I had one case where a young man committed a terrible offence, and he was brutally beaten by the community in which he committed that offence. So you can say, well, we know that happened, and that is a relevant factor that you can take into account when imposing a sentence. But if it hasn't happened, you then have to assess the likelihood of it happening. And how do you know how severe the customary punishment is going to be? If it's a long prison sentence, you

[68] *Recognition of Aboriginal Customary Laws* (n 65) [507].
[69] Indeed, the Australian Law Reform Commission was unaware of any instances in which Aboriginal customary punishment which *had* been exacted was not taken into consideration by a court: *Recognition of Aboriginal Customary Laws* (n 65).

might say, well, by the time they get out in ten, twelve years' time, people will have forgotten. So it gets difficult.[70]

But I think courts have an obligation to go as far as they can to ensure fairness. But as I mentioned earlier, if you look at the area of provocation, there are often two sides to the coin. You've got to be a bit careful. What on the one hand looks like appropriate recognition of cultural value[71] can, on the other hand, result in discrimination against people, or failure to protect people from a particular culture.[72] So it's tricky stuff and we need to be a bit careful about where we go.

PB: One thing I was thinking about as you were talking, was that a lot of this is heavily within the criminal context, through bail, sentencing and the like. Do we see these notions in other contexts, perhaps outside the criminal law?

WM: I think it's really important in family law areas, again because of significant cultural differences between the way families are structured. I want to try and avoid cultural stereotyping, so I'm not going to mention any particular cultures, but I'm sure we're all aware that there are significant differences between the way people approach family life in different cultures.

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[70] For an instance in which the possibility of future Aboriginal customary punishment was considered, see *R v Larry Colley* (Supreme Court of Western Australia, Brinsden J, 14 April 1978).
[71] See Kirby, 'The "Reasonable Man" in Multicultural Australia' (n 61).
[72] See Bird, 'Power, Politics and the Location of "The Other" in Multicultural Australia' (n 62).

But also in relation to money matters. For example, Sharia law doesn't recognise interest.[73] So, to what extent do we take that into account in an Australian legal system? To what extent should we be taking into account what I might call financial illiteracy, where you have people from overseas or Indigenous backgrounds who are financially illiterate, and then taken advantage of by other people?[74] To what extent can you say, well, we must modify the application of legal principles in a dispute between that person and somebody else who's taken unconscientious advantage of their financial illiteracy? I think there's lots of areas where we could do better outside the criminal law, in terms of fashioning laws that better protect people who are especially vulnerable. And the people who are especially vulnerable tend to be from different cultural backgrounds, be it Indigenous or migrant. Not all, of course, but some tend to fall into that area. I think you're right to draw attention to that. It's important in the civil area, just as it is in the criminal area as well.

PB: In addressing these issues, you mention 'active, diligent and informed responses.'[75] That was six years ago. In the time since, have you seen these responses materialise?

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[73] M Umer Chapra, 'The Prohibition of *Ribā* in Islam: An Evaluation of Some Objections' (2021) 1(2) *American Journal of Islam & Society (Online)* 23, 23.
[74] For an illustration of this concern, see the dissenting judgments of Nettle and Gordon JJ and Edelman J in *ASIC v Kobelt* [2019] HCA 18.
[75] Martin, 'Access to Justice in Multicultural Australia' (n 25) 28.

WM: This is where I've got to enter a pretty significant disclaimer, because I left the bench five years ago, and I really haven't been following what's been going on. I do know that things were happening, very much in the right direction in the last couple of years I was on the bench, and that was through the body I was on called the Judicial Council on Cultural Diversity.[76] And I had the honour of chairing that inaugurally. And the fact that somebody of my complete lack cultural diversity had to chair that was a very telling symptom. One of my friends on the Supreme Court of New South Wales, when I was appointed to the role, rang me up and said he couldn't think of anybody less suitable to chair the Judicial Council on Cultural Diversity than a white, Anglo-Saxon, elderly male! And he was right, of course. That is, I think, unfortunately symptomatic of the fact that there was just a limited pool from which to choose.

But that body has published some really important papers in relation to interpreters,[77] and set out a framework for interpretation.[78] There was another really valuable project, I thought, in relation to access to justice for Indigenous[79] and

[76] The Judicial Council on Cultural Diversity is now called the Judicial Council on Diversity and Inclusion.
[77] See, eg, Judicial Council on Cultural Diversity, *Interpreters in Criminal Proceedings – Benchbook for Judicial Officers* (2022).
[78] Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (n 50).
[79] Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (JCCD Consultation Report, 2016).

migrant women.[80] Both of those papers set out pretty specific guides to the courts as to the things they could do. In the area of access to justice for Indigenous and migrant women, for example, things like the need for better signage at courts, so that when people from those backgrounds arrive at court they know where to go and what to expect.[81]

Waiting times. If there's going to be long waiting times, that can be problematic for some women, not just from migrant backgrounds, who might have other responsibilities.[82]

The need for safe waiting areas.[83] Where you've got cultures in which payback, for example, or retribution is a significant component of the culture, then you need to have safe waiting areas where people can be kept apart.

Forms, orders and decisions are often difficult to understand.[84] Some people don't have fluency in English, so courts need to get better at providing forms in different languages, and providing explanations in different languages.

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[80] Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (JCCD Consultation Report, 2016).
[81] Ibid 9.
[82] Ibid 8; Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 27.
[83] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 39; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 53.
[84] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 29; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 39.

Case coordination.[85] If you have cases going in different courts, you need to make sure that people understand that there are different things happening. You might have, for example, a child protection proceeding going on in one court, and a criminal proceeding going on in another court, or a family court proceeding. You need to make sure that the two are connected so people understand what's going on.

Dynamics within the hearing room.[86] You've got to make sure that people are not overawed by the fact that they're in a foreign court, in a country that's foreign to them, speaking a language that's foreign to them. You've got to make sure that they understand what's going on.

Judicial attitudes and actions.[87] As I mentioned, unfortunately, judges and magistrates tend to be homogenous from a cultural perspective. We are training them, and one of the important roles of the Judicial Council on Cultural Diversity was to make sure that there were ongoing programs improving the cultural awareness of the judiciary.[88] I'm sure

[85] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 27.
[86] Ibid 30; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 40.
[87] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 31; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 41.
[88] 'Essentials of Culturally Responsive Practice Training for Judicial Officers,' *Judicial Council on Diversity and Inclusion* (Web Page) <https://jcdi.org.au/training/>.

those programs are continuing, and I hope they are, because they're very, very important, not just for the judiciary but also for court staff.[89] Court staff need to be aware of different cultural attitudes, and the problems that people from different cultures might face. One of the best ways of dealing with that, of course, is to employ diverse court staff,[90] and the best way of dealing with the judiciary is also to employ culturally diverse judges. But there are limits to how far you can go with that. So you need, I think, a combination of both changed employment practice to increase cultural diversity, but also improved training for cultural 'competency.'

And there are things like the risk of abuse of process, so that you don't allow the court process to become a form of oppression, which can sometimes occur.[91]

There can be, in relation to what we're talking about, problems for women, as there can be very limited opportunities to refer men to culturally appropriate programs. Very often, women go to court as a result of mistreatment at the hands of men. There are limits on men's behavioural

[89] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 39; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 53.
[90] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 34; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 37.
[91] Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 32; Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 47.

change programs that are available,[92] especially that are culturally relevant to men from a particular culture.

And courts, I think, very much need to improve their engagement with CALD[93] communities,[94] and they need to reach out to the communities, having open days, and inviting representatives of the communities. I know the courts in New South Wales were regularly meeting with the Council of Imams, which I think is a great initiative. Those are the sorts of things that we ought to be doing, I think, systematically, right across Australia.

And the need for more information to CALD court users in their own languages, and knowledge about the area and, as I already mentioned, recruitment.[95] So there's a lot that can be done.

[92] Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 46.
[93] 'Culturally and Linguistically Diverse'.
[94] See also Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 79) 8.
[95] See Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 90). See also Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 90).

Interpreters,[96] forms in different languages,[97] awareness of the justice system.[98] Going back to the problems women have, often they need, tragically, to seek violence restraining orders. We ought to be much better at communicating in different languages, within different communities, about how you actually go about doing that.[99]

Unconscious bias and discrimination is another problem.[100] I'd like to think that overt and conscious bias is not a big problem in Australia's judiciary. But I think unconscious bias is a big problem because that's bias you don't know about. You don't even realise that you are being biased against a person because of their cultural background, or because of something or other. So we need much greater awareness of that so that judges can be looking out for it.

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[96] Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 28-36.
[97] See Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 84). See also Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 84).
[98] Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 19.
[99] See Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 84). See also Judicial Council on Cultural Diversity, *Aboriginal and Torres Strait Islander Women's Experience of the Courts* (n 84).
[100] See, eg, Elena Marchetti and Janet Ransley, 'Unconscious Racism: Scrutinizing Judicial Reasoning in "Stolen Generation" Cases' (2005) 14(4) *Social & Legal Studies* 459.

User satisfaction surveys, another very important thing.[101] If you are serving a significant CALD community in your area, then the court ought to engage in user satisfaction surveys with members, specifically members of that community, to work out how you can serve that community better.

Certainly these things were all in train when I left the bench. But if we actively pursue all those things, then I hope we would be able to increase and improve confidence in the courts from people with diverse cultural backgrounds, be it Indigenous or migrant.

But there's no silver bullet. There's no single answer. It's a multifaceted approach and it needs everybody. It needs leadership from the top level of the judiciary. They need to take responsibility. They need to infuse that responsibility into the court staff and it needs to become an accepted and indispensable aspect of the way courts deal with what is now a multicultural community. You can't deny it. You go through any of our cities or major country towns; Australia is multicultural and thank heavens for that. It's become a much better country because of it, in my view.

PB: It sounds like you're perhaps tentatively optimistic about what the future holds.

[101] Judicial Council on Cultural Diversity, *Migrant and Refugee Women's Experience of the Courts* (n 80) 8.

WM: I am indeed. I think time will help because – as I mentioned earlier – there's a bit of a time gap thing here. It's happening now, but I'm optimistic that in another ten, fifteen years, all those smart young kids that the migrant families bring in, they're going to be going through law schools, they're going to be practicing law, and they'll be qualified and eligible to be appointed as magistrates or judges. They will really speed up the sort of things that I've been talking about. To an extent, hopefully, if there's enough of them, a lot of these problems will go away, because there'll be cultural awareness, there'll be different languages spoken in courts, and all of that. So I am optimistic about the future, but it's no excuse for not applying a lot of time, effort, and money to the issue now.

PB: To wrap things up, are there any final comments you'd like to add?

WM: When I was appointed, as I say, quite inappropriately to the Judicial Council on Cultural Diversity, it really opened my eyes to a lot of the issues, a lot of the problems. The law is one area. There are also problems in the health sciences as

well.[102] In our hospitals, you get very similar problems.[103] I think we've embraced multiculturalism, which is great, but we have to be consciously aware of the consequences of that. We've got to be, as I said, diligent and active in addressing the problems to avoid the sort of disadvantage that people might suffer through no fault of their own.

PB: So the reform necessary in the legal system is perhaps only one part of more major systemic reform?

WM: Yeah, I think that's right. I think the two areas where there's greatest risk are probably law and health, but education is probably another where you get systemic disadvantage for cultural groups.[104] So we really ought to be looking at all the important aspects of our society to see how we can make sure that we are appropriately welcoming the people that we've recruited, and who are making Australia a much better place.

PB: Wayne, thank you so much for your time.

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[102] See, eg, Yvonne Wohler and Jaya A R Dantas, 'Barriers Accessing Mental Health Services Among Culturally and Linguistically Diverse (CALD) Immigrant Women in Australia: Policy Implications' (2016) 19(1) *Journal of Immigrant and Minority Health* 697.

[103] See, eg, Resham B Khatri and Yibeltal Assefa, 'Access to Health Services Among Culturally and Linguistically Diverse Populations in the Australian Universal Health Care System: Issues and Challenges (2022) 22(1) *BMC Public Health* 1.

[104] See, eg, Eileen Pittaway, Chrisanta Muli and Sarah Shteir, '"I Have a Voice – Hear Me!" Findings of an Australian Study Examining the Resettlement and Integration Experience of Refugees and Migrants from the Horn of Africa in Australia' (2009) 26(2) *Refuge: Canada's Journal on Refugees/Refuge: Revue canadienne sur les réfugiés* 133, 138.

THE MISSING MIDDLE: A BLIP ON THE LANDSCAPE OR A JUSTICE ACCESS CHALLENGE FOR THE LONG HAUL?

Margaret Castles[*]

When I was asked to write something for *Pandora's Box* about justice access and the phenomenon of the 'missing middle' in the context of justice access in Australia, I thought 'too easy' – a well-known concept, interesting justice access implications, and plenty to talk about. But given the name of the publication, perhaps I should not have been surprised when I realised that this is very much tip of the iceberg territory.

I A Brief History of the Missing Middle

Nearly three decades ago, when I started working in the community legal sector as a clinician in the University of Adelaide Law Clinics program, legal services were an easily defined, and tolerably well-funded market.

At the top were the national and international corporations, the extremely wealthy, the publicly funded organizations, and government entities, that could afford a highly paid legal team to pursue or defend policy, litigation, commercial, and transactional legal matters.

At the other end were the economically, demographically, and otherwise greatly disadvantaged. People who had low-paying or no jobs, people with disabilities, people who were homeless, addicted, with low-levels of education

and often low community engagement. People who were not engaged in commercial, corporate, defamation, policy driven disputes, but who were trying to obtain workers compensation, damages from a low level tortious or consumer dispute, redress for harassment or inequity – disputes that meant a great deal to the individual but were not 'high end' in financial terms – but which were largely covered by the web of legal aid and community legal services providers set up in the 70s by the Commonwealth Labor Government[1] to support people who had a meritorious case, but not the means to defend or prosecute it.

Then in the middle was everyone else. People with jobs and businesses, small companies and property holdings, with steady jobs and mortgages. They experienced diverse issues and interests, and needed some legal help from time to time – a will, an investment contract, a mortgage, a negligence claim, a vehicle accident, a failed business contract, a shoddy home renovation, a copyright or intellectual property theft, a partnership breakdown. These were people who might only see a lawyer once or twice in their lifetime, but who could probably afford the few thousand dollars it might cost to sort out their dispute either in court or out of it. Others with personal injury or similar claims could be sure of getting support because many lawyers would take cases on and carry the fees until a settlement was reached.

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[1] Susan Armstrong, 'What has happened to legal aid' (2011) 85(1) *University of Western Sydney Law Review* 91, 91.

II The Legal Services Landscape Today

Over the past nearly 30 years, quite a lot has changed. The provision of funding by Commonwealth and state governments to fund legal aid has plummeted.[2] The knock-on effect is that legal services have had to minimize their support to a few areas of law and to individuals in extreme need. It is typical for most legal aid funding to be spent on criminal, family, and limited civil and administrative matters.[3] The civil realm is largely out of the picture. In its 2014 Report, the Productivity Commission foreshadowed this decline, pointing out that only 8% of households in Australia might be eligible for legal aid for limited matters, leaving most of the rest with limited capacity for managing large and unexpected legal costs.[4]

Lagging somewhat behind funding reductions, the cost of private legal services has skyrocketed. On a good day, a few thousand dollars today would be unlikely to get you more than a couple of interviews, some basic research, a letter of demand,[5] perhaps a simple statement of claim. If that doesn't do the trick, you enter the reality of paying hundreds of dollars per hour for legal support,[6] and seeing thousands if not tens of thousands of dollars paid to

[2] Law Council of Australia, 'The long-term costs of underfunding legal aid' (Media Release, 3 December 2021) <https://lawcouncil.au/media/media-releases/the-long-term-costs-of-underfunding-legal-aid>.
[3] Productivity Commission, *Access to Justice Arrangements* (Productivity Report No 72, 3 December 2014) 26.
[4] Ibid 20.
[5] Anthony Lieu suggests that a typical letter of demand would cost $1500 plus GST. Other authors provide similar estimates. See Anthony Lieu, 'How Much Does a Lawyer Cost and What are Their Hourly Rates?', *LegalVision* (Web Page, 18 July 2023) <https://legalvision.com.au/how-much-lawyer-cost-fixed-fees-hourly-rates/>.
[6] Typical charges range from $380 per hour for a junior lawyer to $495 for a senior lawyer depending on firm and jurisdiction.

lawyers before you get near a court or a negotiated resolution or transactional solution.

At the same time, the regulatory and procedural environment has become much more complex. A small business owner challenged over the dismissal or treatment of a casual employee will need to demonstrate compliance with a myriad of employment, harassment, discrimination, and other provisions. A dispute about a failed retaining wall might involve neighbours, builders, professionals who approved or designed the build, and the local council that approved the plans. The legal work required to manage a dispute, and the perceived need to include many more parties in order to ensure every avenue of recompense is covered, has expanded exponentially as has the associated legal cost.

III 'Too Poor to Afford a Lawyer but Not Sufficiently Poor to Qualify for Legal Aid'[7]

This has led to the phenomenon of the 'missing middle' – the layer of people in between the desperately disadvantaged and the well-resourced elite who suddenly find that they can simply not afford sustained legal support for a disputed legal matter unless they borrow large amounts of money or mortgage their home. Today, in the 2020s, we are seeing significant socio-economic pressures – precarious employment and under employment, rising mortgage rates, substantial basic cost of living rises, skyrocketing energy bills,

[7] Gabrielle Canny, 'Grim Prediction Comes to Pass', *Legal Services Commission South Australia* (Web Page, 16 February 2022) <https://lsc.sa.gov.au/cb_pages/news/Grimpredictioncomestopass.php>.

complex consumer credit claims, debt, employment,[8] all coming on the tail of the lasting negative financial impacts of COVID.[9] These converging factors see more and more people in the 'middle layer' bulging into the legal services needs environment, at the same time as these very services are contracting.

IV Responses to the 'Missing Middle' Phenomenon

There have been initiatives to remedy this ongoing trend. Courts are on an endless cycle of endeavouring to simplify process for lawyers and self-represented parties alike. DIY kits for wills are readily available, and legal services commissions and community legal services, as well as other agencies, produce ever more sophisticated and accessible resources for people who need support to get started, to do it themselves, or to find a lawyer. Within the legal services community, new approaches to legal work, including unbundling legal services[10] collaborative lawyering,[11] and opening up traditional legal areas to non-legally qualified providers[12] are gaining a

[8] Law Council of Australia, *Addressing the legal needs of the missing middle* (Position Paper, 2021) 3.

[9] Luke Michael, 'Helping the "missing middle" access legal help', *Pro Bono Australia News* (online, 12 January 2021) <https://probonoaustralia.com.au/news/2021/01/helping-the-missing-middle-access-legal-help/>.

[10] See generally Margaret Castles, 'Expanding Justice Access in Australia: The Provision of Limited Scope Legal Services by the Private Profession' (2016) 41(2) *Alternative Law Journal* 115. See also Michael Legg, 'Recognising a new form of legal practice: limited scope services', *LSJ Online* (Web Page, 1 November 2018) <https://lsj.com.au/articles/recognising-a-new-form-of-legal-practice-limited-scope-services/>.

[11] Caroline Counsel, 'What is this thing called collaborative law?' (2010) 85(1) *Family Matters* 77.

[12] Gillian Hadfield and Deborah Rhode, 'How to Regulate Legal Services to Promote Access, Innovation, and the Quality of lawyering' (2016) 67(5) *Hastings Law Journal* 1191.

foothold. More significant initiatives include programs like the Accessible Justice Project[13] – a 'low bono' legal practice, the first in Australia, following an established trend in the USA[14] designed to provide affordable flexible legal services for clients who would not qualify for legal aid due to income or assets, but who nonetheless could never afford to pay for a lawyer.

A sign of the times we might say – everything is getting just a bit harder, a bit less easy to reach, a bit more of a challenge. But it is more than that. Society itself if shifting – there is an ever-increasing gap between people who earn significant amounts of money, and people who barely earn enough to get by.[15] Corporations, institutional and otherwise, earn millions in mining, investment, trade and other enterprises, but the people working for them are fewer, with declining conditions, and declining work security.[16]

V A New Status Quo

An ecologist might call this a 'step change' – a permanent or at least long-term change to the prevailing social ecosystem that moves everything in it onto a slightly different footing. The foundational components have not shifted – there remain desperately disadvantaged people, just more of them,

[13] For more details surrounding this initiative, see https://accessiblejustice.org.au/.
[14] Luz E Herrera, 'Rethinking Private Attorney Involvement through a Low Bono Lens' (2009) 43(1) *Loyola of Los Angeles Law Review* 1.
[15] Reserve Bank of Australia, *Financial Stability Review* (October 2022) <https://www.rba.gov.au/publications/fsr/2022/oct/index.html>.
[16] James Foster and Rochelle Guttman, 'Perceptions of Job Security in Australia', *Reserve Bank of Australia Bulletin* (online, 15 March 2018) <https://www.rba.gov.au/publications/bulletin/2018/mar/perceptions-of-job-security-in-australia.html>; Sarah Marinos, 'The rise and rise of job insecurity', *Pursuit* (online, 5 December 2022) <https://pursuit.unimelb.edu.au/articles/the-rise-and-rise-of-job-insecurity>.

and there remain well-resourced people with a lot more of the wealth. In between, there are people shifting up or down, but for the many, finding it harder to operate with diminishing resources, with access to the means of achieving legal justice becoming a luxury and not a given. We might see this mirrored in diminishing health care, social security, childcare, and educational resources – all of those things that we think are an essential part of the Australian social fabric, but just not quite so much anymore. We might see this as a point on a gently undulating trajectory that is part of the inevitable ups and downs in any society, albeit with a significant blip caused by the social and economic disruption of COVID.[17] But let's assume for the moment that it is the new status quo, and let us add something else into the projected mix: the impacts of climate change on society in general, and on justice access specifically.

VI Do Laws, Legal Structures, and Values Need to Change?

If the structural norm of society is shifting, maybe the law needs to shift with it. I don't mean lawyers. I mean the actual law itself. In one of my legal clinics, which deals with Civil Claims, the amount of time needed to produce a halfway decent statement of claim, defence, and submission to the court for a case worth over $12,000 that complies with procedural rules, would cost many thousands of dollars. A friend recently told me that she's been advised it would cost $45,000 to contest (and try to better) an $85,000 offer from a workers compensation insurer. This seems intuitively wrong. How can it cost

[17] See Canny (n 7).

that much to do something so simple? All we want to do is sort out a solution, not argue about it for 14 months in a court case.

Court rules and procedures in civil matters, where many people in the missing middle are squeezed out of the market, are now extraordinarily complex, as are the laws that underpin many such cases. Year after year, court policy makers try to make the rules simpler, more intuitive, easier to implement and follow, and yet year after year, lawyers and their clients find themselves bound to produce detailed, technical, adversarial-framed allegations and counter-allegations before getting near a court or even near a conversation with the other party. If they do start on court process, the next step is the arduous process of discovery and the equally costly gathering of evidence – real, expert, or documentary – to bolster each side of the argument, often before the parties make any serious attempt at resolving the issue.

We seem to be buying into a world of increasing legal, legislative and regulatory complexity, that ultimately exceeds the value of matters in dispute in a large number of cases. Lawyers are partly to blame – of course we are – we embrace accuracy, complexity, technical detail, and careful compliance with legally framed expectations because that it is our job, and we wouldn't be doing our job properly if we didn't. So perhaps these expectations are the problem. The increasingly 'tick box' approach to managing the sheafs of forms and documents that are required to engage in administrative review or civil litigation might be wagging the dog, rather than the other way around. Academic Katherine Wallat argues that conflating justice access with access

to court is a systemic issue, and that lawyers must start to reimagine their role in achieving non-court-focused civil justice outcomes.[18]

VII Dispute Management Values

One possible cause of this state of affairs is the failure of the institutions of justice to come to grips with Alternative Dispute Resolution (ADR) methodology as a primary and dominant form of engagement. Most lawyers know that most cases don't go 'all the way' to resolution. Sadly, there is a residual culture within the legal profession, coupled with the compulsion to comply with court requirements, that the 'right' time for mediation is after the parties have squared off in pleadings and discovery, and have felt enough financial stress to be serious about resolution.[19] And in fairness to legal practitioners, the court rules do mandate early compliance with adversarial procedure, and parties are also not necessarily psychologically ready to consider compromise when they've only just decided to 'see you in court'.

ADR practitioners know precisely the opposite, that getting people together early and in a non-adversarial context can resolve, or at least significantly reduce, significant numbers of disputes, and minimize the costs of others. But somehow getting a wedge into that 'litigate, plead, gather evidence, posture a bit, then talk' dynamic is slower than it could be.

[18] Katherine Wallat, 'Reconceptualising Access to Justice' (2019) 103(2) *Marquette Law Review* 581, 581.
[19] Tania Sourdin and Margaret Castles, 'Is the Tail Wagging the dog? Finding a Place for ADR in Pre-Action Processes: Practice and Perception' (2020) 41(2) *Adelaide Law Review* 479, 485.

VIII Climate Change and the Missing Middle

The second point to be made is that the world is about to start changing a lot faster, and in more direct ways, than it ever has before. Flooding, bushfires, extreme heat events, power interruptions, rising insurance claims and premiums, access to and denial of essential services, land acquisitions, mortgage default, broken supply chains, and crop failures are all becoming standard fare in many communities in Australia. The convergence of geographic and demographic disadvantage already exposes vulnerable groups to extreme risk.[20] Add to this a housing crisis, already driven by COVID, and by the Airbnb trend, building companies over committing and going bankrupt, poor regulation of construction industry, flooding, bushfires, reclamation, business loss and property damage, refusal of insurance and mortgage for at risk properties, and we will see a cascade of legal issues – all the way from mortgagee sales, loan defaults, disputes around council approvals, accessing grants compensation and services, litigation about who opened the dam gates, who failed to warn the residents, who didn't spot the fire in time, whether permission to build should have been granted in the first place, and whether emergency responses were adequate. Extreme heat events inevitably predicted for urban and peri-urban environments causing illness, loss of income, power shutdowns and associated losses; business slowdowns or stoppages will affect individuals small businesses alike. These sorts of disputes pop up now and then across the board, but they will become more common, and will largely fall into the demographic of the missing middle.

[20] Sarah Lindley et al, *Climate Change Justice and Vulnerability* (Study for the Jospeh Rowntree Foundation, November 2011).

Natural disasters have always been part of life, but they have also always led to legal consequences, remedies and disputes. As the number of disasters rises (as we know it will) this will simply enlarge the area of potential legal activity, at the same time lessening the number of people, many of whom will be at risk of losing everything, who can access it. An as-yet-unpublished Masters thesis by Issy Quek, as part of the Accessible Justice Project in South Australia, argues that the impact of disasters is already of such severity in Australia that a unique concept of disaster justice access should inform future legal services planning.[21] More generally, whilst climate change events can have acute, often life threatening, impacts on communities and individuals experiencing social disadvantage in all its guises, they may also be incremental and unforeseen. Jan McDonald describes climate change impacts as a combination of sudden shocks and creeping change, arguing that it is fundamentally distinguishable from environmental, social and economic stressors previously experienced.[22] It is already recognized that more effective intervention, funding, resilience building, and support at government agency and organizational levels are necessary. Adaptive legal responses to these cumulative and unforeseen legal changes will also be necessary, but as McDonald points out, the law is typically slow to adapt to changing and uncertain circumstances.[23] Direct and indirect impacts of climate change will impact all aspects of life and commerce – those already severely disadvantaged will suffer more, but increasing numbers of people not

[21] Issy Quek, 'Achieving access to justice in the context of climate-driven disasters: the role of the legal profession' (Unpublished Thesis, Master of Laws, University of Adelaide, 2023).
[22] Jan McDonald, 'The role of law in adapting to climate change' (2011) 2(2) *WIREs Climate Change* 283, 283.
[23] Jan McDonald and Phillipa McCormack, 'Rethinking the role of law in adapting to climate change' (2021) 12(5) *WIREs Climate Change* 1, 1.

presently thought of as disadvantaged will find themselves with legal challenges that they simply cannot afford to manage.

IX Where to Now?

Thus, this missing middle that I initially thought was a fairly straightforward concept – albeit with associated challenges – has turned out to be a complex and dynamic interrelationship of social, economic, and external drivers and consequences. Rising legal costs, diminishing financial security, a widening resource access gap, coupled with a step change in the range and types of matters that are going arise from climate change impacts and increasingly disadvantage people who already can't afford a lawyer for day-to-day disputes, let alone catastrophic events beyond their control are only some. Whilst Australian Governments have responded to diverse stresses over the last 3 or 4 years, there has been little Governmental financial attention to the legal needs arising from these impacts.[24]

The law itself, the processes of law, and the way we perceive managing legal disputes will all be important. We need to make the law simpler and more accessible, we need to make the institutions of justice (whether that be a court, a tribunal, or a regulatory process) understandable and achievable, we need to commit to other ways to resolve disagreements and disputes that are more humanistic, quicker, and less costly, and we need to rethink how we will, in the future, manage the broad range of cases, claims and challenges that will

[24] Law Council of Australia, 'Funding for legal assistance services more urgent in tough times' (Media Release, 9 May 2023) <https://lawcouncil.au/media/media-releases/funding-for-legal-assistance-services-more-urgent-in-tough-times>.

be presented by climate change impacts so that the practice of law in the community can achieve a paradigmatic shift that serves the immediate needs and future needs of a community in a state of change.

HEARING VICTIMS' VOICES: PUBLIC PROSECUTORS AND THE PARTICIPATION OF VICTIMS IN CRIMINAL TRIALS

Stan Winford[*]

I Introduction

On 21 December 2022, Chief Minister Andrew Barr, MLA and Attorney-General Shane Rattenbury, MLA announced the establishment of a Board of Inquiry into the Criminal Justice System in the Australian Capital Territory. The Board of Inquiry is being conducted by the former Queensland Solicitor-General and retired judge of the Queensland Supreme Court and Court of Appeal, Mr Walter Sofronoff KC. The Inquiry commenced on 1 February 2023 and is examining the conduct of criminal justice agencies involved in the trial of *R v Lehrmann*.[1] Among other matters, the terms of reference require the Board to inquire into the role of the Director of Public Prosecutions in making decisions to commence, to continue, and to discontinue criminal proceedings. The terms of reference also require the Inquiry to consider the role of the Victims of Crime Commissioner in providing support to the complainant.

At the time of writing, the Inquiry had not reported to the Chief Minister.[2]

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[1] *Director of Public Prosecutions v Lehrmann [No 5]* [2022] ACTSC 296, McCallum CJ.

[2] The Inquiry reported to the Chief Minister on 31 July 2023: Board of Inquiry – Criminal Justice System, (Web Page) <https://www.cjsinquiry.act.gov.au/home>.

Nonetheless, the circumstances giving rise to the Inquiry bring into focus different conceptions regarding the role of public prosecutors as they relate to the rights and interests of complainants and victims of crime in criminal trials.

According to media reports and transcripts of evidence given during the inquiry, Mr Lehrmann's defence counsel, Steven Whybrow KC, described the ACT Director of Public Prosecutions Shane Drumgold SC as 'at times overzealous,' raising the question of whether he properly complied with his duties as the Director of Public Prosecutions, including his duty of impartiality.[3] Media reports about the Inquiry have also highlighted the potential challenge of balancing an accused person's right to the presumption of innocence with the need to provide support to a complainant such as that provided to the complainant during the trial by the Victims of Crime Commissioner. The role of the Victims of Crime Commissioner in advocating on behalf of the complainant in relation to the conduct of the proceedings has also been examined.[4]

[3] Transcript of Proceedings, *ACT Board of Inquiry – Criminal Justice System* (15 May 2023) 573 (Steven Whybrow KC).

[4] Maeve Bannister, 'Lehrmann Inquiry Exposes Delicate Balance of Justice', *Australian Associated Press* (online, 3 June 2023) <https://citynews.com.au/2023/lehrmann-inquiry-exposes-delicate-balance-of-justice/>.

II Victims[5] and the Prosecutor's Role

The well-established role of the public prosecutor is to '…act with fairness and detachment, and always with the objectives of establishing the whole truth in accordance with procedures and standards which the law requires to be observed, and of helping to ensure that the accused's trial is a fair one.'[6] Further, the public prosecutor acts independently of all other organisations and individuals. For example, as the *Policy of the Director of Public Prosecutions for Victoria* (the *Director's Policy*) explains, the Victorian public prosecutor represents only the interests of the Director of Public Prosecutions, not 'the government, the police, the victim, or any other person.'[7]

Traditionally, public prosecutors had little contact with victims of crime, interacting with them only in the limited circumstances where a victim was also a witness. However, over the past few decades justice systems in common law jurisdictions have seen a shift that has created new expectations of justice sector personnel: the emergence of the role of the victim as a *participant* in criminal proceedings.

A growing recognition of the interests of victims in the criminal trial process has been reflected in developments across Australian jurisdictions. Most

[5] The terms 'victim' and 'victim of crime' are used in this article. It is acknowledged that some people who have experienced victimisation – and their advocates – prefer the term 'survivor' and/or 'victim-survivor,' as a more empowering expression. However, we have chosen to use the term 'victim' for ease of reference and for general understanding. The term 'victim' is also used in instances where the term 'complainant' might equally apply.

[6] *Whitehorn v The Queen* (1983) 152 CLR 657, 663.

[7] Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (January 2022) 8.

jurisdictions now provide victims with information about support services and entitlements including health, welfare, counselling, medical and/or legal services, and entitlements to compensation and restitution. Other reforms include protections for victims as witnesses, including remote witness facilities and evidentiary reforms. Most jurisdictions incorporate Victim Impact Statements, Victims' Charters, and Victims of Crime Commissioners.[8]

Justice sector personnel, including public prosecutors, are now expected to actively include victims. Expectations of public prosecutors now include: that prosecutors take into account and respond to victims' needs; that they treat victims with courtesy, respect and dignity; and that they provide victims with information about criminal proceedings. However, the public prosecutor's contemporary role as a facilitator of victims' inclusion in the criminal justice system can sit uneasily with their overarching duties to act independently, fairly, and in furtherance of the public interest. Certainly, victims' wishes may be considered as an aspect of the public interest in this context. In some cases, there may be considerable overlap between a victim's wishes and the broader public interest. However, in other cases, victims' wishes and the public interest may not coincide to a large extent.

It is clear that in their everyday work, the contemporary public prosecutor is presented with the challenging task of balancing their traditional duties to act fairly and impartially with their relatively new responsibilities to victims.

[8] See, for example: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016).

However, existing research indicates that public prosecutors can and do find ways of navigating these tensions.[9]

In the Victorian context, the Office of Public Prosecutions (OPP) has for many years carried out the traditional role and duties of a public prosecution service, in addition to providing services and mechanisms that support victims' participation in the prosecution process, which include establishing a Victim and Witness Assistance Service that employs specialist social workers to assist victims of serious crime throughout the prosecution process.[10]

The OPP's commitment to victims includes a stated commitment to 'ensuring victims are prepared for, and feel involved in the prosecution process, and to treating them with courtesy, respect, dignity and sensitivity.'[11]

A further illustration of the OPP's commitment to supporting victims' active participation in the criminal trial process is the fact that the *Director's Policy* provides for victims to be given opportunities to have input into prosecution decision-making regarding resolutions. The *Director's Policy* requires OPP lawyers to seek victims' views prior to a decision about a resolution being made. The victims' views then function as one factor that the OPP takes into

[9] Edna Erez, Julie Globokar and Peter Ibarra, 'Outsiders inside: Victim Management in an Era of Participatory Reforms' (2014) 20(1) *International Review of Victimology* 169; Dan Jones and Josie Brown, 'The Relationship Between Victims and Prosecutors: Defending Victims' Rights? A CPS Response' (2010) 3(1) *Criminal Law Review* 212.
[10] Office of Public Prosecutions Victoria, 'Victims and Witnesses' (Web Page) <https://www.opp.vic.gov.au/victims-witnesses/>.
[11] Office of Public Prosecutions Victoria, *Victims and Witness Assistance Service* (online, June 2022) https://www.opp.vic.gov.au/wp-content/uploads/2022/06/Victims-and-Witness-Assistance-Service.pdf>.

account when determining whether a resolution is in the public interest. This obligation to consult victims can be distinguished from a narrower right of victims to information found in Charters of Victims' Rights in many Australian jurisdictions, including Queensland.[12]

A *Prosecutors Communicating with Victims*

The Centre for Innovative Justice, a research centre at RMIT University, undertook research on behalf of the Victorian OPP to establish whether OPP lawyers communicate effectively with victims about decisions to resolve criminal charges, and to make recommendations for improvement. This article is derived from a report about this study.[13]

The study found that OPP lawyers can and do consult effectively with victims about resolution decisions. Interviews with OPP lawyers indicated that they are actively engaged in trying to reconcile the conflicts between victims' interests and their own prosecutorial duties to act fairly and in the public interest, and that they have developed effective strategies to do so.[14]

While the study found evidence of effective consultation with victims by OPP lawyers, some victims reported negative experiences of being consulted about resolution decisions.[15]

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[12] *Victims of Crime Assistance Act 2009* (Qld) sch 1AA ('Charter of Victims' Rights').
[13] Stan Winford, Nareeda Lewers and Mary Polis, *Communicating with Victims About Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Centre for Innovative Justice Report to the Office of Public Prosecutions Victoria, April 2019).
[14] Ibid 8.
[15] Ibid.

The study sought to understand why some victims had a negative experience when being consulted by prosecutors. Interestingly, and perhaps counter-intuitively, victims who reported negative experiences of their interactions with prosecutors were not necessarily victims being informed that prosecutions in their cases were being discontinued.

III Procedural Justice Theory

There is now a solid base of empirical research that supports the contentions of procedural justice theory. A wide range of studies in different contexts have established a clear connection between people's experience of justice processes and their perception of the legitimacy of a legal outcome.[16] While early procedural justice studies concentrated on the experience of people encountering the legal system in the role of the accused, later research has established that these principles also apply to the experiences of victims of crime. This research has demonstrated that, in particular, victims' interactions with police and prosecutors determine the degree to which they experience procedural justice. In her influential work, Jo-Anne Wemmers found that victims are more likely to feel fairly treated by the criminal justice system when police and prosecutors: take an interest in them; give them an opportunity to express their wishes; and take their wishes into consideration.[17] In a recent study, Wemmers identified that victims' experience of their interactions with prosecutors is primarily shaped by whether they feel

[16] For an overview, see Deborah Epstein, 'Procedural Justices: Tempering the State's Response to Domestic Violence' (2002) 43(5) *William and Mary Law Review* 1843, 1878-1882.
[17] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996).

recognised and treated with respect.[18] For Wemmers' interviewees, 'recognition and respect' involved a victim receiving recognition of their status *as the victim*, feeling believed, being treated courteously, being consulted, and being listened to. Conversely, treatment involving a lack of recognition and respect correlated with victims not feeling heard, not feeling believed, not being consulted, not having things properly explained to them, and being treated with indifference. These findings suggest that for victims to feel fairly treated by prosecutors, they need to feel as though they *matter* in the eyes of the prosecutors.

The procedural justice literature as it applies to victims of crime is pertinent to the issue of how prosecutors go about communicating with victims about important decisions. Inevitably, prosecutors will sometimes make decisions that victims do not agree with. However, the procedural justice literature tells us that when prosecutors show victims recognition and respect in their interactions with them, victims are more likely to experience the process as fair, even when a decision has been made that does not accord with their wishes. As Wemmers puts it, '…if a prosecutor treats the victim with dignity and respect and is able to gain the victim's confidence, then the victim will still feel fairly treated even when the prosecutor makes an unpopular decision.[19]

In short, according to procedural justice theory, people are more likely to see an outcome as valid if they perceive the process that led to it as being fair,

[18] Jo-Anne Wemmers, 'Victim Participation and Therapeutic Jurisprudence (2008) 3(2-3) *Victims & Offenders* 165.
[19] Ibid 186.

even if the outcome is not reflective of what they wanted.[20] Conversely, if people feel unfairly treated by the legal system, they will see outcomes such as court orders as less legitimate, and will be less likely to accept them.[21]

A *Drawing on Procedural Justice to Improve Prosecutors' Interactions with Victims*

Viewed through a procedural justice lens, the OPP's policy of consulting victims about resolution decisions presents an ideal opportunity to accord victims a sense of procedural justice. This mechanism expressly provides a way for victims to express their wishes and for victims' wishes to be taken into consideration by the prosecutors; two key aspects of procedural justice for victims, according to the research.

During the study, the victims we spoke with expressed views that are consistent with the procedural justice literature. They said that they wanted opportunities to express their views, and wanted these views to be genuinely taken into account by the OPP.[22] Further, their experience of how the OPP lawyers treated them featured prominently in their interviews.[23] The victims also clearly expressed a desire for the lawyers to take the time to understand them as people and their priorities.[24] They wanted to feel that they mattered to the prosecution lawyers.[25]

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[20] Winford, Lewers and Polis (n 13) 8.
[21] Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990).
[22] Winford, Lewers and Polis (n 13) 9.
[23] Ibid.
[24] Ibid.
[25] Ibid.

The study's findings are consistent with procedural justice theory because they indicate that the *process* of being consulted is very important to victims.[26] Victims did not simply focus on the particular prosecution decision in their case, although this was significant for some. Rather, they expressed strong views on *how* the consultation process was carried out.[27] What they said in this regard is highly significant, because read together their comments shed light on the particular aspects of the consultation process that work well or not so well, from victims' perspectives.

Consistent themes emerged from interviews with all participant groups, including victims (both those who reported positive experiences of the consultation process, and those who reported negative experiences of the consultation process), members of the Victims and Witness Assistance Service, and OPP lawyers, regarding what is important to victims when they are consulted about resolution decisions.[28]

The victims we spoke with drew a clear distinction between being genuinely consulted about a resolution decision and being 'told' about a resolution decision. Being genuinely consulted involved:

- being given the opportunity to express their views;
- OPP lawyers genuinely listening to their views;
- feeling heard and understood by the OPP lawyers;
- feeling that their views mattered to the OPP lawyers; and

[26] Ibid.
[27] Ibid.
[28] Ibid.

- feeling that their views would play a role in the decision that the OPP would ultimately make.[29]

According to the victims, being merely 'told' about a resolution decision involved:

- being informed about a resolution decision *after* it had been made; or
- being informed that a particular resolution decision was going to be made and then:
    - OPP lawyers not engaging in a discussion about the decision; or
    - OPP lawyers asking the victims how they felt about the decision but at the same time making it clear that their views would not alter the course of action that the OPP had already committed to.[30]

For the most part, the victims who participated in our research indicated that they did not want the power to make resolution decisions themselves. They accepted that these decisions were the OPP's to make. However, it was very important to them that their views on the matter were taken into account by the OPP when it made its decision; that they got to 'have a say' in the resolution decision.

[29] Ibid 10.
[30] Ibid.

IV What Do Victims Want?

Despite the significant reform efforts undertaken in Australian jurisdictions over the past few decades to improve the criminal justice system for victims, Australian and international research on victims' experiences of criminal justice processes consistently reveals high levels of dissatisfaction.[31] In order to understand why this is so, it is important to understand what victims are seeking from criminal justice processes, and then examine why many victims feel that they do not receive what they need or expect.

Victims of crime are not a homogenous group, and their distinct characteristics and experiences shape how the crime affects them, and their interests and needs following the crime. Nonetheless, the literature about victims' experiences usefully identifies common themes that help us understand what victims seek when they look for a justice response to a crime. Kathleen Daly, a leading scholar in this area, conceptualises these themes as encompassing five elements: participation; voice; validation; vindication; and offender accountability.[32] She explains each element as follows:

A *Participation*

Being informed of options and developments in one's case, including different types of justice mechanisms available; discussing ways to address

[31] Joanna Shapland et al, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Wemmers (n 17); Victorian Law Reform Commission, *Sexual Offences* (Final Report, July 2004) 81; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Information Paper No 2, May 2015) 13.

[32] Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 378, 387.

offending and victimization in meetings with admitted offenders and others; and asking questions and receiving information about crimes (e.g. the location of bodies, the motivations for an admitted offender's actions).[33]

B *Voice*

Telling the story of what happened and its impact in a significant setting, where a victim can receive public recognition and acknowledgement. Voice is also termed truth-telling and can be related to participation in having a speaking or other type of physical presence in a justice process.[34]

C *Validation*

Affirming that the victim is believed (i.e., acknowledging that offending occurred and the victim was harmed) and is not blamed or thought to be deserving of what happened. It reflects a victim's desire to be believed and shift the weight of the accusation from their shoulders to others (family members, a wider social group, or legal officials). Admissions by a perpetrator, although perhaps desirable to a victim, may not be necessary to validate a victim's claim.[35]

D *Vindication*

Having two aspects of the vindication of the law (affirming *the act* was wrong, morally and legally) and the vindication of the victim (affirming *this perpetrator's actions* against the victim were wrong). It requires that others (family members, a wider social group, legal officials) do something to show that an act (or actions) were wrong by, for example, censuring the offence and affirming

[33] Ibid 388.
[34] Ibid.
[35] Ibid.

their solidarity with the victim. It can be expressed by symbolic and material forms of reparation (e.g. apologies, memorialization, financial assistance) and standard forms of state punishment.[36]

E *Offender Accountability*

Requiring that certain individuals or entities 'give accounts' for their actions. It refers to perpetrators of offences taking active responsibility for the wrong caused, to give sincere expressions of regret and remorse, and to receive censure or sanction that may vindicate the law and a victim.[37]

In our study, victims also often expressed another need: to ensure that the offending does not happen again and for their experience – however traumatic and harmful – to contribute to something positive in the future. We referred to this in our study as a 'prevention' need.[38]

The victims who participated in our study variously said that they wanted: to receive answers (participation); to tell their story before a judge and jury (voice); for the full extent of the offending to be recognised (validation); for the offender to admit to the offending (offender accountability); and to speak out in order to make things better for other victims who might come forward in the future (prevention).[39]

Our study therefore suggests that it is important that prosecutors:

[36] Ibid.
[37] Ibid.
[38] Winford, Lewers and Polis (n 13) 56.
[39] Ibid 23.

- understand that victims have a range of priorities or 'justice needs' that the look to the prosecution process to meet; and
- try to identify the unique justice needs of each individual victim.[40]

Drawing on these, it is possible that prosecutors may be able to improve the experiences of complainants and victims in criminal trials.

V Conclusions

While our study suggests that it is possible to do a better job of listening to victims by drawing on procedural justice and an understanding of justice needs, it remains a struggle for prosecutors to balance this task with competing obligations and prosecutorial duties.

This is symptomatic of a broader challenge. With a primary focus on fairness and due process, the criminal trial process has limited scope to offer responses to meet victims' justice needs. While measures to enhance victims' inclusion in the criminal justice system – including the criminal trial process – continue to be made through victim impact statements and other reforms, victims are unlikely to become the central protagonists within a criminal proceeding without more fundamental changes. Other alternatives – sitting outside the formal process – may provide more flexible and tailored responses for victims. These alternatives include restorative justice processes, which may be more effective at meeting the justice needs of some victims. In this context,

[40] Ibid 10.

it is promising to see recent recommendations – accepted by the government – for greater access to restorative justice for victims in Queensland.[41]

[41] See for example recommendations 90 and 91 of the *Hear her voice* report: Women's Safety and Justice Taskforce, *Hear her voice: Women and girls' experiences across the criminal justice system* (Report No 2, July 2022) 396.

AN INTERVIEW WITH STEPHEN GRACE*

Samuel Vecchi

In this interview, Stephen Grace explores the inescapable nexus between law and social justice. Drawing from over a decade of experience working in community legal centres, he illustrates that any attempt at law reform must necessarily be considered in light of underlying social issues. In this way, he demonstrates that community legal centres can play a significant role in informing good government decision-making.

PB: Steve, thank you so much for taking the time to speak with me today, I know you've got quite the busy schedule, so I appreciate any time you can spare! I wanted to start off today by talking about your involvement with organisations such as LawRight Qld[1] ('LawRight') and Justice Connect.[2] How did you get involved in this kind of legal work?

SG: I started while I was at the University of Queensland, through a Pro Bono Centre winter vacation placement with what was

* Stephen Grace is the manager of Homeless Law at Justice Connect.

1 LawRight Qld is a Queensland-based community legal centre dedicated to the provision of access to justice through partnerships with pro bono lawyers. Alongside these partnerships, LawRight works with community, health, and civic organisations to improve the lives of vulnerable people by way of access to housing, income and legal rights, and improving health and well-being.

2 Justice Connect is a Victoria-based community legal centre providing high impact interventions, increasing access to legal support and furthering matters of social justice. Justice Connect has partnerships with over 10,000 lawyers through its network of pro bono member firms, and provides both individualised advocacy services, as well as work in the public interest.

then called the Queensland Public Interest Law Clearing House, now called LawRight. What started as a four-week placement turned into a rolling volunteer position, which in turn led to a paralegal role. When I was admitted, I moved into a lawyer role in what is now called the 'Community and Health Justice Partnerships' program, which I begun managing in 2016. Ultimately, what started as a winter vacation placement has led to a decade working in the community legal sector.

PB: What then would you say is the role of organisations such as these in providing access to justice?

SG: Both LawRight and Justice Connect are community legal centres, which are not-for-profit, independent, community organisations that provide free legal assistance to individuals or groups facing injustice. Clients of community legal centres have unresolved legal needs,[3] but are unable to afford private legal assistance, or their legal issue would be uncommercial to pursue if they had to pay a private solicitor. Many help-seekers face systemic barriers to accessing legal protections yet are disproportionately represented in our justice system and experience life circumstances that are heavily impacted by legal issues. Community legal centres help to address this injustice.

[3] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) 85.

It's worthwhile considering what we actually mean by 'access to justice.' It's a bit of an unobjectionable, amorphous term.[4] It's often used in different ways, in different circumstances, and can be used to meet different ends. For me, access to justice is more than simply access to the legal system, more than just access to legal information or black letter law. Access means a system where everybody can approach and use the justice system, and the protections it offers, to effectively resolve disputes and life problems. My thoughts around access to justice stem from the idea that the laws we have, and the bodies that implement them, should progress social justice and equality. Our legal system ought to promote better, fairer outcomes for everyone in our community. It should protect our basic rights as humans, and it should ensure that we have things like an adequate standard of living, including safe and appropriate housing. It should give us a strong basis for living productive, rewarding lives. Our legal system should be more than just accessible, more than just fair, the system as a whole should lead to just outcomes. It should lead to a just society. In that sense, whenever I think about the idea of access to justice, I'm thinking about it as 'how do we promote the types of laws that promote fairness and equality, and do we ensure that everybody is able to access those benefits?'

[4] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) 74.

It may not be possible to guarantee fair and just outcomes for everybody in every instance. Competing interests need to be balanced. But why not try? Why not seek to design a system that achieves fair outcomes for most people most of the time? A system that addresses inequality and is accessible to everyone? A system that is designed for the least advantaged, rather than the majority. While it may be aspirational, designing a legal system that addresses the social, economic and historic barriers to access seems like a good place to start.

In recent history, there have been many wonderful initiatives to increase access to justice. The move to update or draft laws in a way that is accessible to non-lawyers, including more broadly the 'plain English movement,'[5] are important developments. Similarly, steps to publish court decisions and legislative documents widely and accessibly help to make our laws transparent and accessible. But for the vast majority of the people that I've worked with, going to court isn't their experience of justice. Reading legislation isn't their experience of justice. What they're looking for is a solution to a life problem. They view legal issues as life or social issues. They view them as housing issues. They view them as relationships issue or money issues. The law might offer them a solution, but it's one of many solutions. For many Australians, access

[5] Jeffrey Barnes, 'The Plain Language Movement and Legislation: Does Plain Language Work?' (Conference Paper, Australian Institute of Administrative Law National Administrative Law Conference, 24 July 2014).

to justice is about access to fair and just solutions, not just access to legal protections or legal systems.

Justice Connect and LawRight seek to provide access to justice in the most fulsome way. Both organisations acknowledge that people need a genuine awareness of their rights and the protections the law offers. Even with this information, many of our most at-risk members of society need assistance to navigate the often-complex systems in which you enforce these rights. Without the appropriate support to access and enforce these rights, it's hard to say that they exist in any legitimate fashion. Similarly, without broader social supports to provide a base level of security and stability, these rights are often inaccessible or practically unenforceable. We see this on a day-to-day basis in the community legal sector.

PB: I was talking to Wayne Martin, the former Chief Justice of Western Australia, and he made a really good point which was that while law reform is important, you have to acknowledge that the law is only one aspect of society. You need to look at law within the wider context of areas like health and education, and then consider what changes need to be made holistically. And so simply reforming the law doesn't necessarily provide those immediate, tangible outcomes to those who most need them.

SG: Absolutely. While law reform is important, it is only one aspect of ensuring you have an accessible and fair legal system. If we aim to develop fair and just outcomes, legislative reform is not enough. Consideration needs to be given to how internal policies are drafted and implemented, and also to the policies and decisions that seek to bring the legislative intention into reality. In my experience, how policies are actually implemented has a significant impact on the individuals in our community forced to engage with government agencies or decision-makers. It's as much about how these policies or laws are implemented or interpreted by the individuals that engage with them. How do these departments engage with individuals, how do they exercise discretion or implement internal processes? Is it trauma informed? Is it human centred? Is it something that takes into account an individual's circumstances to ensure that that person can appropriately engage with the system that they are required to in order to get a fair outcome?

Even if the application of these laws is fair and appropriate, do the individuals have the security, safety and stability in their lives to access these protections and engage meaningfully in the process?

Unless the government ensures that systems at all levels are fair and accessible, it's difficult to say that we have systems that promote access to justice, or that seek to achieve just and fair outcomes. Unfortunately, we still see these shortcomings:

the recent 'Robodebt' scandal[6] is a prominent example, not just because of the broader government policy, but also because of the small decisions made on a daily basis. How information is provided, how decisions are explained or how someone is treated when contacting a government department. These small daily decisions can impact how some accesses a system or engages with government. There are other examples. Police discretion and policies can disproportionately impact vulnerable cohorts, including people experiencing homelessness, or First Nations people. Historically, internal policies and processes for government departments that collect fines or manage public housing can have significant impacts on individuals. Implementing policies or processes that lead to better outcomes, providing appropriate training, or creating an environment that treats people with care and respect, rarely requires law reform.

Community legal centres provide an invaluable service to help everyday people navigate these policies and processes. But they do more than this. Community legal centres have expertise not just in the relevant legal frameworks, but also in the social, financial, and practical experience of the clients we assist. With this knowledge, community legal centres can provide insight into the lived experience of the particular

[6] The Robodebt scheme was a method of automated debt assessment and recovery that was deemed unlawful. It gave rise to both class action lawsuits and a Royal Commission. See *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634; *Royal Commission into the Robodebt Scheme* (Report, 7 July 2023).

client cohorts they assist to inform government decision-making and policy formation. This may involve promoting a human-centred, trauma informed decision-making framework informed by the insights of people with lived experience. For example, building off Justice Connect's experience helping people experiencing homelessness, we meet with relevant government agencies to provide feedback to their internal policies or how these are implemented. We also recently released our briefing report, 'Rising Housing and Financial Insecurity for Victorian Renters,'[7] which provides insights into the lived experience of Victorian renters during the COVID-19 pandemic and makes recommendations for fairer outcomes. In this way, community legal centres can inform policy creation so that lived experiences can be considered when making decisions to hopefully lead to better and fairer outcomes, and to that genuine experience of justice or access to our government systems in a way that's appropriate.

PB: You touched on it earlier, but what are some of the pre-eminent issues that ordinary Australians face when seeking access to justice?

SG: What are the current pre-eminent social issues that create barriers to accessing justice? We're in a housing and cost-of-

[7] Justice Connect, *Rising Housing and Financial Insecurity for Renters: COVID-19's Impact and Opportunities for Fairer Responses in Victoria's Recovery* (Report, July 2023).

living crisis. That's the first thing that comes to mind. Without stable housing, people face immeasurable barriers to accessing or enforcing other rights. The research, including the 'Legal Australia-Wide Survey,'[8] confirms that people experiencing homelessness or inappropriate housing are more likely to have multiple legal needs that are left unaddressed. This is consistent with my experience in practice: if somebody doesn't have stable housing, you're unlikely to be able to adequately resolve the legal issues impacting their life and well-being. Often these issues are both a cause and a consequence of the person's experience of homelessness. This is partly why both LawRight and Justice Connect's Homeless Law support the 'Housing First' approach.[9] We know through our work at Homeless Law that individuals, particularly the most at-risk individuals, are unable to access or enforce their legal rights unless they have stable, safe, and secure housing. Without an adequate standard of living, and the appropriate supports to maintain housing, many people are unable to resolve the issues – even those issues with a legal solution – that are impacting their life.

The current housing crisis is as bad as I've seen. We've seen record rent increases,[10] placing further financial pressure on households. Everybody's Home's recent report, *Brutal Reality:*

[8] Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012).
[9] Maiy Azize, *Brutal Reality: The Human Cost of Australia's Housing Crisis* (Everybody's Home Report, July 2023).
[10] *Rising Housing and Financial Insecurity for Renters* (n 7) 22.

The Human Cost of Australia's Housing Crisis found that four in five renters are experiencing housing stress.[11] Anglicare's Rental Affordability Snapshot found that only four advertised properties in Victoria were affordable for a single parent receiving Parenting Payments, and only one property was affordable for a single person receiving a Disability Support Pension.[12] There were no properties in Victoria which were affordable for someone receiving Jobseeker payments.[13] In Cairns, things are worse: there were no properties available for people on JobSeeker, Youth Allowance, or a Parenting Payment.[14] None. All this has a flow on effect: people are being priced out of the private market, putting further pressure on the already under resourced social and public housing sector, in turn pushing more people into homelessness. It's truly at a crisis point.

A significant investment in appropriate and affordable housing is one way to address the current housing crisis, particularly for the most financially vulnerable members of the community. Queensland has recently announced changes to the planning schemes which will allow more than 900,000 new homes to be built, with a target that 20% of these will be

[11] Azize (n 9) 7.
[12] Anglicare Victoria, *Rental Affordability Snapshot* (Regional Report, 2023) 4.
[13] Ibid.
[14] Anglicare North Queensland – Cairns Region, 2023 Rental Affordability Snapshot. Anglicare North Queensland, *Snapshot – Cairns Region* (Regional Report, 2023) 2.

social or affordable.[15] Victoria's 'Big Housing Build'[16] is another program designed to provide homes for people in need. Despite this program, Victoria continues to have an acute shortage of social housing,[17] with more people on the waiting list for social housing than at any time in at least the last 5 years.[18] Undoubtedly, more needs to be done to ensure housing is secure, safe, and accessible.

Financial insecurity, caused by the rising cost of living, also creates a practical barrier to accessing justice. People in extreme financial hardship are not only more likely to experience legal issues but can also be less able to resolve these issues without support. This places further pressure on the community legal sector, which has seen a significant increase in demand.[19] But it's not just an increase in need, we are also seeing a marked increase in the complexity of the

[15] Antonia O'Flaherty and Scout Wallen, 'Queensland Deputy Premier Reveals Master Plan for 900,000 New Houses in State's South East', *ABC News* (online, 2 August 2023) <https://www.abc.net.au/news/2023-08-02/qld-miles-reveals-seq-plan-for-900-thousand-new-houses/102676886>.

[16] 'Big Housing Build', *Homes Victoria* (Web Page, 2023) <https://www.homes.vic.gov.au/big-housing-build>.

[17] Productivity Commission, *Report on Government Services 2023: Housing and Homelessness (Part G)* (Report, January 2023); Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into the Public Housing Renewal Program* (Final Report, June 2018) 41.

[18] On 30 June 2022, there were 54,857 applicants on the social housing waitlist, up from 38,185 in 2018: *Report on Government Services 2023* (n 17).

[19] Federation of Community Legal Centres Victoria, *Legal Need and the COVID-19 Crisis* (Report, April 2020) 12.

matters we are working on.[20] This is consistent with our experience at Justice Connect: since COVID-19 started, we have seen legal inquiries for our 'Under One Roof' project almost double.[21] This suggests that legal need is increasing as those experiencing disadvantage are pushed further into poverty, housing, and financial insecurity. Those with legal issues face further barriers – including limited access to an under resourced community and legal sector – to finding a successful resolution.

PB: It definitely sounds like before you can even start thinking about law reform and legal considerations, you first have to take a step back and look principally at these underlying social justice issues.

SG: Absolutely. My professional experience has focused on working with people experiencing or at risk of homelessness. Common legal issues for this cohort include consumer debts, minor criminal charges and fines connected to the criminalisation of poverty, and housing and tenancy disputes. Our work focuses on government interactions that people have on an everyday basis, the types of decisions that can have a disproportionate impact on the most vulnerable members of the community, particularly people in disadvantaged

[20] Jozica Kutin et al, *Working in Community Legal Centres in Victoria – Results from the Community Legal Centres Workforce Project: COVID-19 Experiences and Lessons* (Victoria Law Foundation Report, 11 May 2022) 19.
[21] 'Under One Roof', *Justice Connect* (Web Page) <https://justiceconnect.org.au/our-services/homeless-law/under-one-roof/>.

housing. It's a practical, everyday type of law. We focus on using the legal system to achieve good outcomes for our clients. We provide assistance in close collaboration with community agencies and other frontline supports that allow us to provide a holistic service that addresses the underlying social issues impacting a person's life. By working with housing and support services, we connect with other professionals that provide security and stability for our clients, providing a platform for us to collectively address the legal issues.

This applies equally to systemic law reform and strategic engagement. When we do engage in law reform, our position is based off 20 years' experience representing people with their own lived experience. Our submissions often make recommendations to improve technical legal frameworks, while also addressing the underlying social justice issues. For example, our recent submissions to the 'Inquiry into the rental and housing affordability crisis in Victoria' made technical legal recommendations while also recommending governmental approaches to address social inequality that would lead to fairer and better outcomes for individuals.

Our approach to both individual legal representation and law reform is informed by a practical approach to the law, and how the law impacts individuals across society. It recognises that the law is more than just the written words of the legislation, but rather, it is intrinsically linked to the whole of

society. It needs to consider and support outcomes that align with what people hope the law can achieve for them. It's more than just knowing a right exists or having that right, but actually being able to use the right to achieve a better outcome.

PB: One thing I was interested in talking about with regards to these sorts of organisations, and you've definitely touched on it already; obviously they play a big role in providing advocacy services for individuals facing these underlying problems, but what more can you say about this ancillary law reform element?

SG: Community legal centres have existed in Australia for over 50 years. Last time I checked, there were over 200 community legal centres in Australia, and over 50 in Victoria alone. The starting point for many community legal centres is that direct-to-individual – or direct-to-group, for the services that do work with charities and other not-for-profits – traditional legal service. At Justice Connect's Homeless Law, our partnership with the private profession allows us to provide full representation to our clients. Other centres may provide advice or deconstructed legal assistance. This is the work that gives us specialist insight into the social and legal issues that impact our client base.

We then can use this experience and expertise to help shape how laws are made and the way that the government makes

decisions. As I mentioned, Justice Connect's Homeless Law recently made submissions into the Inquiry into the rental and housing affordability crisis in Victoria. Not only do we do that, but in doing so we hope to add to the broader social discussion by releasing evidence-based reports built off the work that we do and the connections we have to our clients and other community-wide service providers.

But it's more than that as well. Community legal centres play a vital role in building understanding in the community. The Youth Advocacy Centre in Queensland has a long history of delivering an amazing Community Legal Education program.[22] As has the Refugee and Immigration Legal Service. LawRight, for many years, ran a caseworker training day, where hundreds of frontline workers received legal education from a variety of stakeholders, including Legal Aid, Tenants Queensland, and other specialist community legal centres.

As we've previously discussed, community legal centres also work closely with government or other decision-makers to improve how the government operates, leading to better outcomes for both individuals and the whole community. This engagement occurs not just when legislation is drafted or considered, but at all stages. Community legal centres can

[22] 'Community Legal Education (CLE)', *Youth Advocacy Centre* (Web Page) <https://yac.net.au/community-legal-education/>.

bring specialist knowledge and experience based off our direct work with particular client cohorts.

PB: So in addressing some of the issues that we've talked about today, what would you say needs to be done?

SG: Right now, we have a real opportunity. The housing and cost-of-living crises have shifted the social conversation. Just a few years ago, they were fringe issues. Today, they're central issues discussed by major news outlets. They've become both a social and a political issue. We have an opportunity to address some of the underlying issues causing these crises. We have momentum and a stated desire to make a significant investment in social housing and supports. Governments at all levels seem prepared to make sizeable investments to address the cost-of-living pressures or to provide appropriate supports for some of our most at risk members of the community.

There are other opportunities as well. At Justice Connect, we use digital technologies to scale our reach. We have products like 'Dear Landlord,' which was released just prior to COVID, and is an online tool to help private renters in Victoria navigate the complex tenancy law system.[23] These tools have

[23] 'Dear Landlord: A self-help tool for renters in Victoria', *Justice Connect* (Web Page) <https://apps.justiceconnect.org.au/dear-landlord/>.

not only been very successful, but are also complementary to our high intensity, full representation work.

There have also been positive developments in the understanding of multidisciplinary, holistic approaches to legal assistance.[24] At Justice Connect's Homeless Law we've had social workers on staff for over 10 years. Further to this, we implement a co-located, collaborative approach, where we embed our lawyers and social workers into community partner agencies that offer a range of other social services. We do this in recognition of the fact that good community lawyering can't be done in a vacuum. This type of approach is becoming better understood and more widely accepted. There's a real opportunity for this to grow and to become a more mainstream approach to the delivery of legal services.

We have also seen a more developed understanding of trauma informed lawyering. Blue Knot Foundation has done a lot of work with regards to the impact of trauma: 'knowmore' has been a leader in this space. It's something that we talk a lot about at Homeless Law: how do we design services that are trauma informed, in that they are accessible for those people in our community who have experienced trauma? Our understanding of trauma and how it impacts our service

[24] Professor Tamara Walsh has written about the benefit of interdisciplinary legal assistance. See, eg, Jemma Venables and Tamara Walsh, 'An Interdisciplinary Classroom in Law and Social Work: Can It Be Done?' (2023) 33(1) *Legal Education Review* 1.

delivery has advanced over the last 15 years, and is becoming much more commonplace.

Finally, the adoption of human rights legislation creates a real opportunity for positive social progress. We've had the Charter of Human Rights and Responsibilities in Victoria for many years now.[25] Queensland is in earlier stages, but we're already seeing the benefits of having this framework.[26] This legislation can improve government decision-making earlier in the process, before something is at the point of litigation or at an escalated crisis point. And although it's not perfect, and it's not to say that every government decision is always made with people's human rights at the forefront, taking that human rights framework in a legitimate way to government decisions leads to better outcomes. It's been my experience, and this has also shown through some of the reviews of the various Acts. Anecdotally, it has shifted the conversation both with and within government departments in a positive way. It has led to better outcomes for individuals. In Victoria, the Charter of Human Rights has led to better outcomes for individuals, government and the community as a whole.

There's currently also an inquiry into a national human rights framework,[27] which is something that I personally support.

[25] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[26] *Human Rights Act 2019* (Qld).
[27] The Australian Human Rights Commission recently launched a proposed model for a national Human Rights Act: Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, 7 March 2023).

Not just because people have an expectation that their human rights are protected. Not just because Australia has signed up to treaties that say that they support and protect human rights, including the right to an adequate standard of living and housing. But because it just leads to better government decisions.

PB: It sounds like you're maybe optimistic about the way in which technology, and these holistic approaches to access to justice, are being implemented and will continue to be implemented in the future.

SG: Yeah, absolutely. There's no getting past the fact that we're in a dire situation. It's a different landscape to when I started 10 years ago. Talking with some of our frontline workers and our housing support officers, the lack of appropriate and affordable housing is a genuine issue that makes it hard to do good work in this space.

But there are a lot of opportunities, and there's a lot of things to look forward to. There is a real place for technology to support the on-the-ground, individualised work being done. There's opportunity to invest in significant housing infrastructure in a way that could have lasting intergenerational impacts. While difficult, we have an opportunity to make changes for the better. Investment in safe, secure housing with appropriate supports will lead to better outcomes for individuals, for the entire community,

and also for government. It's expensive for people to be made homeless. Dr Cameron Parsell's work with the Brisbane Common Ground project showed the financial benefit in housing people.[28] Other reports have quantified the cost of homelessness.[29] Supporting people in staying housed by providing access to appropriate housing that gives people the basis for having rewarding and fulfilling lives isn't just good for the individual, it's also good for the government. It's good for society, as a whole.

PB: It seems like fundamentally, the unifying thread that's been inherent in everything we've talked about today is that you can't really look at any potential law reform in a vacuum. It always has to be contextualised against these social issues.

SG: Yeah, it just absolutely does. When we're assisting people, the assistance we provide isn't just legal advice, we provide ongoing assistance and support to resolve issues, informed by the law and their legal options. But the life issues we help to

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[28] Cameron Parsell, *Brisbane Common Ground Evaluation: Final Report* (Institute for Social Science Research Final Report, 18 December 2015).

[29] See Kaylene Zaretzky et al, *The Cost of Homelessness and the Net Benefit of Homelessness Programs: A National Study – Findings from the Baseline Client Survey* (Australian Housing and Urban Research Institute Final Report No 205, 16 April 2013) 4, which identified that people experiencing homelessness had higher interaction with health, justice and welfare systems than people with stable housing and estimated that an individual experiencing homelessness represents an annual cost to government services that is $29,450 higher than for the rest of the Australian population. Of this increased cost, $14,507 related to health services, $5,906 related to justice services, and $6,620 related to receipt of welfare payments.

address are not created in a vacuum. You can only effectively resolve these disputes by acknowledging the social and economic circumstances that created them; by treating them as a life issue with a legal solution, not just a legal issue. This is even more prominent when looking to address these issues on a systemic level – any law reform project must consider the broader social framework and barriers to accessing justice.

PB: Steve, once again, thank you for your time today.

LEFT BEHIND? LEGAL REPRESENTATION AND ACCESS TO JUSTICE FOR THE 'MISSING MIDDLE' IN CONTEMPORARY AUSTRALIA

Nickolas Sofios[*]

I Introduction

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney and have an attorney present during any questioning. If you cannot afford an attorney, one will be provided for you at the government's expense. Do you understand these rights as I have just recited them to you?[1]

Anyone who's watched a police officer make an arrest on American television has watched a suspect get 'Mirandised'. The 'rights' in a *Miranda* warning – named after the US Supreme Court decision in *Miranda v Arizona*[2] – are reflections of the Fifth and Sixth Amendments to the United States Constitution. These are, respectively, the rights against self-incrimination[3] and the right to counsel.[4] In Australia, no such are entitlements enshrined in the

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[1] 'To'hajiilee', *Breaking Bad* (AMC, 2013) 0:39:22.

[2] 384 US 436 (1966).

[3] *United States Constitution* amend V.

[4] Ibid amend VI.

Constitution. Australians still enjoy a right to silence, arising at common law,[5] but not a positive right to a lawyer at the State's expense.[6]

This essay will begin by exploring the status quo under Australian law and its implications for access to justice, focusing in particular on the 'missing middle': people who aren't eligible for publicly funded legal aid, but don't have the resources to retain a lawyer for the duration of a legal matter.[7] Next, the essay will consider the relationship between legal representation and fundamental principles underpinning the Australian legal system, as well as principles of international law. Finally, the essay will examine the efficacy of the current system and discuss whether the system is in need of reform.

II The Australian Position

A *Criminal Law*

The leading authority on the right to legal representation in a criminal trial in Australia is the case of *Dietrich v The Queen*.[8] Following a 40-day trial in the Victorian County Court, during which he was unrepresented, Olaf Dietrich was convicted of importing a trafficable quantity of heroin.[9] He appealed on

[5] See David Dixon and Nicholas Cowdery, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law Review* 23, 23.
[6] See Neil Sills, 'A Struggle for Justice: Legal Representation in Australia' (2005) 27(3) *Bulletin (Law Society of South Australia)* 17, 17.
[7] Elif Sekercioglu, 'The Wide and Deep "Missing Middle"', *Justinian* (Web Page, 24 May 2018) <https://justinian.com.au/bloggers/the-wide-and-deep-missing-middle.html>. See also Jacoba Brasch, 'Access to Justice: Meeting the Need of the "Missing Middle"' (Speech, Annual Gold Coast Legal Conference, 11 June 2021) 5–6.
[8] (1992) 177 CLR 292 ('*Dietrich*').
[9] Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Australian Legal Aid System* (Report No 2, June 1997) 4.3–4.5 ('*Inquiry into Legal Aid 1997*').

the basis that his lack of representation had resulted in a miscarriage of justice.[10]

A majority of the High Court agreed, deciding that while there is no positive 'right' to representation at the State's expense, the absence of representation may interfere with an accused's right to a fair trial:

> [I]t should be accepted that *Australian law does not recognise* that an indigent[11] accused on trial for a serious criminal offence has a *right to the provision of counsel at public expense*. Instead, Australian law acknowledges that an accused has the *right to a fair trial* and that, depending on all the circumstances of the particular case, *lack of representation may mean that an accused is unable to receive*, or did not receive, *a fair trial*. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.[12]

Accordingly, the Court held that where a person charged with a serious offence requests legal representation, but is unable to obtain it, a trial judge should ordinarily grant a stay or an adjournment, effectively 'pausing' the proceedings until representation can be secured.[13] This is the '*Dietrich* principle.'

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[10] Ibid 4.5.
[11] An 'indigent' is someone without funds of the ability to hire a lawyer. See *Black's Law Dictionary* (5th ed, 1979) 'Indigent'.
[12] *Dietrich* (n 8) 311 (Mason CJ and McHugh J) (emphasis added). See also *Inquiry into Legal Aid 1997* (n 9) 4.5–4.6.
[13] *Dietrich* (n 8) 315 (Mason CJ and McHugh J).

B *Other Contexts*

Notably, in *New South Wales v Canellis*,[14] the High Court – considering the majority judgment in *Dietrich* – found 'no suggestion' that the principle was applicable in civil proceedings,[15] such as personal injury claims. The principle has also not been formally extended to defendants in family law cases,[16] nor in administrative law matters, such as those relating to refugee status[17] or deportation.[18]

Furthermore, while the principle has been praised for its recognition of the importance of legal representation, it has also been criticised for its potential to divert legal aid funding towards criminal law matters at the expense of family and civil law matters.[19]

C *Legal Aid and Community Centres*

Where a person can't afford legal representation, they may be able to seek assistance from their state or territory's legal aid commission ('LAC'): an independent statutory authority[20] which provides legal services to the socially and financially disadvantaged in criminal, civil, and family law matters.[21] These

[14] (1994) 181 CLR 309.
[15] Ibid 328.
[16] But see *Sadjak v Sadjak* (1993) FLC 92-348.
[17] See, eg, *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417.
[18] See, eg, *Nguyen v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 20.
[19] See, eg, *Inquiry into Legal Aid 1997* (n 9) 4.10–4.13.
[20] Ibid 2.30.
[21] See, eg, Legal Aid Queensland, 'Our Organisation: Legal Aid Queensland', *Legal Aid Queensland* (Web Page, 11 May 2023) <https://www.legalaid.qld.gov.au/About-us/Our-organisation/Legal-Aid-Queensland>.

bodies are funded by both the Commonwealth and state or territory governments.[22]

Alternatively, they may be able to access support through community legal centres ('CLCs'): independent, not-for-profit organisations which work alongside LACs, offering free legal advice, representation, and referrals to vulnerable Australians.[23] CLCs, too, receive government funding, but many also rely on volunteers (acting 'pro bono') to provide their services.[24]

Each state and territory also has an Aboriginal and Torres Strait Islander legal service ('ATSILS'), designed to deliver legal assistance to First Nations People.[25] In addition, all states and territories except the ACT and Tasmania have dedicated family violence prevention legal services ('FVLPS') to support First Nations victims of family violence and sexual assault.[26]

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[22] See ibid. See also Mary Anne Noone, 'Challenges Facing the Australian Legal System' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 23–4, citing Productivity Commission, *Access to Justice Arrangements: Overview* (Inquiry Report No 72, 5 September 2014) ('*Access to Justice Arrangements*').

[23] See, eg, Legal Aid Queensland, 'Community Legal Centres', *Legal Aid Queensland* (Web Page, 15 March 2016) <https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/Service-providers/Community-Legal-Centres>. See generally Jude McCulloch and Megan Blair, 'Law for Justice: The History of Community Legal Centres in Australia' in Elizabeth Stanley and Jude McCulloch (eds), *State Crime and Resistance* (Routledge, 1st ed, 2012) 168–79.

[24] Noone (n 22) 24.

[25] *Access to Justice Arrangements* (n 22) 25. See also National Aboriginal and Torres Strait Islander Legal Services, *National Aboriginal and Torres Strait Islander Legal Services Strategic Plan* (Report, 2019) 7.

[26] *Access to Justice Arrangements* (n 22) 25.

D *Some Practical Realities*

1 *Cost of Representation*

Lawyers, in charging for legal costs, are legally and ethically obliged to charge no more than what is 'fair and reasonable' in the circumstances.[27] Nonetheless, legal representation can be expensive, and increases with the complexity of a case.

Take Queensland, for instance. In a criminal law matter before the District Court, a solicitor advocate can charge up to $1,014 for a full day in court.[28] An advocate in a one or two day family law trial can charge a maximum of $3,220 for trial preparation and $1,146 for a day of trial;[29] the average total cost for a family law matter is around $30,000 per person.[30] In workers' compensation cases, a solicitor may charge up to $2,145 to prepare for and attend the first day of a hearing in the Industrial Court, and $683 for additional days.[31] Per Wayne Martin, former Chief Justice of Western Australia:

> The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. … In theory, access to that legal system is available to all. In practice, access is limited to substantial

[27] See, eg, *Legal Profession Uniform Law (NSW)* s 172.
[28] Legal Aid Queensland, 'Scale of Fees – Criminal Law', *Legal Aid Queensland* (Web Page, 1 September 2023).
[29] Legal Aid Queensland, 'Scale of Fees – Family Law', *Legal Aid Queensland* (Web Page, 1 September 2023).
[30] Jane McCarthy, 'How Much Does a Family Lawyer Cost?', *McCarthy Family Law* (Web Page, 22 June 2023).
[31] Legal Aid Queensland, 'Scale of Fees – Civil Law', *Legal Aid Queensland* (Web Page, 1 September 2023).

> business enterprises, the very wealthy, and those who are provided with some form of assistance.[32]

2 *Availability of Legal Assistance*

It's logical, then, that Australians with limited financial resources would turn to publicly funded legal services. But due to high demand for these services, most legal aid providers employ strict criteria to determine whether a person is eligible, usually including a 'means test' and a 'legal merits test.'[33] Means testing assesses a person's income and assets, while merits testing concerns a case's likelihood of success; together, they aim to ensure legal aid is provided to those most in need.[34]

As a result, access to representation through legal aid is only available for a small minority of Australians. A 2014 report prepared by the Productivity Commission estimated that only 8% of households were likely to meet the relevant income and asset tests, 'leaving the majority of low- and middle-income earners with limited capacity for managing large and unexpected legal costs.'[35] This is the 'missing middle.' Overrepresented in this group are people in remote communities, older Australians, and asylum seekers.[36]

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[32] Wayne Martin, 'Creating a Just Future by Improving Access to Justice' (Speech, Community Legal Centres Association WA Annual Conference, 2012) 3.
[33] See, eg, Legal Aid Queensland, 'Can I Get Legal Aid?', *Legal Aid Queensland* (Web Page, 15 December 2022); Legal Aid New South Wales, 'Eligibility Tests', *Legal Aid New South Wales* (Web Page).
[34] See, eg, ibid.
[35] *Access to Justice Arrangements* (n 22) 20.
[36] Brasch (n 7) 10–11.

While some LACs provide 'non-means tested legal assistance,' including limited advocacy,[37] and some CLCs don't apply means testing,[38] it remains that demand for representation significantly outweighs supply. For example, the Family Court of Australia's 2019–20 Annual Report highlighted that in 21% of family law matters, one or both parties were unrepresented at some point in the proceedings,[39] and at trials, 39% of litigants were self-represented.[40]

Furthermore, legal assistance has long been relatively poorly funded in Australia,[41] and despite an overall increase in funding for the area in the 2023 Federal Budget, there are lingering concerns among some stakeholder groups about the adequacy of this funding.[42] CLCs Australia, for instance, has expressed that the recent Budget only delivers 'temporary fixes', while the Law Council of Australia has noted that the funding fails to acknowledge a history of underfunding in the family law sector.[43]

E *Implications for Access to Justice*

People who can't afford legal representation or obtain legal assistance may be forced to represent themselves, which can have profound implications for their access to justice: 'the capacity to understand the law, … get legal advice, … get legal assistance and representation, and … use public legal institutions'

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37 *Inquiry into Legal Aid 1997* (n 9) 2.35.
38 See, eg, Community Legal Centres Queensland, 'LGBTI Legal Service', *Community Legal Centres Queensland* (Web Page).
39 Family Court of Australia, *Annual Report 2019–2020* (Report, 2020) 26.
40 Ibid 27.
41 See generally Noone (n 22) 24–5.
42 See Howard Maclean, 'Budget Review April 2022–23: Legal Aid and Legal Assistance Services', *Parliament of Australia* (Web Page, April 2022).
43 Ibid.

like the courts.[44] Access to justice also means 'the ability to … understand, communicate, travel, and pay' with respect to legal matters.[45]

Although a person may choose to represent themselves, the complexity of the law, coupled with Australia's adversarial system – wherein two parties compete to establish their case before an impartial adjudicator – makes it challenging for the layperson to adequately represent themselves.[46]

In criminal trials, for example, an ordinary unrepresented defendant is 'at a distinct disadvantage.'[47] The layperson is highly unlikely to understand the complex rules of evidence and secure future grounds of appeal, or be able to capitalise on the opportunity to criticise the prosecution's case during pre-trial processes.[48] For a litigant in a family law matter, self-representation can be frustrating, overwhelming, and time-consuming,[49] and in some cases, might mean facing their abuser in court.[50]

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[44] Simon Rice, 'Access to a Lawyer in Rural Australia: Thoughts on the Evidence We Need' (2011) 16(1) *Deakin Law Review* 17, 18.
[45] Ibid.
[46] See Andrew Crockett, 'What Price Justice?' (2001) 13(4) *Legaldate* 5, 5.
[47] Sills (n 6) 17.
[48] Ibid.
[49] Liz Richardson, Genevieve Grant and Janina Boughey, *The Impacts of Self-represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (Report, 2018) 24, citing Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Final Report, May 2013) 9.
[50] See Clare Blumer, 'No Right to Justice', *ABC News* (online, 1 April 2015) <https://www.abc.net.au/news/2015-04-01/no-right-to-justice/6328790?nw=0>.

The absence of representation can also negatively impact the efficiency of the legal system as a whole by increasing the costs of litigation and demands on courts' time,[51] further impeding access to justice.

III Fundamental Principles

A *The Rule of Law*

Legal representation is about upholding equality before the law: the idea that all people and institutions alike are subject to the law, protected and bound by it.[52] It's about putting people on equal footing with their opponents in litigation to ensure that if theirs is a defensible, meritorious legal position, they have a real chance at a favourable outcome. Equality before the law is at the heart of the rule of law,[53] a foundational pillar of the Australian legal system.

Another important aspect of the rule of law is the distinct but related concept of equal access to justice.[54] This is the notion that people should 'not be seriously disadvantaged in their interactions with the legal system' due to a lack of resources, personal or material, such as language difficulties or limited financial means.[55] Equal access to justice forms not only the impetus for

[51] See Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Final Report, June 2004) 10.31–10.32, 10.37–10.40.
[52] See Matthew Groves, Ingrid Nielsen and Russell Smyth, 'Public Support for the Rule of Law' (2022) 51(1) *Australian Bar Review* 80, 103. See also Brasch (n 7) 2.
[53] Groves, Nielsen and Smyth (n 52) 103.
[54] Robert French, 'Rights and Freedoms and the Rule of Law' (2017) 28(2) *Public Law Review* 109, 111–12.
[55] See ibid 112.

government-funded legal assistance, but the basis of a society which recognises the rule of law as its guiding principle.

The rule of law is a 'contested concept'[56] – its precise content can range from mandating the existence of the courts to guaranteeing human rights[57] – but it is clear that access to legal representation is consistent with the rule of law.

B *International Law*

The importance of representation is also reflected in international law, both directly and indirectly. For example, the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, provides that '[a]ll persons shall be equal before the courts and tribunals' and 'entitled to a fair and public hearing'.[58] It also states that, in criminal matters, 'everyone shall be entitled to … adequate time and facilities for preparation of [their] defence, and to communicate with counsel of [their] own choosing', as well as to be informed of their right to legal assistance, to defend themselves through such assistance, and to have assistance assigned to them 'without payment … if [they do] not have sufficient means to pay.'[59]

Similarly, the European Convention on Human Rights (EHRC) states that in determining a person's rights and obligations in civil or criminal matters,

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[56] See Jeremy Waldron, 'The Rule of Law in Public Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 56, 58.
[57] See, eg, Jeremy Waldron, 'The Rule of Law', *Stanford Encyclopedia of Philosophy* (Web Page, 22 June 2016).
[58] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976) art 14(1).
[59] Ibid 14(3).

'everyone is entitled to a fair and public hearing'.[60] Further, people charged with criminal offences have a right to adequate time and facilities to prepare a defence, to legal assistance, and to free legal assistance if they are without means 'when the interests of justice so require.'[61]

The Universal Declaration of Human Rights, which Australia was one of the original drafters of, confers several rights which 'necessitate' legal representation for their 'enforcement and protection',[62] such as the right to equal pay for equal work and the right to own property.[63]

IV The Case for Reform

An effective legal system promotes access to justice through the efficient allocation of State resources. Whether reform is necessary in Australia to improve the availability of legal representation is therefore a question of balance.

The case for reform is bolstered by growing demand for legal services. In a 'conservative and now outdated' survey conducted in 2012, 50% of respondents had experienced a legal problem in the preceding 12 months.[64]

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[60] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1).
[61] Ibid 6(3)(b), (c).
[62] Howard Lintz et al, *A Basic Human Right: Meaningful Access to Legal Representation* (Report, June 2015) 11 [19].
[63] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) arts 25(1), 17.
[64] Amanda Alford and James Farrell, 'Community Legal Centres Face Funding Crisis' (2016) 41(1) *Alternative Law Journal* 2, 2, citing Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Report, August 2012).

Additionally, the aforementioned 2014 Productivity Commission Report estimated that 'around 17% of the population … [had] experienced some form of unmet legal need.'[65]

However, recent developments in this area are comforting, especially for people in the 'missing middle' seeking representation – in particular, the Federal Budget's overall increase of funding for legal aid services, welcomed by several legal aid providers.[66] Digital and AI innovation are already proving useful in supplementing lawyers' work, despite their limitations,[67] helping make representation more affordable. In addition, the emergence of the after-the-event (ATE) legal insurance market may improve the accessibility of the courts for civil plaintiffs and the recovery rate for defendants.[68]

As various stakeholder groups observe, the impact of additional funding 'remains to be seen';[69] its efficacy will substantially impact the need for broad-scale reform. The coming months and future reports, utilising more recent data on unmet legal need, will offer insight into whether this funding is consistent with a 'transparent, predictable, sustainable, and long-term' model as recommended.[70]

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65 *Access to Justice Arrangements* (n 22) 107.
66 Maclean (n 42).
67 See, eg, Stebin Sam and Ashley Pearson, 'Community Legal Centres in the Digital Era: The Use of Digital Technologies in Queensland Community Legal Centres' (2019) 1(1) *Law, Technology and Humans* 64, 77; Felicity Bell, 'Family Law, Access to Justice, and Automation' (2019) 19 *Macquarie Law Journal* 103, 132.
68 Sarah Hawksworth, 'Assisting the "Missing Middle": Funding the Costs of Litigation' (29 April 2015) 9(1) *Law Society Journal* 84, 84–5.
69 Maclean (n 42).
70 See, eg, Law Council of Australia, *The Justice Project: Introduction and Overview* (Final Report, August 2018).

In the meantime, to minimise legal need for the 'missing middle' and improve their access to justice, advocates should consider the recommendations of the Law Council of Australia. Among these are promoting and facilitating alternative dispute resolution, such as mediation, as well as offering 'unbundled' legal services for discrete legal tasks, providing 'low-bono' (highly discounted) services, and being receptive to third-party litigation funding.[71]

[71] Law Council of Australia, *Addressing the Legal Needs of the Missing Middle* (Position Paper, November 2021) 4–8.


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