



**ATTORNEY-GENERAL
HON ROBERT McCLELLAND MP**

**ADDRESS TO THE
LAW COUNCIL OF AUSTRALIA
36th AUSTRALIAN LEGAL CONVENTION**

CHECK AGAINST DELIVERY

PERTH

FRIDAY, 18 SEPTEMBER 2009

First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

- The Hon Colin Barnett MEd MLA, Premier of Western Australia;
- The Hon Chief Justice Robert French, Chief Justice of Australia;
- The Hon Chief Justice Wayne Martin, Supreme Court of Western Australia;
- Mr John Corcoran, President, Law Council of Australia;
- Distinguished guests;
- Ladies and gentlemen.

Thank you for inviting me to speak today and for your warm welcome.

As Law Council President, John Corcoran noted in his welcome, this Conference provides a great opportunity for all areas of the profession to get together and discuss new ideas and reflect upon the effectiveness of current laws.

It also provides an opportunity to think more broadly about the effectiveness of our justice system.

It is my pleasure to speak to you this morning about 'Law and Government'.

While constitutionally separate, the Judiciary, the Executive, and the Parliament are inextricably connected and form the three 'arms' of Government.

Government in our country is centered on a stable democracy underpinned by the rule of law. The role of Attorney-General pivots between each arm of Government and is, in many ways, a bridge between the Judiciary and the Parliament.

As the member of the Federal Executive responsible for the national legal profession, the Attorney-General is also a facilitator of the role that practitioners play. We are all, however, collectively custodians of the rule of law.

In fulfilling that role, we need to keep in mind who we serve.

Insofar as our democracy is based on respect for the rule of law and not coercive powers, it ultimately depends on acceptance by the members of our society. Where it is necessary for the law to be enforced it must be done in a fair and balanced way – with appropriate balances and safeguards.

It is said that what doesn't grow stagnates or withers. Accordingly, in fulfilling our collective responsibility we also have an obligation to propose new ideas, scrutinise proposals, discuss options and aim to continually improve our system of justice for the benefit for the community.

Today provides an opportunity for me to further engage in that dialogue in the context of reforms in progress, and in contemplation, to deal with some of the upcoming challenges that we face.

The Legal Framework

Lawyers rightly scrutinise any extension of Executive power – particularly where it involves greater coercive powers. In that context there has been considerable debate about the role of counter-terrorism laws.

There is no greater responsibility of Government than to protect the safety and security of its citizens.

The Rudd Government is committed to ensuring the focus of Australia's national security and counter-terrorism laws remains on preventing a terrorist attack from occurring in the first place – not just waiting to punish those who would commit these heinous crimes after they occur.

An effective legal framework is therefore fundamental to our ability to address Australia's security environment. At the same time we need to ensure that our response is consistent with our democratic values and traditions.

To that end, the Government has proposed a number of reforms to Australia's national security and counter-terrorism legislation. These laws were initially introduced in a situation of urgency after the September 11 attacks and the Bali and London bombings. It is now time to reflect and recalibrate those laws so that they may continue to enjoy long-term community acceptance.

We need to ensure our agencies have the tools they need to protect the community. We also need to ensure the laws and powers are balanced by appropriate safeguards and are accountable in their operation. I welcome all the contributions, including from the Law Council of Australia, to the draft amendments that the Government has circulated.

On the other side of the coin, we will soon receive the report of the National Human Rights Consultation Committee. I also welcome the broad contributions to the important debate that this report will generate.

The Role of the Courts

I've observed since becoming Attorney-General, an increasing willingness of the judiciary to become more responsive to the profession and to litigants. Indeed, I sense that, in part, this is due to an increasingly competitive and talented judiciary. Whatever the reason – it is a very good thing.

There is no doubt that a talented judge with expertise in the subject matter before the Court, and properly equipped with appropriate case management powers, is a tremendous instrument of justice.

Such a judge can achieve great savings for their client and the community.

At a Federal level, to ensure we obtain that judicial talent we have introduced a system where judicial selections are assisted by advisory panels involving heads of jurisdiction, eminent jurists and representatives of the Attorney-General's Department. I am proud of each selection I have made as Attorney-General – they are extremely talented lawyers and decent fair-minded people.

With the assistance of the Federal Court, we have also introduced legislation to give the Federal Courts greater case management powers. I will expand on this shortly, but in short it provides an overriding obligation on all parties to play their part in ensuring that the courts can function as quickly, inexpensively and as efficiently as possible.

Again, I also appreciate the valuable assistance I have received from the legal profession and I would welcome your ongoing feedback as these reforms are implemented.

Access to Justice

Before discussing possible reforms in the area of access to justice, can I congratulate the legal profession for the amount of high quality pro-bono work that you do.

I had contemplated various models of mandating a specified amount of pro-bono work as a condition of Government contracts, however, on our calculations this would in fact risk downgrading the actual amount of pro bono work that is provided.

The pro-bono roundtable has provided great assistance in prioritising pro-bono services.

In addition, I also appreciate the assistance the legal profession is providing through the International Pro Bono Advisory Group. We are in our early stages of liaising with non-Government aid organisations and AusAid as to areas of the greatest need, most particularly in our region. We will then work through a schedule of work to identify where legal practitioners may be able to assist.

Further promoting the rule of law and respect for fundamental human rights in our region is vital to the maintenance of civil society and hence, the stability of those countries and our region.

As Attorney-General, I consider that access to justice is one of my highest priorities. That is a view generally shared by the legal profession.

Not only is access to justice central to the rule of law and integral to the enjoyment of basic human rights. It is also an essential precondition to social inclusion and a critical element of a well-functioning democracy.

An effective and accessible justice system must be accessible in all its parts.

Without this, the system is compromised and in danger of losing its relevancy to, and respect from the community it serves.

I know from my experiences as a lawyer and Member of Parliament that many people are intimidated by the justice system, while others feel they don't have sufficient skills or resources to navigate it.

Increasingly, the experience of ordinary Australians dealing with the justice system is marked by confusion and complexity.

Many consumers do not have a clear, or even basic, picture of their rights and responsibilities when engaging a lawyer, nor are many aware of what to do should something go wrong.

In its 2006 report, *Justice Made to Measure*, the Law and Justice Foundation of NSW, found that nearly three quarters of those with a legal issue that sought advice, did so from a non-legal adviser such as their doctor or accountant. Even more striking was the fact that less than 5 per cent of legal issues were resolved through formal legal proceedings.

Statistics such as this demonstrate that access to justice is not necessarily just about more courts and lawyers.

While these aspects are undoubtedly important, real access to justice can only be achieved by ensuring that people can access the information or assistance they need to resolve disputes when they arise.

Critically, we must also focus on prevention, rather than just cure.

We need to ensure our policies and laws work to prevent disputes from arising in the first place, through, for example, drafting clear and simple laws, providing better information, and building resilience in individuals and communities. Projects such as those being undertaken by the legal profession in Law Week can be part of that educative process.

The reality is that there are many situations where courts are the last place people will get the outcome they are looking for to resolve their issues. And I think there is an increasing tendency for lawyers to acknowledge that the best thing they can do for their clients is keep them out of court.

Often a full blown court case will be completely disproportionate to the issues in dispute.

The Rudd Government is facilitating this process with the introduction of two important Bills to make federal courts more flexible and minimise the costs of litigation.

The *Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008* will give the Federal Court the power to refer questions arising in proceedings to a referee for inquiry and report. This is an important reform that will provide greater flexibility in obtaining expert assistance and will enable litigation to be managed more effectively.

The *Access to Justice (Civil Litigation Reforms) Amendment Bill* contains important case management reforms to improve the operation of the Federal Court. The centre-piece of this is a new overarching obligation to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible.

I hope these Bills will be passed by the end of this year.

Access to Justice Taskforce

Cases like *C7* and *Bell*, with which you are all familiar, may capture public attention due to their sheer scope and the public and private costs of running them, but they are far removed from the justice issues and experiences of most Australians.

In January 2009 I established an Access to Justice Taskforce in my Department to undertake a comprehensive examination of the federal civil justice system with a view to developing a more strategic approach to access to justice issues.

I have recently received the report of the Taskforce and I expect to formally release it in the near future for public discussion and input.

Without pre-empting this process, the Taskforce has found that information failure is a significant issue in the justice system.

People often don't understand legal events, what to do or where to seek assistance. As a consequence, people who mistakenly approach the 'wrong' area of the system feel they have been rejected by the system.

In addition to information failure, the cost of legal services is undoubtedly a major barrier to people accessing the justice system.

The perception, true or otherwise, that engaging a lawyer will be too costly discourages many from seeking legal advice. This perception is difficult to shift when many lawyers remain wedded to a time sheet costing that is based on time rather than outcomes. In some ways that system rewards inefficiency over value.

Improving the transparency of legal costs and the way they are calculated is one way in which this situation can be improved.

This will also allow consumers to meaningfully assess the value of legal services they receive and encourage greater competition in the legal market.

The Taskforce also concludes a more strategic approach to legal assistance is needed, including greater collaboration between service providers and a stronger emphasis on early intervention and dispute prevention. It is proposed that a triage process be

developed where individual problems are assessed for the most appropriate means or resolution.

Every citizen has a right to their day in court. But we as practitioners have a responsibility to ensure that step is a last, not first, recourse. Where there are more cost effective and expeditious ways of resolving disputes, these should be specifically pointed out.

These are vitally important issues that go to the heart of an effectively functioning legal system.

I look forward to the contribution of each of you on the findings of the taskforce, and helping to guide our agenda for the future.

Conclusion

To ensure that we collectively deliver on our obligations, it is critical that we work together and maximise cooperation between Government, the community and the private profession to improve access to justice for Australians, particularly those most vulnerable and disadvantaged.

I congratulate you, individually and collectively, on the good work you are doing and wish you well for the convention, and in your work.

Thank you.