OCCASIONAL REMARKS: NORTH AND NORTH WEST COMMUNITY LEGAL SERVICE INC 21ST CELEBRATION

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Introduction

1 Good evening, members of the profession, members of the local community, guests one and all. I pay my respects to the traditional owners of this land upon which we meet, and in particular, to their elders and law makers. It is an honour to have been invited to speak to you on this important occasion to mark 21 years of the North & North West Community Legal Service and to celebrate the work and achievements of the Service, its staff and its volunteers.

2 Most of the privileges associated with adulthood, like the right to vote, drive and drink alcohol, now accrue at a younger age, but 21st birthdays retain a special significance in our culture as a coming of age in a more mature way than could ever be the case at 18 (three years is a lifetime of experience for most young adults) and a time for celebration. When I received the invitation to speak to you this evening, I thought it fit to reflect on how one would ordinarily go about a 21st celebration. Alas, I do not have any embarrassing early photos of the Service to share (nor, thank goodness, do I have any of me)!

3 It is customary at 21st celebrations to reflect on the past and the path travelled, while also looking forward with an eye to future goals and aspirations. Your invitation has given me the opportunity to do both.

[*] I wish to express my thanks to my Researcher, Adam Fovent for his invaluable research and assistance in the preparation of this paper.

4 Australia is recognised as a society which is the "*fair go" society*", and in many ways it is. We are also increasingly being reminded that we are a society governed by the rule of law. That is indisputable, although in popular use the principle is often invoked to castigate those who do not abide by the law. However, the rule of law is not as confined as such invocation would appear to have it and is far more nuanced. AV Dicey, an early exponent of the concept, described the rule of law in terms that citizens were not to be the subject of arbitrary rule: in other words, that law makers and law enforcers themselves were bound by and required to abide by the rule of law.

5 The concept is now described so as to encompass a broader, and, I would suggest, a more cohesive notion relevant to a modern society, as follows:

- "*accountability under the law generally applicable to governments, public officials, individuals, and public and private entities*";
- "*clear, publicised, stable and just laws evenly applied which protect fundamental rights including the security of persons and property*";
- "*accessible, fair and efficient processes for the enactment, administration and enforcement of laws*"; and
- "*timely delivery of justice by a sufficient number of competent, ethical, independent, adequately resourced representatives and neutrals who reflect the makeup of the communities they serve*".[1]

6 The role of community legal centres in facilitating accessibility, representation, delivery of justice and advocating for just laws, is nicely cocooned in the second, third and fourth of those features.

The role of CLCs in promoting access to justice

[1] The Hon. Robert French AC, "The Rule of Law as a Many Coloured Dream Coat" (speech delivered at the Singapore Academy of Law, 18 September 2013) 8

7 The growth and success of community legal centres can be traced in large part to the socio-political context and climate of change that took hold in the 1960s and 1970s: protesting the war in Vietnam, "*flower power*", feminism and the 1965 Freedom Ride. Although there had been various schemes of publicly funded legal assistance available for disadvantaged persons involved in criminal matters,[2] prior to the 1970s and the Whitlam era, there was no publicly funded legal aid scheme in Australia providing legal representation in civil matters. In a wonderful article written in 2012, entitled '*From maverick to mainstream: forty years of community legal centres*', Jude McCulloch and Megan Blair identified the reasons why the earliest community legal centres emerged:

- This was unique point in time when widespread calls for radical change created a culture of protest and direct action;
- New blood was entering the legal profession; and
- There was a dynamic new federal government, eager for novel ideas and fresh solutions to old problems.[3]

These many circumstances converged to aid and abet the new community legal centres and ensure their survival in some form.

8 The Fitzroy Legal Service in Victoria, widely regarded as the first of what we now call community legal centres, opened its doors in 1972.[4] In New South Wales, the Redfern Legal Centre opened some five years later in 1977 following the coming together of lawyers, volunteers, academics, social workers and community activists in a 1975 forum on the need for community

[2] See, for example, *Poor Persons Legal Remedies Act 1918* (NSW); *Legal Assistance Act 1943* (NSW).
[3] See Jude McCulloch and Megan Blair, 'From maverick to mainstream: forty years of community legal centres' (2012) 37(1) *Alternative Law Journal* 12, 16
[4] Ibid

legal centres that challenged unfair laws and helped people exercise their rights.[5]

9 These early Australian community legal centres were a product of their time, rather than any particular organised government plan or design. As one account puts it, the early Australian community legal centres:

> …were not part of any overriding articulated plan. The early centres – to use key words of the time – were 'unstructured', celebrated 'spontaneity' and operated in the spirit of 'do your own thing'. Pioneers were making it up as they went along.[6]

10 The impacts of the work of these early Australian community legal centres has been described as follows:

> In seeing, publicising and meeting a legitimate need for affordable legal services, CLCs forced governments that had previously ignored the law's uneven impacts on rich and poor to admit the problem, and conveniently absolved the government from seeking a solution. Put another way, governments may have been more open to admitting the problem when the remedy was so clearly at hand…[W]hen the Whitlam government gave [Fitzroy Legal Service] financial backing in 1974, it signified official recognition that the model worked and was valued.[7]

11 This can be compared with the development of community legal services in the United States, which followed a different, more consciously planned trajectory. In his 1964 State of the Union address, US President Lyndon B Johnson declared "*all-out war on human poverty and unemployment in [the] United States*" and beseeched Congress to join him in working towards "*a nation that is free from want and a world that is free from hate--a world of peace and justice*". The subsequently enacted *Economic Opportunity Act 1964* (US) provided authority for the establishment of community action programs "*to provide stimulation and incentive for urban and rural*

[5] Community Legal Centres NSW, *Annual Report 2015/2016,* 6
[6] Jude McCulloch and Megan Blair, 'From maverick to mainstream: forty years of community legal centres' (2012) 37(1) *Alternative Law Journal* 12,13
[7] Ibid 16

communities to mobilize their resources to combat poverty".[8] In this period, so-called "*neighborhood law offices"* were established in poor areas and functioned with government funding and full-time staff.

12 From their early origins, community legal centres in Australia have certainly flourished. There are now almost 200 community legal centres under the auspices of the National Association of Community Legal Centres. The association reports that in 2014/2015 financial year, community legal centres across Australia "*assisted over 216,000 clients with advice/casework services; provided over 250,000 referrals; and responded to around 190,000 requests for legal information from the public*".[9] That is not to mention the policy advocacy and law reform work conducted by over 75% of community legal centres.[10] As Bell J observed in a 2012 edition of the *Alternative Law Journal* marking 40 years of the community legal centre movement in Australia:

> The distinctive feature of CLCs is their pursuit of a reform agenda…The development of specialist expertise through a solid casework base is important to the quality and credibility of the policy work.[11]

13 Looking at New South Wales in particular, in the 2015/2016 financial year, community legal centres provided assistance to at least 55,460 people and completed 253 law reform and legal policy projects.[12]

14 The North & North West Community Legal Service should be proud of its contribution over the past 21 years. The scope of that contribution is vividly illustrated by the impressive description of the Service on its website as covering 98,000sq kms, or 12% of the state of New South Wales, and of its solicitors as travelling up to 26,000 km a year!

[8] *Economic Opportunity Act 1964* (US), s 201
[9] National Association of Community Legal Centres, *2016 Annual Report,* 1
[10] Ibid 3
[11] The Hon Justice Virginia Bell AC, 'Introduction' (2012) 37(1) *Alternative Law Journal* 2
[12] Community Legal Centres NSW, *Annual Report 2015/2016,* 8

15 With that said, the goal of ensuring access to justice is a continuing rather than static one. As the National Association of Community Legal Centres has recently reported, almost 160,000 people were turned away from community legal centres throughout Australia in the 2014/2015 period.[13] Of those, 67.3% were turned away due to insufficient resources. In 35.6% of cases, the community legal centre was unable to provide the person being turned away with an appropriate, accessible and affordable referral.

16 Over the past few years, there has been an increasing awareness of the difficulty of accessing legal services in rural, regional and remote areas. In 2014, the Law and Justice Foundation of New South Wales reported the per capita rate of solicitors in rural, regional and remote areas as three to four times lower than in non-rural areas.[14] The Foundation has also reported that some local government areas have no or very few registered solicitors, as a result of which parties must travel substantial distances in order to access legal services.[15]

17 Although almost 70% of community legal centres self-identify as providing services to clients and communities in rural, regional and remote areas, those figures include state-wide legal services based in major city areas but which provide outreach services.[16] It must be recognised that access to legal advice which is not only technically sound, but also informed by an understanding of the relevant community, is vital to confidence in the administration of justice in our communities. One without the other does not get us very far. Services such as the North & North West Community Legal Service, which have their roots in, and have grown to serve, their local and regional communities are to be lauded in this respect.

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[13] Ibid 2
[14] Law and Justice Foundation of New South Wales, *Lawyer availability and population change in regional, rural and remote areas of New South Wales* (2014) *x*.
[15] Ibid.
[16] National Association of Community Legal Centres, *National Census of Community Legal Centres: 2015 National Report* (2016)19

18 Compounding the difficulties of access to legal services is the increasing specialisation and complexity of the law itself. In this regard, the Law and Justice Foundation of New South Wales reported the difficulty in rural, regional and remote areas of finding private solicitors to undertake Legal Aid grant work in areas such as care and protection, family law and civil law.[17] The forces of legal specialisation can also be seen in the make-up and activities of community legal centres.

19 For example, in the 2015 Census conducted by the National Association of Community Legal Centres, 60.9% of centres described themselves as "*generalist*" or "*generalist with specialist programs*", as compared to 39.1% of centres which described themselves as "*specialist*".[18] The top three specialist areas or client groups were domestic/family violence, homelessness and family law.[19] In New South Wales, 53% of centres are "*generalist*" or "*generalist with specialist programs*", whereas 47% are "*specialist*" services.[20]

20 Undoubtedly, the cost to individuals of obtaining legal advice and representation is a continuing obstacle to universal access to justice. I highlight the continuing difficulties and challenges both with the intention of emphasising the great strides that have been but also with an eye to applauding and encouraging the endeavours of community legal centres going forward.

The role of legal representation in the delivery of justice

21 I want to focus a little more on the role of legal representation in access to, and the achieving of, "*justice*". One of the most fundamental tenets of our legal system is that of equality before the law. Fair treatment of all those who come into contact with the legal system, regardless of gender, ethnicity,

[17] Law and Justice Foundation of New South Wales, *Lawyer availability and population change in regional, rural and remote areas of New South Wales* (2014) *xi*.
[18] National Association of Community Legal Centres, *National Census of Community Legal Centres: 2015 National Report* (2016)19
[19] Ibid 19
[20] Community Legal Centres NSW, *Annual Report 2015/2016,* 10

disability, sexuality, religious affiliation or socio-economic status, is vital to the maintenance of public confidence in the administration of justice. Indeed, judicial officers in the State of New South Wales each swear "*do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will*".[21]

22 A necessary corollary of equality before the law is the recognition, both as a matter of common law principle and statute, that everyone has the right to represent themselves in court, whether the matter be civil or criminal. Rule 7.1 of the *Uniform Civil Procedure Rules 2005* (NSW), for example, provides that "*[a] natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person*". Likewise, s 78 of the *Judiciary Act 1903* (Cth) provides that "*[i]n every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as…are permitted to appear therein*".

23 So much may be accepted as a principled reflection of the notion of equality before the law. However, the question of entitlement, in the exercise of personal choice, to appear for oneself in legal proceedings is a very different question from the impacts, in terms of outcome, when individuals are forced, as a matter of circumstance, to represent themselves because they do not have access to legal advice or assistance.

24 It is trite that the fact an individual is self-represented does not mean that their claim lacks merit. However, the practical reality is that, for most self-represented litigants, the legal system is a foreign and often unintelligible one. Although the Courts have an obligation to ensure a fair hearing, which may in certain circumstances require the provision of some measure of guidance and assistance to self-represented litigants, there are very real limits to what a judge can do without imperilling their own objectivity and impartiality.[22] It is

[21] *Oaths Act 1900* (NSW), Sch 4
[22] See, eg, *Reisner v. Bratt* [2004] NSWCA 22

obvious to anyone that has any experience in the legal system that a lack of legal advice and guidance has the potential to engender difficulty in demonstrating the merits of an otherwise meritorious case.

25 Although it is never advisable to generalise from statistics, there is empirical evidence to the effect that lack of access to legal representation has real implications in terms of the substantive outcome of cases. There is a well-known randomised empirical study from the United States which was conducted in the early 2000s on the impact of legal counsel on the outcomes achieved by poor tenants in New York City's Housing Court.[23]

26 It is worth recounting briefly the background and context of the study. As detailed in the published results of the study, the Housing Court was created under the jurisdiction of the Civil Court of the City of New York to enforce laws regulating housing conditions and to adjudicate tenancy disputes.[24] On the literature available prior to the study, approximately 70% of New York City households were renters and 95% of low-income renters were estimated to be paying half or more of their income in rent.[25] Published estimates were that while 98% of landlords had legal representation in Housing Court, only 12% of tenants had legal representation.[26]

27 Against this background, the study set out to compare the outcomes for 268 legal aid-eligible tenants as between those that were targeted to receive legal representation and a control group which was not. In terms of specific results, the study found that judgment was entered against the tenant in 21.5% of cases in the represented group, as compared to 50.6% of cases in the unrepresented group.[27] A warrant of eviction was issued in 10% of cases in the represented group, compared to 44.1% of cases in the unrepresented

[23] Carroll Seron, Martin Frankel, Gregg Van Ryzin and Jean Kovath (2001) 'The impact of legal counsel on outcomes for poor tenants in New York City's Housing Court: Results of a Randomized Experiment (2000) 35(2) *Law & Society Review* 419
[24] Ibid 420
[25] Ibid 421
[26] Ibid 421
[27] Ibid 428

group.[28] These specific numerical results are not, in themselves, my focus except insomuch as they illustrate the authors' ultimate conclusion, which was framed as follows:

> The findings from this experiment clearly show that when low-income tenants in New York City's Housing Court are provided with legal counsel, they experience significantly more beneficial procedural outcomes than their *pro se* counterparts. Represented tenants are much less likely to have final judgment and order of eviction against them and more likely to benefit from a stipulation requiring rent abatement or repair to their apartment. Because this evaluation is based on a true randomized experiment, these differences in outcomes can be attributed solely to the presence of legal counsel and are independent of the merits of the case.[29]

28 Obviously these results must be interpreted in context – that is, as indicative of outcomes in the New York City Housing Court in the early 2000s. However, they do, at the least, serve to illustrate that the difficulties faced by unrepresented litigants may tangibly impact on outcome and not just in access or felt experience. Indeed, there is some evidence to like effect in Australia.

29 A study of unrepresented litigants in the Family Court of Australia, for example, reported that in appeal proceedings, 61% of unrepresented appellants had their appeals dismissed compared to 43% of represented appellants.[30] The authors of the relevant study interpreted this as "*indicating that the appeal grounds of represented appellants were less likely to be baseless, or unconnected to the issues decided at first instance*".[31]

30 At the outset of these remarks, I recounted a formulation of the defining features of the rule of law which includes the "*timely delivery of justice by a sufficient number of competent, ethical, independent, adequately resourced*

[28] Ibid 428
[29] Ibid 429
[30] Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia* (Law and Justice Foundation, 2002) 157
[31] Ibid 157

representatives". This linking of the delivery of justice with competent and ethical representation, and my brief dalliance into the empirical evidence, should serve to emphasise the fundamental importance of the services provided by community legal centres such as the North & North West Community Legal Service.

31 As lawyers, we are the ones who have the knowledge to assist people in navigating the system – a system which is our bread and butter but which is so often a foreign and treacherous territory for everyone else. In its report released in December 2014, the Productivity Commission estimated that only the lowest 8 per cent of households meet means tests for grants of legal aid, leaving a vast "*missing middle*" of Australians who are unable to obtain publicly funded legal representation but also unable to afford legal services at market rates.[32] For such Australians, community legal centres are the obvious, and oftentimes only, place to turn.

Concluding remarks

32 I read on the Service's website a reference to its "Purpose Statement" of striving "*to support those who have least access and the least power to help themselves*". That goes right to the heart of equality before the law and access to justice. It is truly my honour to join you in recognising 21 years of the North & North West Community Legal Service, and in celebrating its continued contribution to justice in the local and regional communities it serves.

[32] Productivity Commission, *Access to Justice Arrangements*, Report No. 72, September 2014.