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# LAW AND POVERTY: A PARADOX

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## I INTRODUCTION

Contemplating the ideal of a just society has been the province of philosophers for at least two and a half millennia.[1] During this period, philosophers have had very different ideas about the nature of law and the way laws should be made and enforced. But the role of law in bringing about and maintaining a just society has always been part of the philosophical debate, although not always a central feature of it.

In the last half century or so in most liberal democracies, including Australia, debate about the role of the law and the legal system in bringing about a fairer and more just society has extended well beyond philosophers and legal scholars. Indeed 'access to justice' (to use the modern catchphrase)[2] has become something of a preoccupation among governments, the judiciary, professional bodies representing practising lawyers and segments of the wider community.

There is no single explanation for the phenomenon, although it is connected with the emergence of the postwar welfare state, in one form or another, in many Western countries. The welfare state was predicated on the recognition that all people, including those unable to participate in the labour force, should be assured of a minimum if modest income and reasonable access to essential services, notably health care and a decent education. The principles underlying the welfare state reflected both a particular conception of a just society and an understanding that severe deprivation is a breeding ground for social disharmony and conflict.

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1 Two of the most influential modern contributions are John Rawls, *A Theory of Justice* (Oxford University Press, 1972) and Amartya Sen, *The Idea of Justice* (Allen Lane, 2009).

2 Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public and International Law* 85, 86.

Reform of the law and the legal system was not seen, at least initially, as central to the goals of the welfare state. The focus was on introducing or improving income maintenance programs and relying on redistributive policies to reduce inequalities in society. The law continued to be relegated to its traditional function of achieving 'justice' in individual cases according to principles that emphasised stability and continuity.

In due course, however, it became apparent that the legal system contributed to the deprivation and the multitude of injustices inflicted on poor people. This provided an impetus to reform areas of the law of particular significance to disadvantaged people. Reforms designed to ameliorate the most egregious injustices encouraged policymakers to view the law through the prism of reform. Instead of legal rules and institutions being perceived as a means of reinforcing the privileged position of more powerful individuals and groups, some saw the law, potentially at least, as a positive force for alleviating the social and economic disadvantages associated with poverty.

In the decades following the Second World War, the United States seemed to provide a model for a legal system capable of bringing about a profound rebalancing of the relationship between the legal system and disadvantaged people. Lyndon Johnson's 'War on Poverty'[3] coincided with the Supreme Court transforming the interpretation of the Constitution. The *Civil Rights Act* of 1964[4] and the progressive agenda of the Supreme Court of the United States, most notably in the 1954 *School Desegregation Case*[5] and its aftermath,[6] provided powerful evidence that the law could be a force for social and political change.

The United States experience drove home that in a liberal democracy the legal system could and should function to protect individuals and disadvantaged minorities against oppression or discrimination by the majority.[7] Australia, unlike the United States, did not (and does not) have a constitutionally entrenched Bill of Rights. Yet reformers could take heart from the counter-majoritarian decisions of the Supreme Court of the United States. Instead of the courts applying and enforcing principles that in practice further disadvantaged already marginalised groups, the courts could actually serve as agents of significant social change.

## II THE *LAW AND POVERTY REPORT* IN CONTEXT

In Australia the long postwar conservative ascendancy came to an end with the election of the Whitlam Government in 1972. During its less than three years

3 As to the origins of the 'War on Poverty', see Robert A Caro, *The Years of Lyndon Johnson: The Passage of Power* (Bodley Head, 2012) 538–45.

4 The *Civil Rights Act of 1964*, 7 USC (1964) was passed during Johnson's presidency but implemented proposals formulated during the presidency of John F Kennedy. The 1964 Act went much further than the *Civil Rights Acts* of 1957 and 1960, which were passed during Johnson's period as 'Master of the Senate', described by Robert A Caro, *The Years of Lyndon Johnson: Master of the Senate* (Vintage Books, 2003).

5 *Brown v Board of Education of Topeka*, 347 US 483 (1954).

6 For example, *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971), upholding busing as a remedy for de facto segregation in schools.

7 See Ronald Dworkin, *Taking Rights Seriously* (Duckworth, first published 1977, 1981 ed) 133.

in office, the Whitlam Government engaged in an energetic, if not frenetic, reform program. The legislative reforms of that brief period transformed the legal landscape. Legislation such as the *Family Law Act 1975* (Cth), the *Trade Practices Act 1974* (Cth)[8] and the *Racial Discrimination Act 1975* (Cth) remain cornerstones of Australia's legal system in the 21st century.

The Whitlam Government's reform activities included establishing numerous policymaking bodies, both ad hoc and permanent, to examine social and economic issues and propose reforms. Some were specifically concerned with reform of the legal system.[9] One such body was the Law and Poverty section of the Australian Government Commission of Inquiry into Poverty, which came into existence as the result of the Whitlam Government expanding the scope of the inquiry chaired by the distinguished economist Professor Ronald Henderson.[10]

The *Law and Poverty Report*[11] was only one of many reports of that period addressing issues of poverty and social deprivation. It did, however, represent the first attempt in this country to formulate a reasonably comprehensive program to enhance what these days would be described as 'access to justice'. For that reason, it provides a convenient starting point for a brief overview of half a century of access to justice in Australia.

The inquiry into law and poverty reflected, in Professor Langford's phrase, a 'generational moment'.[12] By this he means that in much of the Western world of the 1970s, 'diverse factors conspired to foreground law in social reform as both a sphere and strategy for addressing questions of poverty and inequality'.[13]

The 'zeitgeist' of the times encouraged optimism among policymakers that the hardship suffered by poor people could be ameliorated by new statutory rights and entitlements, provided that mechanisms were put in place to facilitate their enforcement. In this way legislative reforms, accompanied by publicly funded legal aid programs, could help realise the goal of equality before the law. More than this, the law could become a positive force for the elimination or at least substantial amelioration of the hardship and deprivation associated with poverty.[14]

The *Law and Poverty Report* did indeed reflect an optimistic view of the role of the law in achieving social change, but it was not alone in taking that approach. An influential world survey by Cappelletti and Garth published in

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8 Now the *Competition and Consumer Act 2010* (Cth) sch 2 (*Australian Consumer Law*).

9 For example, National Rehabilitation and Compensation Scheme Committee of Inquiry, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (Australian Government Publishing Service, 1974); *Law Reform Commission Act 1973* (Cth), establishing the Australian Law Reform Commission.

10 See Commonwealth Government, Commission of Inquiry into Poverty, *Poverty in Australia: First Main Report* (Australian Government Publishing Service, 1975) vol 1.

11 Commonwealth Government, Commission of Inquiry into Poverty, *Law and Poverty in Australia: Second Main Report* (Australian Government Publishing Service, 1975).

12 Malcolm Langford, 'Poverty and Law: A Comparative Perspective' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 45.

13 Ibid.

14 *Law and Poverty Report*, above n 11, 2.

1978 identified three 'waves' in the access to justice reform movement that they said was taking place across the Western world.[15] The three waves were said to be:

- the development and expansion of legal aid schemes;
- procedural and institutional changes designed to overcome 'organisational obstacles' to civil and political liberties, such as the introduction of class actions; and
- the promotion of alternative dispute resolution as a substitute for costly and dilatory court proceedings.[16]

This taxonomy necessarily oversimplified disparate developments in very different jurisdictions. It was also incomplete. Moreover, the imagery of waves of reform tended to create a false impression of successive and discrete movements, rather than 'a number of interrelated changes' taking place, if at all, at different stages in the development of various legal systems.[17] Nonetheless, the imagery has proved influential among commentators.

To some extent the recommendations in the *Law and Poverty Report* reflected the first two of the waves identified by Cappelletti and Garth. The *Report* concluded that 'the most significant bias of the legal system against poor people ha[d] been its failure to provide legal advice and representation to many who require that assistance'.[18] Accordingly, it proposed that the Commonwealth should establish by statute a Legal Aid Commission charged with responsibility to establish and administer a network of legal aid centres providing the full range of services permitted to the Commonwealth under the *Constitution*.[19]

The *Law and Poverty Report* corresponded to the second of Cappelletti and Garth's waves, by recommending procedural safeguards designed to improve the ability of disadvantaged people to enforce their legal rights and to protect their entitlements. The *Law and Poverty Report* accepted, for example, that it was not enough to change the law governing residential tenancies in order to remove the entrenched bias against people required to rent accommodation in the private market. It was also necessary to regulate practices open to abuse, such as the taking of security bonds, and to establish a specialist tribunal to facilitate the speedy and inexpensive resolution of disputes between landlords and tenants.[20]

Similarly, while it was clearly essential to increase the levels of support to poor people available through income maintenance programs, as Professor Henderson had recommended, safeguards were required to ensure that people received their proper entitlements. Those who relied on government programs for their very economic survival had to be accorded the right to challenge

15 Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report' in M Cappelletti and B Garth (eds), *Access to Justice: A World Survey* (Sijthoff and Noordhoff, 1978–1979) vol 1, 3, 21.

16 Ibid 21–54.

17 Sackville, 'Some Thoughts on Access to Justice', above n 2, 90.

18 *Law and Poverty Report*, above n 11, 3.

19 Ibid 52–3.

20 Ibid 68–72, 91–3.

unfavourable decisions and to be assured of procedural fairness in the conduct of appeal.[21] The oppressive application of the criminal law to Indigenous people required not only the repeal or overriding of legislation discriminating against them, but a range of new procedural safeguards designed to protect Indigenous people against unfairness in the criminal process and the risk of disproportionately harsh sentences.[22]

The principal focus of the *Law and Poverty Report*, however, was on reforms to the substantive law that did not find a place in the 'three wave' taxonomy. Most of the proposed reforms concerned areas of the civil law such as residential tenancy laws, consumer credit laws (or the lack of them) and stringent procedures for the enforcement of civil debts that inflicted particular hardship on poor people.[23] In some cases, long established common law principles such as freedom of contract, allowed commercial entities to exploit or take advantage of people who lacked the resources, both financial and personal, to protect their own interests adequately. Legislation based on English antecedents from another era, such as the *Imprisonment of Fraudulent Debtors Act 1958* (Vic), allowed for the imprisonment of so-called 'fraudulent' debtors. In practice these laws often resulted in the imprisonment of people who were simply unable to pay their debts and lacked the knowledge to take advantage of bankruptcy laws. Outdated criminal laws, the legacy of very different social conditions, in effect penalised homelessness and extreme poverty, conditions frequently associated with mental illness.[24]

The principal assumption underlying the reform proposals was that the substantive law could be reformed to redress, at least to some extent, the imbalance between more powerful groups and poorer people lacking the financial resources or knowledge to protect their legitimate interests. The first group included landlords of residential premises, credit providers and the government itself. The second group included tenants of residential accommodation in both the public and private sectors, people dependent on income maintenance programs and consumers lacking both information and bargaining power. Laws creating new rights were to be accompanied by an expansion of publicly funded legal aid and advice services. People who would otherwise be shut out of the legal system could utilise these services in order to enforce their rights or to defend themselves against exploitation and injustice. The *Law and Poverty Report* argued that the reform proposals, if implemented, would alleviate injustice, address some of the many disadvantages associated with poverty and even permit the law to become a force for change in the interests of poor people.[25]

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21 Ibid 172.
22 Ibid 288–9.
23 Ibid chs 3–5.
24 See ibid ch 9.
25 Ibid 2–3.

## III FOUR DECADES OF CHANGE

Australia is a relatively stable democracy, political perturbations notwithstanding. It has a written constitution that has remained largely unaltered, at least so far as the text is concerned, for nearly 120 years. It is therefore not surprising that the basic legal structure of the second decade of the 21st century contains many features that have remained intact over the last half century or more.

Yet a great deal has changed since the mid-1970s. The reforms of the substantive law and of legal procedures and institutions (including the courts) go well beyond the areas identified and addressed in the *Law and Poverty Report*. The many changes include:

- the implementation by domestic law of international human rights regimes, many of which aim to protect marginalised groups from discrimination and oppression;
- a more diverse judiciary, reflecting fundamental changes in the role of women in Australian society and a community enriched by a non-discriminatory immigration policy;
- the recognition of native title, first by the High Court[26] and then by Parliament;[27]
- the extension by legislation and judicial decisions[28] of the scope of both merits and judicial review of administrative decisions affecting all members of the community;
- the advent and widespread acceptance of 'managerial justice', whereby the courts take active responsibility for managing their caseloads;
- the introduction and refinement of representative procedure regimes under Commonwealth and state law;[29]
- the growth of alternative forms of dispute resolution as a supplement to or in competition with the judicial system; and
- the exponential increases in the sophistication and capacity of information technology and the slow but inexorable use of technology in dispute resolution.[30]

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26 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

27 *Native Title Act 1993* (Cth).

28 Notably *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

29 See Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

30 Recent reports in Britain have placed considerable faith in technology as the means to achieve 'radical and important structural change' in the civil justice system: Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (Judiciary of England and Wales, December 2015) 75 [6.1]; Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales, July 2016) ch 6; Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Civil Claims' (Report, Civil Justice Council, February 2015).

The fate of the proposals in the *Law and Poverty Report* constitutes therefore only one element in a much larger process of reform. Nevertheless, the extent to which the proposals have been accepted clearly demonstrates the extent to which Australian legislatures and the legal community have acknowledged the historical bias of the legal system against the interests of poor and disadvantaged people. In the four decades since the *Law and Poverty Report* was presented, legislation has been enacted in all Australian jurisdictions to address the most serious deficiencies in the substantive law identified in the *Report*. The legislative reforms are the product of many influences, of which the *Law and Poverty Report* itself was only one. The important point is that the substantive law in those areas now bears little resemblance to the law of the 1970s.

A recent assessment of residential tenancy law, for example, concluded that of the 34 recommendations in the *Law and Poverty Report* addressing the private landlord–tenant relationship, 33 have been implemented in whole or in part in all state jurisdictions other than Tasmania and Western Australia.[31] Even in those States many of the recommendations have been adopted.[32] An important empirical study of data obtained from the specialist residential tenancy tribunal in New South Wales demonstrates that substituting the tribunal for courts has led to dramatically higher levels of participation by tenants in the resolution of disputes.[33] Tenants have enjoyed high rates of success when making claims that hardly ever reached the courts under the old regime, such as claims for the return of bonds or for the enforcement of the landlord's obligation to carry out repairs to the premises.[34]

Changes of a similar magnitude have occurred in other areas of substantive law addressed in the *Law and Poverty Report*. It is true that the path towards reform has often been 'convoluted … [and] winding',[35] involving multiple inquiries and piecemeal reforms along the way. Even so, the substantive rights and procedural safeguards available to vulnerable groups, such as consumers of credit, defaulting debtors[36] and people dependent on income maintenance programs[37] have increased immeasurably. The law of consumer credit and debt enforcement procedures, for example, bears little resemblance to the regimes in force four decades ago. People entitled to Commonwealth benefits have

31 Brendan Edgeworth, 'Australian Residential Tenancy Law 40 Years after the Sackville Report: A Multi-Level Snapshot' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 119, 125.

32 Ibid 125.

33 Brendan Edgeworth, 'Access to Justice in Courts and Tribunals Compared – Residential Tenancy Disputes in Sydney (1971–2004)' (2008) 27 *Civil Justice Quarterly* 179.

34 Edgeworth, 'Australian Residential Tenancy', above n 31, 126, citing Edgeworth, 'Access to Justice in Courts and Tribunals Compared', above n 33.

35 Carolyn Bond, 'Consumer Credit, Debt and Disadvantage: How Far Have We Come in 40 Years?' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 134, 135.

36 See ibid 134–150.

37 Cf Scarlet Wilcock, 'Social Security Administration: Producing Poverty and Punishment' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 199.

procedural protections unheard of before the reforms of Commonwealth administrative law of the 1970s.

Legal aid services have greatly expanded, financed in large measure by Commonwealth, state and territory governments. The Whitlam Government paved the way by establishing the Australian Legal Aid Office ('ALAO'), the first national body offering a range of legal services to eligible people in areas of Commonwealth concern.[38] Again the path towards a new system was strewn with obstacles. The ALAO was created by executive action but efforts by the Whitlam Government to enact legislation underpinning a network of federally funded legal aid agencies came to nothing.[39] In consequence, the ALAO ultimately died a gradual death, its functions being absorbed by state and territory Legal Aid Commissions funded partly by the Commonwealth.[40]

Despite the fate of the ALAO, the intervention of the Commonwealth in legal aid has proved to be of great long-term significance. Successive Commonwealth governments, notwithstanding differences in ideology and priorities, have accepted that the national government should provide substantial funds for agencies providing civil legal aid and assistance services. Commonwealth, state and territory governments have also accepted the principle that publicly funded legal assistance should not only be available through statutory bodies such as Legal Aid Commissions, but also through community legal centres and more specialised service providers such as family violence prevention centres.[41]

As is to be expected in Australia's federal system, disputes often occur between the Commonwealth, the states and territories and legal aid agencies over funding issues. The conflicts tend to be particularly acute when the Commonwealth, which provides roughly half of total public funds provided for legal assistance,[42] seeks to reduce its commitment during periods of self-imposed fiscal restraint. Not surprisingly, service providers often complain, with considerable justification, that levels of funding are chronically insufficient to enable them to meet the demand for legal services from even the very poorest members of the community.[43] Nevertheless, governments now fund legal aid services to an extent barely conceivable in the mid-1970s.[44] Moreover, periodic

38 By mid-1975, the ALAO employed 376 staff including 153 lawyers: Don Fleming and Francis Regan, 'Revisiting the Origins, Rise and Demise of the Australian Legal Aid Office' (2006) 13 *International Journal of the Legal Profession* 69, 78.

39 A Bill was introduced in June 1975 but was deferred in October 1975 and was never revisited following the dismissal of the Whitlam Government in November 1975: ibid 85–6.

40 Ibid 86–7.

41 The Productivity Commission provided an overview of the funding of legal assistance services in Australia in Productivity Commission, 'Access to Justice Arrangements' (Report No 72, Australian Government, 5 September 2014) vol 2, chs 20–1.

42 Ibid 687–9.

43 The Productivity Commission recommended in 2014 that the Australian state and territory governments should provide additional funding for civil legal assistance services to maintain existing frontline services and expand services in areas that previously had not attracted government funding. The annual cost of these measures was estimated at $200 million: ibid 741.

44 According to the Productivity Commission, total government funding of 'legal assistance providers' in 2012–13 amounted to $734 million. Of this amount, the Commonwealth contributed $336.6 million and the states and territories contributed $397.4 million: ibid 688. The Commonwealth Attorney-General

political attempts to limit funding for legal aid services are apt to meet strong resistance. The successful opposition to proposals in 2016 to reduce Commonwealth support for community legal centres demonstrated that public funding for legal aid is a well-entrenched component of the Australian legal system.[45]

## IV A PARADOX

On any view, a great deal has been achieved over the last half century or so to make the law much less an instrument of injustice and much more responsive to and protective of the interests of poor and disadvantaged people. But the achievements give rise to a paradox. Over the last 25 years, Australia has seen an almost endless series of inquiries into 'access to justice' by a variety of governmental and non-governmental organisations.[46] It is undoubtedly true that useful proposals have come out of the multitude of reports. But the repetitive nature of these inquiries suggests that the civil justice system, despite extensive reforms to the substantive and procedural law and the expansion of legal aid programs, has failed to protect the interests of poor and disadvantaged people. It would seem that the goal of equal access to justice is as elusive as ever.

Relatively little attention has been paid to this apparent paradox. Why is it, when so much has been achieved, that so much effort is devoted to inquiries that seem to ask much the same questions and, for the most part, produce similar answers?

At least five factors are at work.

### A Inflated Expectations

One explanation for the paradox is widespread confusion as to the meaning of 'access to justice'. The reason that the expression is used freely by so many organisations and commentators with divergent agendas is that it conveys a powerful linguistic message, yet conveys different meanings to different people. The message incorporates both an ideal – 'the fundamental principle that all

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announced in April 2017 that Commonwealth funding for legal assistance services over the three-year period 2017–20, including support for Aboriginal and Torres Strait Islander services, would total $1.73 billion: George Brandis, Michaelia Cash and Nigel Scullion, 'Record Federal Funding for Legal Assistance' (Joint Media Release, 24 April 2017).

45 The Commonwealth proposed to reduce the funding for community legal centres from $42.2 million in 2016–17 to $30.1 million in 2017–18. Following widespread protests the decision was reversed. See Commonwealth, *Budget 2015–16: Budget Measures – Budget Paper No 2*, Parl Paper No 109 (2016) 61; Commonwealth, *Budget 2017–18: Budget Measures – Budget Paper No 2*, Parl Paper No 131 (2017) 66.

46 A phenomenon noted in the *Productivity Commission Report*, above n 41, vol 1, 73. In 2017, the Law Council of Australia established an inquiry entitled 'The Justice Project – A National Blueprint for Justice for All' chaired by the former Chief Justice of the High Court, the Hon Robert French AC: Law Council of Australia, *About the Project: The Justice Project* (2017) <https://www.lawcouncil.asn.au/ justice-project/about-the-project>. See also Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Consultation Paper (2017).

people should enjoy equality before the law'[47] – and a claim that the ideal is achievable. The implicit promise is that in a society that values justice and the rule of law all people can and should have effective means of enforcing their rights and of protecting their legitimate interests.

Some proponents of 'access to justice' interpret the concept to refer almost exclusively to dispute resolution in the civil justice system. They tend to focus attention on the way the courts dispense justice according to law. Lord Woolf's influential report *Access to Justice*, for example, sought to reduce the cost, delay and complexity associated with civil litigation. To this end he proposed reforms to court procedures and redefined the responsibilities of lawyers representing clients involved in disputes.[48] The Woolf Report held out the promise that pre-litigation protocols, managerial judging, less emphasis on an adversarial approach and greater use of alternative dispute resolution would reduce the expense and delays associated with litigation. Among other benefits, this would allow ordinary people, who had effectively been shut out of the courts, a reasonable opportunity to enforce their rights and defend their legitimate interests.

To many observers and policymakers, 'access to justice' has a much broader meaning than merely reforming the civil justice system. A more expansive understanding of the concept embraces at least reform of the substantive law in the interests of otherwise powerless groups, more vigorous enforcement of legal constraints on oppressive behaviour in the marketplace, innovative dispute resolution mechanisms adapted to the needs of poor and disadvantaged people, and ready access to sources of advice on problems that have a legal dimension but often are related to broader social, financial and health issues. Some go further and see access to justice as requiring more sweeping measures designed to allow for the realisation of economic, social and cultural rights,[49] and to redress the power imbalances created by great inequalities of wealth.

The more traditional view of access to justice implies that reforms to the civil justice system, of themselves, can overcome the most significant barriers to achieving equality before the law. The fundamental difficulty with this view, however, is that the expectations simply cannot be fulfilled. Courts can certainly strive to function more 'efficiently' in the sense of determining cases more quickly at a cost that is proportional to the issues in dispute. But there is an irreducible tension between two imperatives. The objective of reducing the costs and delays associated with litigation inevitably conflicts with the overriding requirement 'that courts adhere to [stringent] standards of procedural fairness and achieve principled and just outcomes'.[50] This tension is particularly acute in Australia where Commonwealth and state courts, as repositories of federal judicial power, are subject to constitutional constraints as to how civil justice is to be administered. In particular, Chapter III of the *Constitution* has been

47 This paragraph draws on Sackville, 'Some Thoughts on Access to Justice', above n 2, 86.

48 Lord Woolf, 'Access to Justice' (Final Report, HMSO, July 1996).

49 See the Preamble to the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

50 Sackville, 'Some Thoughts on Access to Justice', above n 2, 99.

interpreted to oblige both federal and state courts, in the exercise of judicial power, to adhere to stringent standards of procedural fairness and to provide cogent reasons for their decisions.[51]

It is now widely accepted that the Woolf reforms in England and Wales, although they may have reduced delays in resolving cases, did not succeed in lowering the costs of civil litigation and in some respects increased procedural complexity.[52] In Australia, the absence of detailed empirical studies makes it difficult to determine whether comparable reforms to the litigious process have reduced costs and delay to the extent that at least some disadvantaged people are better able to enforce their rights or to resist unjust claims against them. But even if the legislative and procedural changes to the civil justice system have substantially reduced the expense and delays experienced by litigants, the improvements cannot of themselves achieve the broader social objectives implicit in the concept of access to justice.

If civil justice reform does not lead to discernible improvements in the ability of ordinary people to enforce their rights or to defend their legitimate interests, it might be thought that expectations would be modified. Experience suggests that it is more likely that demands for greater access to justice will intensify and that these demands will generate further inquiries seeking to solve the problems. In reality, any inquiry into access to justice that focuses on the civil justice system has to recognise that the system has certain fundamental characteristics that cannot and should not be jettisoned. If this is not recognised, the outcomes of the inquiry will not match its aspirations or its rhetoric.

These observations are in no way intended to denigrate methodical and evidence-based proposals for improvements to the operation of the civil justice system. As Hazel Genn has pointed out, too many civil justice reviews have been conducted without the benefit of detailed empirical work that enables assumptions to be tested.[53] But to clothe the process with unrealistic expectations is to foster unnecessary and counterproductive community cynicism about the perceived deficiencies of the civil justice system. If ordinary people are to receive greater protection against exploitation, injustice or the denial of entitlements, it is necessary to go beyond the established mechanisms for dispute resolution.

## B Poverty Persists

The dramatic recent political upheavals in the United States, Britain and Europe reflect, in part, deep disillusionment among voters as inequalities within society become starker and the benefits of increased national wealth seem to flow almost exclusively to the privileged few. Australia is not immune from the malaise that has affected much of the developed world. Despite the profound social changes that have occurred over the past half century, including legal reforms, the fact is that a substantial proportion of the Australian population

51 *Wainohu v New South Wales* (2011) 243 CLR 181, 208–9 [44].
52 Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) 56–7.
53 Ibid 62–5.

continues to live in poverty. While neither the definition nor measurement of poverty is a simple task,[54] it is sobering to contemplate that the Australian Council of Social Service estimated that in 2014 about 2.99 million people in Australia (13.3 per cent of the population), including 731 300 children under the age of 15 (about 17.4 per cent of all children), lived in households below a poverty line set at 50 per cent of the median income (adjusted for housing costs).[55]

It is hardly surprising that 'access to justice' appears to be an elusive aspiration if, despite so many reforms, there has been no significant decline in the proportion of the population experiencing the multidimensional disadvantages associated with poverty. While most members of the community do not closely follow studies measuring the extent of poverty, they are able to observe what is in plain view. The disparities between outcomes for Indigenous communities and the rest of the Australian population, for example, in areas such as life expectancy, health, education and employment are both well known and notoriously difficult to overcome.[56] The gross over-representation of Indigenous people in the criminal justice system and in the prison population is a tangible demonstration that the law continues to operate as an instrument of injustice.[57] The promise of equality before the law and access to justice for all seems somewhat hollow when confronted with incontrovertible facts.

### C A Clamour of Voices

One consequence of enhanced expectations is the proliferation of voices demanding that the legal system respond to the injustices they have suffered. Individuals and groups who have in the past experienced abuse, discrimination and malign neglect have been emboldened sufficiently to make their grievances known. Expectations are then created that the legal system is capable of addressing their legitimate concerns in a timely and effective manner. To the extent that legal redress or protection is unavailable, the justice system is seen as having failed to afford redress to the victims of injustice or to progress towards the goal of equality under the law.

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54 See, for example, Rosanna Scutella, Roger Wilkins and Weiping Kostenko, 'Estimates of Poverty and Social Exclusion in Australia: A Multidimensional Approach' (Working Paper No 26/09, Melbourne Institute of Applied Economic and Social Research, December 2009); Bruce Headley, 'A Framework for Assessing Poverty, Disadvantage and Low Capabilities in Australia' (Report, Melbourne Institute of Applied Economic and Social Research, 2006) 8–10, drawing on Amartya Sen's concept of 'substantive freedom of choice': Amartya Sen, *Development and Freedom* (Anchor Books, 1999) 17–18.

55 Australian Council of Social Service and Social Policy Research Centre, 'Poverty in Australia: 2016' (Poverty Report No 5, Australian Council of Social Service, 2016) 11–12.

56 For a snapshot, see Department of the Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017). Oddly enough this document says nothing of substance about rates of imprisonment of Indigenous people.

57 The Productivity Commission reported that as at 30 June 2013, the rate of imprisonment for Aboriginal and Torres Strait Islander people was 13 times the rate for non-Indigenous adults (compared with 8.5 times the rate in 2000). In 2012–13, the rate of detention for Indigenous young people was around 24 times the rate for non-Indigenous young people: Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2014' (Report No 6, Productivity Commission, November 2014) 4.100.

Discrimination in the workplace based on gender, ethnicity or sexual orientation, domestic violence, sexual abuse of children and exploitation of disabled people are hardly new phenomena. What is relatively new is the widespread recognition that the legal system has neither protected nor provided redress to the victims of these forms of abuse or injustice. There are many reasons for this neglect. Too much time may have elapsed since the abuses were perpetrated, as in the case of the Stolen Generation.[58] Victims may have been unwilling or unable to invoke legal processes with all the attendant burdens and risks, as in the case of historic child sexual abuse.[59] Perhaps there have simply been no legal remedies available or those that are available, such as apprehended violence orders, too often have proved ineffective. When it becomes apparent that the justice system has not provided timely and effective redress for those most in need of it, the obvious conclusion is that they have been denied access to justice.

## D Limits of Reform

Well-intentioned reforms do not always achieve their objectives. There is little doubt that legislation requiring courts to conduct litigation as speedily and economically as is consistent with the dictates of justice, and to apply the principle of proportionality,[60] has contributed to curtailing the most egregious manipulations of the adversary systems designed to thwart legitimate claims or defences. But the frequent judicial denunciations of the disproportionate costs of litigation not only suggest that the legislative objectives are often not achieved but emphasise that the costs of litigation, including cases involving modest amounts, are all too often outside the control of individual litigants.

Legislation allowing for representative (or class) actions provides an example of double-edged reforms. The supporters of the procedural reforms argue that they have removed barriers that prevent powerless individuals from enforcing their rights collectively, thereby increasing the accountability of large corporations and governments for illegal or improper behaviour.[61] While some proponents of representative proceedings have a tendency to panegyrise,[62] there

58 *Cubillo v Commonwealth* (2001) 112 FCR 455.

59 See, for example, *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 164–7 [99]–[105] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

60 See, for example, *Civil Procedure Act 2005* (NSW) ss 56(1), 57, 59, 60.

61 See, for example, Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13.

62 Compare Ben Slade and Jarrah Ekstein, 'Class Actions and Social Justice: Achievements and Barriers' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 281 with Ray Finkelstein, 'Class Actions: The Good Bad and the Ugly' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 415.

is empirical evidence suggesting that in some situations the procedure is capable of achieving the objectives sought by the original reform proposals.[63]

But there is another side to the story. The High Court's endorsement of litigation funding[64] has created a new industry. Litigation funders can share in the proceeds of successful litigation, usually taking from between 25 and 40 per cent of the proceeds.[65] Not surprisingly, the funding criteria applied by litigation funders limit their involvement to the most commercially rewarding claims.[66] In consequence, representative proceedings on behalf of shareholders are more frequently supported by litigation funders than representative proceedings on behalf of poor and disadvantaged groups.

Representative proceedings have been brought on behalf of vulnerable groups such as short-term borrowers, victims of child abuse and asylum seekers, with varying levels of success.[67] Cases of this kind have an important role to play in facilitating claims that otherwise would not be brought before the courts. They are, however, relatively uncommon and often depend on the willingness of practitioners to provide pro bono assistance.

To the casual observer of the legal system, representative proceedings are associated with extraordinarily high legal costs and lucrative returns to litigation funders. The procedural reforms are therefore seen as having less to do with improving access to justice than with commercialising litigation and over-generously rewarding law firms for representing successful parties.

## E Backsliding

The Whig version of history does not apply to efforts to make the legal system more responsive to the interests of poor and vulnerable people. Progression towards that goal is not inexorable. Since political decisions tend to mirror the fears and concerns of a majority – or perceived majority – of the population, governments regularly employ legal mechanisms to impose restrictions on the rights of unpopular and powerless groups.

Nearly two decades ago I mused about whether judicial review of migration decisions in Australia was an institution in peril.[68] I had in mind the conflict between Parliament and the courts over who was to have the last say in migration

63 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43.

64 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

65 Law Council of Australia, 'Regulation of Third Party Litigation Funding in Australia' (Position Paper, June 2011) 4 [3].

66 John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32 *University of New South Wales Law Journal* 1036. See also Ronald Sackville, 'Lawyers and Litigation: A Pathway out to Wealth and Fame?' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 325, 329–33 [21.14]–[21.26]; Victorian Law Reform Commission, above n 46, 27–9 [2.80]–[2.91].

67 Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study' (2016) 35 *Civil Justice Quarterly* 61.

68 Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril?' (2000) 23 *University of New South Wales Law Journal* 190.

cases, notably claims by asylum seekers. The High Court appeared to have settled the controversy by interpreting Chapter III of the *Constitution* to preclude Parliament from legislating to render administrative decisions immune from 'jurisdictional error'.[69] However, successive Commonwealth governments have sought, with considerable success, to circumvent the judiciary's assertion of supremacy by banishing asylum seekers to offshore detention and outsourcing decision-making in relation to their claims for protection under the *Refugees Convention*.[70] The result, quite literally, has been that asylum seekers have been denied access to the Australian legal system to pursue their claims for protection.[71] The use of ever wider ministerial discretion, designed to foreclose merits review of decisions and to limit opportunities for judicial review, is another illustration of the phenomenon.[72]

Backsliding is evident in other areas of the law. The abolition of the criminal offences of vagrancy and public drunkenness was an important step in moving the law away from criminalising poverty and mental illness. But measures such as 'move-on' powers for the police and 'paperless' arrests for minor offences including public intoxication, have once again effectively criminalised manifestations of poverty and mental illness.[73] The familiar pattern of the law being used as an instrument of injustice is repeated.

## V THE LESSONS

### A Dispute Resolution outside the Legal System

Perhaps the major lesson to be learned from half a century of interaction between law and poverty in Australia is that more should not be expected of the

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69 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511–12 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

70 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) read with the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

71 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 61 [3] (French CJ, Kiefel and Nettle JJ) (concerning the Memorandum of Understanding between the Commonwealth and the Republic of Nauru, which relates to the processing of claims by asylum seekers removed to Nauru). Asylum seekers detained offshore have pursued other claims in Australia. On 14 June 2017, lawyers for 1905 asylum seekers detained on Manus Island in Papua New Guinea announced that a class action in the Supreme Court of Victoria alleging mistreatment by the Commonwealth and its contractors had been settled for $70 million plus costs: *Kamasaee v Commonwealth (No 10)* [2017] VSC 537. For the nature of the claims see *Kamasaee v Commonwealth (No 9)* [2017] VSC 171.

72 For example, the forbiddingly entitled Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth) proposes to confer on the Minister power to set aside certain citizenship decisions made by the Administrative Appeals Tribunal if the Minister 'is satisfied that it is in the public interest to do so': at sch 1 item 127, inserting cl 52A(1).

73 Vicki Sentas, 'The Poverty of Criminal Law: Criminalisation and the Limits of Access to Justice' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 249, 256–9. See also *Prior v Mole* (2017) 343 ALR 1, 4 [1], construing s 128(1) of the *Police Administration Act 1978* (NT), which empowered a police officer to arrest without warrant a person reasonably believed to be intoxicated in a public place, subject to certain conditions.

civil justice system than it is capable of delivering. The system is of course capable of delivering a great deal, but there are limits on what it can achieve to redress the manifestations of poverty and disadvantage. Other mechanisms, adapted to the particular needs of vulnerable people, must be identified and utilised.

It hardly needs to be said that an independent judiciary performs essential functions in our constitutional and democratic system of government. The judiciary's role in interpreting the *Constitution*, construing statutes, developing legal principles and resolving disputes impartially and according to law is fundamental to preserving the rule of law and protecting individual liberties. Within limits, courts and tribunals can shape legal rules to provide remedies for disadvantaged people who suffer injustice at the hands of governments, public agencies or commercial organisations. Courts and tribunals can strive to adapt their procedures to the nature of the disputes they have to resolve so as to reduce costs and delays so far as practicable. The expansion of legal aid and assistance services allows more disadvantaged people to pursue their rights or defend themselves against claims.

But courts and tribunals cannot resolve all or even most of the problems associated with poverty and disadvantage even if those problems have a legal dimension. The civil justice system cannot resolve all disputes – including disputes involving relatively small amounts – swiftly and at little or no cost to litigants. The system can provide remedies when a claimant establishes his or her case but it cannot perform a prophylactic role. Courts cannot initiate investigations into the actions of governments, public authorities or corporations to determine whether they are about to inflict hardship or injustice on vulnerable groups. They cannot provide relief unless asked to do so. When asked they are bound to provide procedural fairness to the party alleged to have infringed rights or engaged in wrongdoing.

Laws that are designed to prevent injustice by conferring rights on poor and disadvantaged people are a necessary precondition for achieving genuine equality before the law. That is why it is of such importance to have agencies, such as law reform commissions and other statutory policymaking bodies, responsible for reviewing laws that are of particular significance to the most vulnerable people. But the existence of laws conferring rights on and providing procedural safeguards for such people is not sufficient to ensure that the law effectively redresses the power imbalance associated with poverty.

Policymakers have increasingly recognised that it is necessary to develop and implement schemes that provide redress for people who have suffered injustice but operate outside the traditional civil justice system. For example, the inability of the victims of the Stolen Generation to obtain compensation through litigation has prompted, if belatedly, the introduction of reparation schemes. A modest scheme was established by legislation in Tasmania in 2006[74] and more generous non-statutory schemes have since come into operation in other jurisdictions.[75]

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74 The *Stolen Generations of Aboriginal Children Act 2006* (Tas) provided for ex gratia payments of up to $5000 per individual or $20 000 per family for eligible applicants: at ss 5, 11. See Stolen Generations

In some instances non-government entities have taken the initiative in creating dispute resolution schemes that respond to the obvious deficiencies of litigation, even when conducted in courts of summary jurisdiction, to address the legitimate complaints of consumers. As long ago as 1994, the Access to Justice Advisory Committee drew attention to emerging industry ombudsman schemes which provided aggrieved consumers with the opportunity to pursue their complaints without charge and before bodies more or less independent of industry participants.[76] If consumers were unsuccessful they could still exercise their right to commence proceedings in the courts.

More recently a review of the financial system's external dispute resolution procedure ('EDR') recommended the creation of a single EDR body to replace three existing industry ombudsman and complaints schemes.[77] The review envisaged that the new body would be a company limited by guarantee and would be funded by the industry 'through a transparent process'.[78] Consumers would be able to have their complaints dealt with independently, swiftly and free of charge. Membership of the scheme would be compulsory for industry participants 'through a licensing condition' and they would be bound by the determinations.[79]

There is room for debate about how an industry scheme should be structured so as to minimise the dangers of the process becoming 'judicialised'. It is perhaps doubtful whether industry schemes can be insulated from judicial review, given the expansion of administrative law remedies.[80] It also should not be assumed without careful empirical evaluation that external dispute resolution procedures will always produce better outcomes for complainants than litigation.[81] Nonetheless, the industry dispute resolution model adds force to the

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Assessor, Department of Premier and Cabinet (Tas), '*Stolen Generations of Aboriginal Children Act 2006*' (Report, February 2008).

75 New South Wales has established a Stolen Generations reparation scheme to enable ex gratia payments of up to $75 000 for the act of removal or committal of Aboriginal children by the Aborigines Welfare Board: see New South Wales Government, 'Unfinished Business: NSW Government Response to the General Purpose Standing Committee 3 Report into Reparation for the Stolen Generations' (2 December 2016) 11, 18. The Standing Committee's report included reference to a class action by Stolen Generation survivors against the State of New South Wales: Legislative Council General Purpose Standing Committee No 3, Parliament of New South Wales, *Reparations for the Stolen Generations in New South Wales: Unfinished Business* (2016) 19–21 [2.59]–[2.66]. The South Australian 'Next Steps – Stolen Generations Scheme', which came into force in March 2016, provides for payments of up to $50 000 based on the recommendations of an independent assessor: Department of State Development (SA), 'Stolen Generations Reparations Scheme Opens Tomorrow' (Media Release, 30 March 2016).

76 Access to Justice Advisory Committee, 'Access to Justice: An Action Plan' (Australian Government, 1994) ch 12.

77 Ian Ramsay, Julie Abramson and Alan Kirkland, 'Review of the Financial System External Dispute Resolution and Complaints Framework' (Final Report, Australian Government Treasury, 3 April 2017) 10–12. See also at 30–1 [2.18]–[2.23] ('Ombudsman Schemes and Access to Justice').

78 Ibid.

79 Ibid.

80 See, for example, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

81 See Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38 *Sydney Law Review* 311.

view that novel mechanisms for the inexpensive and ready enforcement of legal rights are just as important as the rights themselves.

A great deal of the concern about 'access to justice' has been channelled into debates about how the court system (including associated alternative dispute resolution processes such as mediation) can be made more responsive to the needs of 'ordinary people', particularly poor and disadvantaged groups. It would be a more effective use of intellectual and material resources if more effort was devoted to exploring how programs outside the judicial system might achieve results that are beyond the capacity of courts.

The innovative 'National Bulk Debt Project' involved a community legal service acting in conjunction with state legal aid bodies to negotiate the waiver or closure of debts owed by hundreds of people suffering long-term financial hardship.[82] As a result of the negotiations with major credit providers, vulnerable people were relieved of debts totalling over $15 million. As Professor Durbach points out, negotiations on behalf of large groups do not necessarily exclude recourse to the courts to clarify or change the law in the interests of financially vulnerable people.[83]

Other examples of the potential significance of mechanisms outside the formal court system are very different but no less striking. Aboriginal dispute resolution customs have not only survived in particular communities but have been adapted to modern conditions.[84] Professor Davis points out that the acceptance of Indigenous approaches to dispute resolution reflects awareness of the tensions between traditional culture and the broader legal system.[85] It also reflects recognition of the potential for injustice if Indigenous practices are ignored or overridden.

### B Poverty as a Multidimensional Phenomenon

The understanding of the relationship between law and poverty has been greatly enriched by large-scale surveys of legal needs.[86] For example, research sponsored by the Law and Justice Foundation of New South Wales has provided insights into the prevalence of legal problems experienced by members of the community, the responses by the people concerned and the characteristics of people experiencing particular kinds of problems.[87] A key finding of this and

82 Andrea Durbach, '"Between the Idea and the Reality": Securing Access to Justice in an Environment of Declining Points of Entry' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 214, 224–5.

83 Ibid 225, citing *Commonwealth Bank of Australia v Wales* [2012] NSWSC 407 (construing the hardship provisions of the *National Consumer Credit Protection Act 2009* (Cth) sch 1 (*National Credit Code*)).

84 Megan Davis, 'Aboriginal and Torres Strait Islander Peoples and Dispute Resolution' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 253.

85 Ibid 262–3 [17.22].

86 For a survey of international studies of this kind see Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in New South Wales' (Report, Law and Justice Foundation of New South Wales, 2012) vol 8. The survey does not mention the first empirical study of legal needs in Australia conducted as part of the Law and Poverty Inquiry: Commonwealth Government, Commission of Inquiry into Poverty, *Legal Needs of the Poor* (1975).

87 *Legal Needs Survey*, above n 86, chs 1, 3, 5.

many other surveys is that the incidence of legal problems is related to indicators of disadvantage such as ill health, disability, family dysfunction and unemployment.[88] Multiple indicators of disadvantage are linked to the incidence of legal and other problems, reinforcing a 'vicious cycle of vulnerability'.[89]

The recognition that poverty is a multidimensional phenomenon and that legal problems are often one element in a constellation of disadvantage has prompted proposals to develop 'joined-up services', involving collaboration between legal and non-legal service providers.[90] The exchange of information and sharing of resources are designed to widen the reach of the agencies and to encourage the early identification of multidimensional problems.[91] Early intervention increases the chance of preventing problems with a legal dimension escalating to the point where litigation or other formal dispute resolution mechanisms are invoked.[92]

There are obvious advantages to cooperation between providers of legal aid and assistance and other service providers such as health professionals, debt counsellors and social workers. A person experiencing multiple problems may first come into contact with one of these non-legal service providers who recognises that the person is likely to benefit from legal advice. If suitable mechanisms are in place, the individual can be referred to an appropriate source of advice. Equally, a client may present at a legal aid agency with what appears to be a legal problem, yet may also urgently require other forms of intervention such as the provision of safe temporary accommodation or access to drug and alcohol rehabilitation services. Cooperation between legal and non-legal agencies may ensure that the individual receives assistance of a kind that responds most effectively to his or her needs.

Assistance to individuals, whether to resolve a particular dispute or to address a constellation of social, economic and legal problems, will always be the primary focus of legal aid services. Nonetheless, concentrating the available resources exclusively on providing assistance to individual clients is not necessarily the most effective means of redressing systemic injustices. Nor is recourse to the courts or even threats to institute proceedings always needed to curb injustices. Financial institutions, for example, may be induced to recognise that unfair practices have caused hardship to many identifiable groups and agree to forgive debts. Governments may abandon practices that cause unwarranted fears among welfare recipients. Regulatory bodies may be prompted to take action to curb abuses or exploitations without the need for litigation. If agencies can formulate workable proposals to remedy past injustices and prevent future injustices, regulations may be amended and legislation reformed. Coordinated

88 Ibid 76. See Geoff Mulherin, 'Law and Disadvantage' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 225, 234 [16.28], referring to the consistent findings of 28 large-scale national surveys of legal needs.

89 Pascoe Pleasence et al, *Reshaping Legal Assistance Services: Building on the Evidence Base* (Discussion Paper, Law and Justice Foundation of New South Wales, April 2014) 8.

90 Ibid 27–8.

91 Ibid 28–9.

92 Ibid.

action of this kind might be considerably more effective in redressing the balance in favour of disadvantaged groups than recourse to formal dispute resolution.

## VI CONCLUSION

Over the last four or five decades Australia has made considerable progress in redressing the bias of the legal system against poor and disadvantaged people. The bias has by no means been entirely eliminated and the more optimistic hopes of the reformers of the 1970s have not been completely fulfilled. Nonetheless the achievements are undeniable.

It is equally undeniable that the achievements have been accompanied by high levels of frustration, both within and outside the legal community, that the legal system appears to have fallen well short of the goals it has set for itself. An understanding of the reasons for this sense of frustration is essential if proposals to change the legal system in order to improve 'access to justice' are to produce worthwhile results.

While there is no simple solution to many complex, interrelated problems, two matters are crucial. First, reform proposals must be based on sound empirical data and reforms, once implemented, must be rigorously evaluated. Secondly, the inherent limitations of the civil justice system must be recognised and novel strategies developed to compensate for those limitations. As Marc Galanter remarked several decades ago, access to justice has many rooms.[93]

93 Marc Galanter, 'Justice in Many Rooms' in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff, 1981) 147.