

**ADDRESS TO THE  
PACIFIC JUDICIAL CONFERENCE  
PORT VILA, VANUATU  
25 to 29 JULY 2005**

**by**

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***ACCESS FOR ALL TO THE LAW  
AND ITS PROTECTION***

For the past four days we have been treated to challenging papers about democracy, human rights and the law. We have looked at developments which have occurred, the potential which exists and the manner in which international norms are influential within our various jurisdictions. We have explored ways these factors can impinge in particular areas, including the rights of women, the rights of children and in the protection of people from the security issues which so dominate our contemporary world.

Justice Durie has described a current project of the New Zealand Law Commission which it is hoped will make a significant contribution to understanding the relationships between indigenous or customary rights and internationally accepted human rights. The need to constantly keep abreast of the appropriate standards and norms to which we should ascribe is a challenge for all Judges everywhere.

I want this morning to consider these weighty matters on a different plane. I am persuaded that the greatest challenge for those of us who live, work and operate in the Pacific (and I include Australia and New Zealand within that classification), is guaranteeing that the promise of the rule of law, and the protection of human rights and individual liberty is attainable for, and accessible to, all people.

My involvement in the Courts of this country for nearly a decade, adding to my experience as a long-term trial Judge in New Zealand and coupled with what we learned in the New Zealand Law Commission during a lengthy assessment of Courts and Tribunals, leaves me in no doubt that there are recurrent problems with the extent to which individuals see Courts as being relevant in their lives. This is so whether they live in a small South Pacific Island territory or nation, or in Australia. When dragged into the Court's purview by others, people find themselves in an environment in which they are unable to participate. When they need assistance they do not see the Courts as an available avenue, or feel unable to go there.

I have no radical solution for these very real perceptions and the associated problems, but recognition of the reality rather than apathetic denial would be a valuable first step. We cannot ignore the constant refrain that the legal systems as we operate them are alien and alienating for most of our citizens. When disputes go to Court, the process is seen as too slow, too costly, and unresponsive to the need for individuals to be able to tell their story and have it heard and understood.

There are a multitude of perspectives or angles which we could consider. I want to identify just four today which create particular problems and which, unless we seriously

confront and respond to them, will make hollow our commitment to the high ideals with which we have been challenged. In practice these justice ideals are only attainable by a minute fraction of our populations, in fact only by a small elite.

First there is the conundrum of unrepresented and under represented litigants. In most of our countries we have arrangements whereby, at the top end of the Courts hierarchy, lawyers will generally be participating either through some sort of legal aid arrangement, or because the litigants (who are often corporate) have the economic ability to meet the costs involved. That is, of course, commendable and important, but although it is not fashionable to say so, I have held a firm view throughout my legal career that what happens at first instance is really more important than what happens in the tiny handful of cases which get an appellate hearing or an ultimate hearing in a multi-level court system.

That is not to minimise the importance of the ultimate determination. There should not be an either/or dichotomy. However, we need to fully appreciate that the vision of the rule of law and the delivery of human rights means these fundamental norms have to be capable of being asserted or called in aid at all levels. What happens in the first hearing is critical.

What is the core of an originating hearing? At its fundament, it is the opportunity for each side to assert the facts upon which they want relief or restraint and the ability to challenge and be challenged about alternative interpretations. For many courts – Magistrates' Courts, District Courts and other tribunals at first instance – they don't do a lot of law. But these places do the factual assessment and determination. If that is not

done rigorously, accurately and carefully in the first place, then injustice which flows is almost incapable of correction thereafter.

It is essential, if injustices are to be avoided, at that very first point, wherever it may be – on an atoll or island or mountain town or a modern city –every party has to be able to get out their story, to be challenged about it, to hear the other side's story and challenge it, so that facts can be found with reliability and equity.

But how do we achieve this when, in many of these Courts, there will seldom be lawyers and, when there are lawyers, they are often people who lack the experience, skill and knowledge to really present the case as it should be so as to exploit the greatest advantage which can be obtained for the party they represent.

It's pie in the sky to suggest legal aid systems so comprehensive that there would be relevant professionals all the time in every one of these Courts. So what then is the Judge or Magistrate to do when confronted by a person who is unrepresented, or even worse, represented by a person who is harming, not helping, their client's position?

Our systems are predicated on the basis of a neutral Judge in an adversarial system. The unspoken premise is that each side has competent equally experienced counsel so that the Court can be satisfied that the case, in all its manifestations, is being exposed so the true factual position can be determined. But as you all know more often than not that is not the case.

What do we do to the fundamental requirement of judicial neutrality if the Judge tries to assist a party who clearly is not getting out their story, or a Judge who intervenes when he sees a lawyer who is failing to take points which are obviously there to be taken, failing to cross-examine in an adequate way, failing to call witnesses to assist, or pursuing unhelpful lines? Is the Judge to discard his mantle of neutrality and go into the arena to protect those individuals? Is the traditional maintenance of judicial restraint to be given priority and precedence so as to protect the system's integrity? This is an issue faced day in or day out in Courts and tribunals throughout the Pacific. Ignoring the problem is no solution. We need committed women and men, imbued with the principle of judicial impartiality, to find a way to turn the rhetoric of the rule of law available for all into a living reality everywhere.

I recognise this inevitably leads to issues of proportionality. In many countries legal aid will be available if a person is at risk of being sent to prison but not otherwise. In other cases, it is said that it is not necessary or appropriate to give somebody legal assistance. In civil cases where the amounts are relatively modest, people are thrown back on their own resources or those of their tribe, family, aiga or other support grouping.

The difficulty with that police decision is assessing the measure by which you are to determine what is a serious matter and what is a minor issue. Let me explain. In New Zealand we have Disputes Tribunals which are the place where cases involving not more than \$7,500 are adjudicated. The amount can be increased to \$12,000 by consent. Lawyers cannot appear. The rules of evidence do not apply. There is no right of appeal. That is rationalised on the basis that they are relatively minor matters where the costs of representation would outweigh the benefit. Understandable theory.

In the course of the extensive empirical inquiries the New Zealand Law Commission undertook into the delivery of justice in New Zealand, I was confronted by a young Maori woman lawyer who, with flashing eyes, said to me “How dare you, white pakeha middle-aged male, say that \$7,000 is a minor matter. That is more money than most people in this town will ever have in a bank in their lifetime. It is a matter of overwhelming importance to a small trader or a normal family whether they have to pay that sort of amount or get it paid by someone else.” Her challenge needs to discomfort all of us rather more than it seems to.

Our response in the final report in the Law Commission’s review of the court system was twofold. We recommended a simplified and less costly civil process in the District Court which allowed judicial leadership, when necessary, to refine issues. We also recommended changes to the training and appointment of Disputes Tribunal Referees to improve the consistency and professionalism of their decision-making. They are small steps but even they will face resistance from some.

Secondly can we turn to the time it takes for court proceedings to be finalised. I am troubled, sitting as an appellate Judge in New Zealand or Vanuatu, to find that frequently we are hearing pre-trial appeals 12 months after a person has been charged in a criminal case, and appeals post-conviction 18 months or two years after the act or omission which constituted the crime. That, in my view, is intolerable. It is a failure to deliver justice and it ignores, or fails to adequately reflect, what Court proceedings do to people - to those charged, victims, witnesses, family or friends. The draining effect on a small business of being caught in the Court cycle is enormous. There is for all of us

uncertainty and apprehension about the unknown. The keeping alive of memories of events which would best be put to rest so that someone can get on with making a new life are examples of the abject failures in the timeliness of our Court processes.

Reducing these delays requires attention to the complex matrix of scheduling cases, rostering judges, provision of adequate administrative services, effective case management, counsel support and last, but by no means least – streamlining existing, often antiquated, court procedures. This is complex but there is now willingness in New Zealand, I think (or certainly hope), to look at all these aspects.

My third issue relates to the nature of our processes and procedures. I believe that our civil procedures have become constipated by Court Rules. This country, under the committed leadership of Roger Coventry when he was Puisne Judge here, created a set of Civil Rules for Court which are sufficient to ensure the basics. They comprehensively cover what needs to occur so that people get to tell their story, to identify their issues and to know what they are up against. The indignation of some colleagues when the Law Commission suggested New Zealand could emulate their approach. No-one identified the real problems in doing so.

The New Zealand approach is not inconsistent with what occurs in Australia, Canada and perhaps the United Kingdom, although Woolf reforms did lessen some of the burdens. Whether this sophisticated and prescriptive approach is necessary or justified in those countries is open to debate but not here. I submit, that imposing this approach in small emerging Pacific nations, is indefensible.

My view, not shared by many, is that a significant impediment to delivery of justice in New Zealand is the complexity and inaccessibility of our rules and our continual perpetuation of a culture and attitude which are inconsistent with the way our societies otherwise operate. This approach may be fun and fine for lawyers, but it does nothing to enable people in a sensible and seemly way to get their problems resolved. These views are held not merely by those represented by community law agencies. The most strident criticisms came from business, commerce and the professionals.

The law in its established formats is failing to respond to the identifiable needs of real women and men. The perpetuation of our system seems to have become an end in itself. I invite you to each consider openly and critically what is required in your countries. Are the Rules of Court an aid or a barrier? Do they facilitate getting to the nub of a problem in a simple, principled manner?

I suggest that at least the procedural rules could and should be simplified for the tens of thousands of disputes which people need to have resolved in the lower level courts so they can get on with their lives. I have already mentioned our proposals in relation to civil procedures in the high volume courts. The Law Commission has also recently published a report which could potentially greatly enhance the effectiveness and fairness to all of pre-trial criminal processes. But even the modest reforms advocated there I suspect will face opposition by Judges and lawyers.

The current system is not working. The answer to overloading and delays cannot continue to be appointing more Judges to do it, as we have always done. Principled,

independent adjudication can be delivered in new and different ways without interference with fundamental integrity.

Finally, in all of this there are the problems associated with the cost of going to law. For general middle-class New Zealanders the legal system is off-bounds. I know the same to be true here also. Those who can get legal aid are mostly well served by dedicated women and men. But the Law Commission in New Zealand for example frequently found that people with their hands on the levers in the Court system would say that a case involving less than \$50,000 is not worth litigating. But, like the woman who challenged me over the \$7000, what have we got wrong that an amount which is about double the annual income of the average New Zealander is too insignificant to be able to involve the third arm of government in providing resolution.

Reducing costs for participants in the court system was probably the major issue for lay submitters to our review of courts, and the number of lay people who made submissions was unprecedented. It was an issue we had to confront. We concluded that costs can only be permanently and significantly reduced by an ongoing and united focus by government, the judiciary and the profession on the kind of measures I have already discussed - those that promote easily accessible and streamlined processes both in and out of court.

Well, what possibilities are available? First and foremost I think that in all proceedings we need a change of culture so that the starting point is - what is the optimum outcome for each client? What is the way forward in respect of people who are going to have a future, and some times a relationship future, beyond the courthouse and its adjudication?

We are in election mode in New Zealand. Law and order will be one of the flavours of the month and we can anticipate sustained advocacy of the need for longer and sterner sentences. Rarely is it asked whether these have any economic utility or how, at the end of the process, there is going to be a reintegration of people into the community. Except in those cases where people are incarcerated for the term of their natural life, every evil scoundrel will, at some stage, be released from prison. We put scant emphasis on how that will be achieved and what the consequences will be. I doubt that these long term consequences will receive much attention.

The position is no different when a business transaction goes sour. Frequently the outcome the parties need is assistance to move forward in some way together. Usually we put people through a draining and pulverising process with insufficient attention to ways in which they can achieve a win-win situation rather than a win-lose or, from the perception of too many participants, lose-lose.

In Family Courts we have endeavoured to make moves in this direction. In New Zealand we have extensive mediation processes in labour disputes which means that only a tiny fraction of cases ever get near the courthouse. The potential for alternative dispute resolution in the general civil and criminal areas has yet to be fully explored. A willingness to see and respond to the needs and expectations of those forced into our Courts is essential. We cannot continue to expect women and men to fit into our way of doing things. We must find ways of delivering justice that are meaningful and available and which people can afford.

I was heartened to find that the Ministry of Justice in New Zealand recently identified several projects in their three year work programme which will focus on measures such as better lay access to legal information, use of alternatives such as mediation, police diversion and restorative justice, simplification of court processes and judicial led case management.

Substantial work has been undertaken in various developed countries on most of the issues I have discussed. The New Zealand Law Commission's work was informed in particular by law reform reports and initiatives on civil and criminal process reform in the UK, Australia, Canada and the USA. Where significant changes were advocated and implemented, there was often initial resistance. Respect for tradition and a cautious approach are necessary attributes of the practice of law. But there is no turning back from reform as was seen, for example, with civil procedure in the UK or criminal procedure in Victoria, Australia.

One initiative that may be of particular interest for some Pacific countries is work done by the Centre for Court Innovation in New York, USA. They have developed and implemented a concept of first level "community courts" with a problem solving approach. The Red Hook Community Justice Centre in Brooklyn, New York, has not only shown it is possible to deliver swift and effective justice and follow up with support for the people involved, it has also been a catalyst for practical improvements of conditions in a difficult and depressed urban community.

That sort of concept is capable of adaptation to different environments and cultures. We thought it would allow, for example, courts in communities with strong Polynesian and

Melanesian cultural traditions to use this base in their problem-solving approach. This sort of thing is being trialled in several places, including in the UK.

There has been significant change in recent times with some politicians of all shades in New Zealand, and many legal professional groups such as Law Society committees, acknowledging the need for a focus on the high volume end of legal and court processes. What are we doing across the region? I know that in many Pacific nations there is little spare capacity. Resources are stretched just to keep the existing structure operational. But if we lack the courage and vision to try new approaches, our ability to deliver justice will undoubtedly be reduced.

Throughout the Pacific there is the opportunity to share ideas and work together to develop ways in which, to return to my starting point, the promise of the rule of law in the protection of human rights and individual liberties is attainable for all and accessible to every citizen.