

CAPUCHIN MONKEYS, HENRY VII, ROCK STARS AND LEGAL AID

Keynote Address to the Legal Aid NSW Criminal Law Conference 2024

The Honourable Justice H Dhanji¹

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Introduction

- 1 Good morning.
- 2 I begin today by acknowledging the traditional custodians of the Country on which we meet, the Gadigal of the Eora Nation. I acknowledge their many thousands of years of care and custody of this land and its surrounding waters. I pay my respect to Elders past and present as well as to all First Nations people here today. I pause to recognise that, since colonisation, the criminal justice system of New South Wales has often delivered far less than justice to Indigenous peoples. The longstanding connection between Legal Aid and First Nations peoples on this continent, and the Commission's commitment to issues concerning Indigenous justice form a core pillar of its role in facilitating access to justice. This is a topic to which I will return throughout this address.
- 3 The title of my address is "Capuchin Monkeys, Henry VII, Rock Stars and Legal Aid". That is, to most, likely to appear to be a disparate collection. I will attempt, in the time I have, to make each relevant to my theme.
- 4 Before I attempt to do so, I would like to say that it is, for me, on very personal level, a particular pleasure to have been invited to deliver this morning's keynote address. It is, in a sense, a coming back. This is not the first Legal

¹ I wish to acknowledge the substantial contribution of my tipstaff, Elisabeth Henke, in the preparation of this talk.

Aid conference I have attended. My first was in 1990. It is disturbing to think that some of you were not yet born. In fairness, I was very young at the time.

5 It was a far more modest affair. I attended as a freshly minted solicitor, having commenced, earlier that year, at what was then called the Legal Aid Commission. It was after a disastrous few weeks at a private firm, my first job as a lawyer. I attended the conference each year as an employed solicitor of Legal Aid from 1990 to 1996 – some seven years.

6 I recall regarding it, at least at first, as one of the few, perhaps the only perk, of the job. That idea that a few days away from court was a boon, was a reflection of the reality that my work, initially in the Prisoners Legal Service, and then as a duty solicitor, was hard, and it was unrelenting.

7 But what I also recall, is having been inspired. I recall hearing from senior practitioners who shared their knowledge and their wisdom. Less tangibly, but perhaps more importantly, they imparted a sense of their commitment.

8 One of the great benefits of working at the Commission was, of course, the opportunity to work with many wonderful people. The benefit of that was felt every day. Something that I hope to impart this morning is that one of the truly great advantages of practice at Legal Aid, is working as a criminal lawyer for an organisation that is a leader in that field.

9 But, as I have said, at a more prosaic level, the conference provided the opportunity to have a few days away from the usual pressures of the job, to have time together, to regroup, and to reaffirm a shared sense of purpose before returning to the practical day-to-day work. A favourite part of the conference was its conclusion with the annual talent quest. It was instituted a few years after I started, and I am pleased to hear it continues to this day. The talent quest, as you know, provides an opportunity for attendees to dust off some hidden, and often curious talents, across arcane fields of human endeavour. I was concerned that the proliferation of mobile phone cameras may have impacted the willingness of generally sensible people to perform for

the entertainment of their colleagues. But the recording of outlandish behaviour does not seem to discourage your clients, and pleasingly it has not discouraged you.

- 10 Over the time the talent quest ran, I entered each year until my departure. I do not propose to tell you the nature of my act. What I will tell you is, I remain seriously miffed at never taking out the prize. I was consistently beaten by the Burwood office song and dance routines led by Brian Sandilands and Shirl Ackland.
- 11 My grumblings of unfairness were, of course, not entirely serious. But the joke – to the extent it was funny (now that I am a judge my jokes are funny as a matter of law; that principle does not necessarily apply retrospectively) but to the extent my joke was funny, it was funny because it played on something deeply serious and relatable. A sense of unfairness.
- 12 Some of you may know of Frans de Waal. He was a very well-known and well regarded Dutch-American primatologist. He died earlier this year but left an impressive legacy. He did an experiment some years ago – it has been replicated many years since, with chimpanzees and apparently even with non-primates. Frans de Waal wrote about this experiment in his book *The Bonobo and the Atheist*.² If you Google “Frans de Waal and fairness”, you will find it on YouTube.
- 13 The experiment is very simple. There are two capuchin monkeys in a cage; there is a divider between them, a metal grate, so each can each see the other clearly. They have been trained to perform a simple task for a reward. Each monkey has a number of pebbles. In return for handing a pebble to a researcher, the monkey receives a piece of cucumber. This works fine until one monkey sees that the monkey in the neighbouring enclosure receives, for the same task, a tasty grape.

² Frans de Waal, *The Bonobo and the Atheist: In Search of Humanism Among the Primates* (W.W. Norton, 1st ed, 2013) 232.

- 14 The first monkey tries again – handing over a pebble but gets a cucumber again. This time she reaches out of the cage and throws the cucumber back at the researcher, rattles her cage and pounds the floor in protest.
- 15 The reaction is similar to that shown in another video of a human toddler who sees her older brother get a cookie, only to get half herself.
- 16 My point is that capuchin monkeys understand the principle of parity. Capuchin monkeys may not be able to use word processors and may not write judgments explaining the principle of parity, but they clearly understand the idea. What that tells us, is what is being expressed in those judgments is not some form of advanced logic or theory. The parity principle is an expression of a basic sense of fairness. That fairness is hard wired into us. Just as it can take a capuchin monkey from being perfectly content, and in fact rewarded, to receiving nothing and being terribly unhappy, it can do the same to us.
- 17 It is perhaps then a statement of the obvious that our wellbeing is directly affected by any injury to our sense of fairness. Our criminal justice system is not exclusively concerned with maintaining order. While the concerns overlap, at a more fundamental level, it is concerned with maintaining wellbeing. For a defendant in a criminal matter, their sense of fairness, will be directly affected by their sense of being heard and understood – that is, achieved, imperfectly, but to a significant and important extent, by being represented.
- 18 It was recognised in *Dietrich v The Queen* that, save in the rare case of a skilled litigant, the adversarial system breaks down where there is no legal representation.³ The importance of the defence lawyer in aiding those who, without their existence, would go without such representation, is therefore obvious. But the point I make is related but slightly different. The role of the defence lawyer is about more than making the system work in the individual case. Defendants may lose, they may go to gaol. But if they go to gaol after being heard, they, and society more generally, will be far better off if than if they

³ (1992) 177 CLR 292 at 302 (per Mason CJ and McHugh J).

go to gaol rattling the cage in the same frame of mind as the aggrieved capuchin monkeys.

- 19 So, you may be aware, that most, if not all of my colleagues will thank you at the conclusion of a case. For my part, and I speak for, I think the vast majority of my colleagues, this is not a mere politeness. It is not an ironic thank you, as in, thank you for making my task more difficult. In one sense it is your job to make my task more difficult. But, properly understood, ensuring the judge (or for that matter the jury) is well appraised of the case for the defence makes it easier for the judge or jury to do their job well. So it is a genuine thank you for doing so – because the task you perform is one that is essential to the wellbeing of the community generally.
- 20 Can I pause then to observe that much of this important work done by criminal defence lawyers is done by individuals providing their services through Legal Aid. It is worth taking a moment to emphasise the sheer scale of legal assistance offered by the Legal Aid Criminal Division in New South Wales. In the year ending 30 June 2023, 315 employees of the Division formed the largest criminal defence practice in Australia.⁴ The Commission provided 242,922 criminal law services.⁵ In relation to each of those services, there were no doubt countless hours of preparation, client conferencing, research, and referrals made to non-legal support services.
- 21 In the year of the Supreme Court’s bicentenary, my topic today seeks to underline the rich history of Legal Aid NSW, and its indispensable role in upholding the interests of a fair and just society. The reputation that Legal Aid has built as comprising some of the leading criminal advocates in New South Wales, and indeed, the nation, and as an institution of great value, is one that has been moulded over time.
- 22 A commitment to facilitating access to justice lies at the heart of Legal Aid. Very rarely, if ever, does a person find themselves before a Legal Aid lawyer without

⁴ Legal Aid NSW Annual Report 2022-23 53.

⁵ Ibid 54.

experiencing some degree of vulnerability or disadvantage. You are all, no doubt, intimately familiar with the challenge of working with clients who experience intersecting avenues of marginalisation, in addition to their legal problems. The psychological, intellectual and physical demands of the role are challenging, and the cases often confronting. In the face of this challenge, you continue to be, as the Commission's lawyers have been throughout its history, renowned for your skill, worth ethic and social conscience.

A History of Legal Aid

- 23 The importance of access to justice, while not generally a popular cause of the rich and powerful, is so fundamental a part of the criminal justice system, that it would be surprising if it were a recent idea.

British Origins

- 24 Over 500 years ago, in October 1495, to be more precise, in England, whose justice system we of course inherited, a statute was enacted by Parliament during the reign of King Henry VII. It was titled, "A mean to help and speed poor persons in their suits".⁶ In that statute, the King:

"willeth and intendeth that indifferent justice be held and ministered according to his common laws, to all his true subjects, as well as to the poor as rich, which poor subjects be not of ability nor power to sue according to laws of this land for the redress of injuries and wrong to them daily done, as well concerning their persons and their inheritance as other causes."⁷

As a result, every poor person who had a cause of action against any person in the realm could have their original writs and subpoenas sealed free of

⁶ P.R. Cavill, 'Justice' *The English Parliaments of Henry VII 1485-1504* (Oxford Historical Monographs, Oxford University Press, 2009) 76-77; Richard Coates, 'A History of Legal Aid in Australia' (Speech, Fourth Annual Colloquium of the Judicial Conference of Australia, 6 October 1999) 1.

⁷ Ibid.

charge.⁸ The Chancellor engaged counsel to provide pro-bono services to those in need, without any prospect of remuneration.⁹

- 25 The provision of legal services to the financially disadvantaged had been ordered by the State as far back as Roman times however King Henry VII's statute is thought to be the first example of the creation of an administrative service by the court to assist its litigants in the common law system.¹⁰
- 26 Of course, the existence of state financed schemes of legal aid and advice to the underprivileged is not unique to the western world. And in India, for example, the concept of legal aid was well evolved before their Constitution was enacted, and that Constitution itself now promotes justice and equal opportunity by mandating the provision of free legal aid.¹¹
- 27 Returning to the statute of King Henry VII, I should note that the state of affairs under this scheme was not entirely smooth sailing. The service was only available to plaintiffs, who were required to bear their opponents costs if unsuccessful. Many of those who received assistance were flogged when their cases were lost. Others were banished to the workhouse.¹²
- 28 In 1883, the system was expanded to provide assistance to defendants. An assets test was introduced, with an eligibility limit of 25 pounds. For the first time, a merits test was also imposed.¹³
- 29 Henry VII's statute was repealed in England only in 1949. That was upon the introduction of the *Legal Aid and Advice Act*, which applied to proceedings in all courts and tribunals in England and Wales.¹⁴ This Act did not receive a universally warm welcome. It was reported in The Times newspaper on 20 March 1951 that the Lord Chief Justice, Lord Goddard, had said that he found

⁸ Ibid.

⁹ Coates (n 6) 1.

¹⁰ Ibid.

¹¹ *Constitution of India*, Part IV, art 39A.

¹² Coates (n 6) 1.

¹³ Ibid.

¹⁴ Ibid.

“very little gratitude among persons who get aid” and that he of the view that “it would be far better to leave many of these people to defend themselves.”¹⁵ Such views, as I have been at pains to point out, no longer hold sway.

Legal Aid in Australia

- 30 In Australia, early forms of legal aid rested largely on the shoulders of the private legal profession.¹⁶ In most States and Territories, legal aid for criminal cases was available to those charged with serious indictable offences and was provided by private practitioners who were appointed by the court and compensated by the State.¹⁷
- 31 Australia’s first government-funded legal assistance programs mostly comprised the limited schemes founded by law societies in the decades after the Second World War.¹⁸
- 32 The 1960s and 1970s saw a worldwide shift in values, resulting in legal aid being framed as a social right.¹⁹ Australian activists were inspired by the achievements of the legal services movement in the United States, as well as the campaign for reform in Britain.²⁰
- 33 In 1971, the Redfern Aboriginal Legal Service was founded in response to harassment by police of the local Indigenous community. In 1972, the first non-Indigenous community legal centre, the Fitzroy Legal Service was founded to assist those involved in the anti-Vietnam War movement.²¹
- 34 Then, in 1973, the Australian Legal Aid Office was established by the Whitlam Labor government and, quite controversially, expanded the federal

¹⁵ Coates (n 6), citing an article by Kay Barralet, former Executive Officer, National Legal Aid, in November 1995.

¹⁶ Coates (n 6) 2.

¹⁷ *Ibid.*

¹⁸ Mary Anne Noone and Stephen Tomsen, ‘Service beyond Self-Interest – Australian Lawyers, Legal Aid and Professionalism’ (2001) 8(3) *International Journal of the Legal Profession* 251, 256.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

government's involvement in the provision of legal services. Constitutionally, the provision of legal aid was not a responsibility of the Commonwealth and earlier Federal governments had been only very minimally involved with the result that legal aid was restricted to a few inadequate and rarely used programs.²²

35 The Australian Legal Aid Office (ALAO) had a brief but turbulent history.²³ It drew hostility from the private legal profession, which viewed a public legal aid service as a threat to professional independence.²⁴ In 1975, mobilisation against legal aid reforms even found its way to the High Court. The Law Institute of Australia launched a legal challenge to the validity of the Office established by the Whitlam government, and, in that challenge enjoyed the support of the State Attorney-General.²⁵ This watershed event speaks to the intensity of opposition from those involved in private practice at the time.

36 Ultimately, the Whitlam government was dismissed and a coalition government under Malcolm Fraser was elected to office. The new Attorney-General, The Hon. R.H Ellicott announced a national review of legal aid in 1976, and the ALAO was absorbed by new statutory bodies in the States and Territories.

Legal Aid in New South Wales

37 The history of legal aid services in New South Wales is unique when compared to other States and Territories. From the early 1940s, it conducted a Public Solicitor and a Public Defender Service which provided relatively comprehensive legal aid services in civil and criminal cases.²⁶ In doing so, the New South Wales government of the time took significant steps towards integrating a robust public service sector within the legal profession.

²² Don Fleming and Francis Regan, 'Re-Visiting the Origins, Rise and Demise of the Australian Legal Aid Office' (2006) 13(1) *International Journal of the Legal Profession* 69, 71.

²³ Coates (n 6) 7, citing M Cass and J S Weston *Legal Aid and Legal Need* (1980) 24.

²⁴ S Tomsen, 'Professionalism and state engagement: lawyers and legal aid policy in Australia in the 1970s and 1980s' (1992) 28 *Australian New Zealand Journal of Sociology* 307, 312.

²⁵ Fleming and Regan (n 21) 83.

²⁶ Ronald Sackville, 'Legal Aid in Australia' *Australian Government Commission of Inquiry into Poverty: Law and Poverty Series* (1975) 7.

38 The *Legal Assistance Act 1943* (NSW), which established the Public Solicitors Office was, however, the subject of significant controversy in parliament. One parliamentarian, Mr Drummond said:

“This measure will encourage the spirit of litigation within the community. If it does, it will encourage one of the most senseless, useless, and time-wasting things that any man can possibly engage in.”²⁷

39 Nonetheless, the Public Solicitors Office prevailed, and garnered popularity. Its success later led to the *Legal Practitioners (Legal Aid) Act 1970* (NSW) under which the New South Wales Law Society established a scheme to offer legal aid in certain civil cases. This scheme did not extend to criminal matters, and a contribution fee payable by those receiving assistance was made mandatory.²⁸ Financial eligibility guidelines were designed to capture what was termed ‘the missing middle’. Low-income earners as well as those above a maximum level were excluded. The Public Solicitor was left with the sole responsibility of providing aid to the most financially disadvantaged people in the State.²⁹

40 In 1974, substantial alterations to the legal aid system were introduced.³⁰ The *Legal Aid (Miscellaneous Provisions) Act* of 1974 was passed. The Act transferred responsibility for all civil legal aid work which had previously been undertaken by the Public Solicitor to the Law Society Scheme; the Public Solicitor’s Office was thereafter confined to the conduct of criminal cases.³¹

41 Finally, in 1979, with the passing of the *Legal Aid Commission Act 1979* (NSW), the New South Wales government established the Legal Services Commission, the forerunner of today’s Legal Aid NSW, combining the Public Solicitor’s Office and the Law Society Legal Aid scheme. Legal Aid, of course, continued in operation over the next several decades, while undergoing numerous structural changes.

²⁷ New South Wales Parliamentary Debates (Legislative Assembly 29 April 1943) 2759.

²⁸ Sackville (n 25) 7.

²⁹ *Ibid.*

³⁰ *Ibid.* 8.

³¹ *Ibid.*

42 It should be stressed that Legal Aid’s continued operation has not involved stagnation, or simply treading water. Rather, with that continuity Legal Aid has taken on a leadership role within the profession.

Legal Aid at the Forefront of Culturally Competent and Trauma-Informed Practice

43 There are, of course, several ways the Commission acts at the forefront of the profession. A notable feature of this leadership is Commission’s role as a pioneer of culturally competent and trauma-informed legal practice.

Culturally Competent Practice

44 The Commission’s Aboriginal Cultural Safety Framework provides robust benchmarks against which the organisation strives to better its representation of First Nations people.³² In 2008, the Commission began providing cultural awareness training to all Legal Aid NSW staff. From 2012 it offered a dedicated program for private practitioners, to ensure cultural awareness in practice extended throughout the profession. From 2015, the Commission has tailored Aboriginal cultural awareness training to the specific requirements of each practice area. In 2020, it introduced the Best Practice Standards for Representing Aboriginal Clients which constitutes a significant step in ensuring the Commission provides the best possible services to First Nations clients.³³

45 These developments highlight Legal Aid’s longstanding commitment to tailoring its services to Aboriginal and Torres Strait Islander people, who made up nearly a quarter of all Legal Aid clients in the last financial year.³⁴

46 It is clear that Legal Aid also recognises the importance of diversity and representation within the legal profession. In 2018 the Commission set a target

³² Legal Aid NSW Aboriginal Cultural Safety Framework (May 2022).

³³ *Ibid.*

³⁴ The precise figure is 23.2%: see Legal Aid NSW Annual Report 2022-23, 39.

of 11% Aboriginal employment to ensure its workforce became more reflective of those it represents.³⁵

47 There is, of course, always more work to be done. As the Uluru Statement from the Heart makes clear, First Nations people on this continent are, proportionally, the most incarcerated people on the planet. They are grossly overrepresented in courts and prisons throughout the country. This is a national shame. Legal Aid alone, cannot be charged with resolving the problem. However, I commend Legal Aid for leading by example by putting tangible structures in place to engage more effectively with First Nations clients. I encourage each of you to take full advantage of those structures and to listen to and be guided by those amongst your ranks with lived experience; they are a great asset to Legal Aid.

48 It is a harsh reality that any system of criminal justice will be flawed. The point to be made, however, is that we retain control over what life we bring to the structures we have inherited and how we make use of them to best serve those less privileged than ourselves. The conceptual underpinning of Legal Aid's projects is that a culturally competent practitioner, working, as they must, within a flawed system, comes to appreciate that separating an Indigenous client's legal issues from social or cultural matters may be neither possible nor, indeed desirable. Recognising not only deficiencies, but the enduring strength of Indigenous people, and the various ways that connection to Country and culture can constitute a powerful pathway away from criminal offending, is crucial to helping Indigenous clients to navigate the justice system. As Legal Aid exemplifies, it is what we do with the system we have inherited that matters.

Trauma-informed Practice

49 Legal Aid also paves the way when it comes to trauma-informed practice. On behalf of National Legal Aid, Legal Aid NSW led the implementation of the "With You," toolkit, a training package for practitioners to aid in their provision of

³⁵ Ibid 5.

trauma-informed, rights-based legal services to people experiencing distress and mental ill-health.

- 50 As I have said, few clients find themselves in need of Legal Aid without compounding vulnerabilities which make it more difficult for them access the legal system. The adoption of an intersectional approach to legal practice, one which places the realities of the client's lived experience at the forefront of client engagement is vital. Legal Aid should be proud to be at the forefront of the movement towards this approach to legal practice.

The future of Legal Aid

- 51 Having been through the history, allow me to now say something of Legal Aid's future.
- 52 It will come as no surprise that one issue that has plagued Legal Aid since its inception relates to funding. By 2001, there was said to be a "noticeable exit from legal aid work by private practitioners due to the low level of fees paid, the number of grants decreasing and simultaneously, the amount spent per case reducing."³⁶ The departure of private practitioners raised alarm bells for the future of the organisation. To this day, Legal Aid remains reliant on the considerable assistance of private practitioners to whom matters are routinely referred. Their substantial contribution must be acknowledged.
- 53 It goes without saying that problems in relation to funding persist. The *Justice on the Brink* report was released in November last year.³⁷ Its findings serve as a stark warning that this country's already-strapped community legal sector is under severe pressure from rising demand and needs urgent increased funding to maintain its output of vital services for the community. The data gathered by the report shows that the number of people accessing Legal Aid Commission websites and hotlines across Australia doubled, and in some

³⁶ Noone and Tomsen (n 17) 263.

³⁷ *Justice on the Brink: Stronger Legal Aid for a Better Legal System* (Report prepared by Impact Economics and Policy for National Legal Aid, November 2023).

jurisdictions, tripled in recent years.³⁸ It is imperative that Legal Aid be provided with the financial capacity to meet demand. Without the necessary resources, Legal Aid cannot continue make just outcomes accessible for those that would otherwise struggle to obtain them.

- 54 The work of criminal lawyers is notoriously demanding and, at Legal Aid, where funding and resources are lacking, I am cognisant of just how hard lawyers work for their remuneration. You do not need to tell me that remuneration in the private sector, and particularly in the commercial field, can be significantly greater. But what people such as yourselves demonstrate, as employees of the Legal Aid, or criminal defence lawyers more generally, is an understanding that you are working within a “profession” as that term is properly understood. Former justice of the High Court, Michael Kirby, some 27 years ago said the following:

“The great debate for lawyers in the coming century will not be whether a separate profession of advocates will survive. It will not be whether competition and consumer pressure will improve the delivery of some legal services. Still less will it be whether some lawyers will wear wigs. These are not the vital questions. What is vital is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service. We must certainly all hope that the basic ideal of the legal profession, as one of service beyond pure economic self-interest, will survive. But whether it survives or not is up to the lawyers of today.”³⁹

It is safe to say that the basic ideal Justice Kirby feared losing remains alive and well. Legal Aid NSW’s total staff in the year 2022-2023 amounted to over 1500 people.⁴⁰ I hazard a guess that these people are motivated by something other than “economic self-interest.” That, of course, is not to say that that

³⁸ Ibid 11-12.

³⁹ The Hon. Justice Michael Kirby, AC CMG, ‘Billable hours in a noble calling?’ (1996) 21(6) *Alternative Law Journal* 257, 261.

⁴⁰ Legal Aid NSW Annual Report 2022-23, 15.

motivation should be exploited to pay skilled and hardworking practitioners other than a fair wage.

- 55 The current Chief Justice of New South Wales spoke at this conference in 2022. He made the following observation of Legal Aid lawyers' shared ethos and passion for their work, in spite of the lack of financial reward:

“That is a measure of your dedication, commitment to the administration of justice and principled belief that people charged with criminal offences are entitled to a fair trial and competent representation. This often results in what is in effect and substance hours of unpaid additional work in aid of an accused. That work is a testament both to professionalism and, in many cases, great compassion and sensitivity since, as we all know, whilst some criminal activity is driven by greed and selfishness, much criminal conduct is at least contributed to by systemic societal problems, cycles of disadvantage (often severe) and mental health issues.”⁴¹

I echo the Chief Justice's sentiments. It is not lost on me that each of you has chosen to pursue what can be, at times, a thankless endeavour, because you are motivated by a common goal – to make a difference to those other than yourselves. I am confident that there is scope for optimism towards the Legal Aid's future. The number of law graduates attracted to a career at Legal Aid, particularly in the Criminal Division is unprecedented. This demand is a testament to the reputation Legal Aid has built for itself over time and is something you should all be proud of.

The Judiciary and Legal Aid NSW

- 56 That reputation is underscored by the many lawyers that have come through Legal Aid on their way to the judiciary. The following biographical diversions by no means constitute an exhaustive list of those that have followed this path.

⁴¹ The Hon. A S Bell, Chief Justice of New South Wales, 'When an Accused Goes into Evidence' (Speech, Legal Aid New South Wales Criminal Law Conference, 2022) 2.

- 57 The late Judge Peter Zahra SC, a vastly experienced criminal advocate, who spent almost 16 years on the District Court bench, began his career at Legal Aid career in 1981, where he became a fixture of the Blacktown Local Court.
- 58 In 1986, a 25-year-old Richard Button secured a position with the Legal Aid Commission's Prisoners Legal Service, a notable shift from his previous role within the legal department of the then State Bank. The now Justice Button reflects that "without a doubt, working at Legal Aid was the key that unlocked the door of my career, and really, my entire life", and refers to the sheer quantity and quality of the work Legal Aid offered him, and the great variety and opportunity to move across different practices in the criminal law, from bails to trials to appeals.⁴² That is what, in his Honour's words makes Legal Aid "the leading criminal law firm in New South Wales".⁴³
- 59 That view is shared by Justice Mark Ierace. In his swearing in speech, Justice Ierace acknowledged the solicitors of Legal Aid New South Wales, who, in his Honour's words, are "without peer in their skill and dedication."⁴⁴
- 60 Justice Yehia of course had a storied career with the ALS before a stint at Legal Aid as a solicitor advocate, preceding her appointment to the bench.
- 61 Justice RA Hulme commenced his career at the forerunner to Legal Aid. He reflects that his growth as an advocate was bolstered by the guidance of great criminal lawyers who were "not only his colleagues at Legal Aid, but mentors, tutors and role models."⁴⁵ I have no doubt that the degree of professional camaraderie to which his Honour refers continues to this day. Conferences such as today's, are an important part of that spirit of collegiality. Other Supreme Court judges have had briefer but still formative periods at Legal Aid NSW include Justices Wilson and N Adams.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The Hon. Justice Mark Ierace, 'Swearing in Ceremony of the Honourable Justice Mark Joseph Ierace as a Judge of the Supreme Court of New South Wales (Speech, Wednesday 21 January 2019) 15.

⁴⁵ Ibid.

- 62 Of course, there are a significant number of District Court judges. On the District Court there is at least Judge Allen, Judge Gartelmann, Judge Mottley, Judge Skinner and Judge Townsden. Added to that is a very significant number of magistrates.
- 63 Reflecting on my own experience, Legal Aid gave me the opportunity to specialise in criminal law from the outset. When I started with the Prisoners Legal Service, I was a shiny know-nothing graduate, dealing with a client base that knew a lot more about the criminal law than me. But I was able to get on my feet early with some excellent colleagues in support. I was also exposed to some very good lawyers at the bar including John Basten and Peter Hidden, both of whom were later appointed to the Supreme Court, the former to the Court of Appeal.
- 64 I had not entertained the prospect of going to the bar before my time at Legal Aid. But the opportunity to undertake all my own advocacy in the Local Court and the environment more generally gave me the confidence and skillset to see myself as a barrister. I am sure my career would have would have taken a very different trajectory had I not been afforded the vast opportunities presented to a Legal Aid lawyer.

Legal Aid and Access to Justice

- 65 The rich history of Legal Aid to which I have referred reveals a longstanding and persistent need for free, accessible legal advice and representation for disadvantaged members of society. Recognition of the importance of access to justice bleeds through each stage of the Commission's history. It was at the heart of the statute of 1495, of the Public Solicitors Office of the 1940s, the Law Society scheme in the 70s and now, of Legal Aid as we know it.
- 66 Much has been said about access to justice. Ronald Sackville, formerly a judge of the Federal Court and the Court of Appeal NSW once remarked that the concept of "access to justice" has "become a catchphrase that is ubiquitous in

modern legal and political discourse,” an observation with which I agree.⁴⁶ His Honour said of the concept:

“The implicit promise contained in the catchphrase is that the law and the legal system are capable of achieving the goal of access to justice, if not in the short term then ultimately. The implication is that a just society will be prepared to find the resources required to achieve the goal of access to justice. The catchphrase also suggests that it is feasible to establish mechanisms that will effectively break down the barriers that prevent disadvantaged individuals and groups from utilising the legal system to enforce their rights and protect their interests. Accordingly, the principle of access to justice carries with it a promise that there is a realistic prospect of ameliorating the unjust legal consequences of inequality in society.”⁴⁷

67 I pause to say that if ever there was an institution capable of fulfilling this promise, of working hard to at least ameliorate the unjust consequences of inequality in society – it is Legal Aid. Legal commentary on access to justice tends to concentrate on the deficiencies in the legal system and on the expense and delay involved in the enforcement or protection of defendants’ rights through the legal system. These deficiencies were highlighted in 1975, when the then Justice Sackville acted as commissioner of a landmark Australian government inquiry, *Law and Poverty in Australia*, which became known as the *Sackville Report*. The report had a vast impact on the law reform process of the late 1970s to which I have referred.

68 Recognising deficiencies in our system should not, however obscure the advances that have occurred since *Sackville Report* was presented. The expansion of Legal Aid in this State, and the Commission’s transformation into a leader of the profession, demonstrates that there is much to celebrate.

⁴⁶ Ronald Sackville, “*Some Thoughts on Access to Justice*” (2004) 2 NZJPIL 85, 86.

⁴⁷ *Ibid.*

Legal Aid in the High Court of Australia

- 69 A major accomplishment has been the emergence of Legal Aid as a leading criminal defence practice with the mettle to fiercely defend matters anywhere from the Local Court to the High Court of Australia. Legal Aid, it is fair to say, dominates the bringing of appeals in criminal matters in the High Court, and similarly dominates appeals in the Court of Criminal Appeal.
- 70 The Commission's appellate practice thus directly facilitates access to justice in those particular cases. But, as a result of our system of laws, the results of those appeals reverberate at all levels. Not only that, the existence of Legal Aid, and its willingness to pursue a just cause has an impact without actually bringing an appeal. That is, the awareness that an appeal is not just a theoretical possibility, but exists as a practical reality, itself has an impact on the conduct of criminal proceedings.
- 71 The impact on the landscape of the criminal law as a result of Legal Aid's appellate practice has been and, I am confident, will continue to be, momentous. The point can be very quickly demonstrated by reference to a subset of cases, each an appeal conducted by Legal Aid NSW.

Conviction appeals

- 72 With respect to conviction appeals:
- ***BA v The King***⁴⁸ was determined last year. The High Court found in favour of the appellant, holding that the break and enter offence requires an element of trespass, or rather, entry into a premises of another without lawful authority.

⁴⁸ (2023) 275 CLR 128; [2023] HCA 14.

- ***RP v The Queen***⁴⁹ – a foundational case relating to the doctrine of *doli incapax*;
- ***Lane v The Queen***⁵⁰ and ***Cesan v The Queen***⁵¹ – both of which concerned the principle that a substantial miscarriage of justice may not be related to the outcome of a case, it may also be the result of an unfair trial;
- ***Azzopardi v The Queen***⁵² – relating to the accused’s right to silence;
- ***TKWJ v The Queen***⁵³ – as to whether counsel’s incompetence can found a miscarriage of justice; and
- ***McKinney v The Queen; Judge v The Queen***⁵⁴ – admissibility of “verbals” – the decision had a direct impact on the introduction of provisions in relation to the recording of admissions and stands as a very tangible example of the far-reaching impact of Legal Aid’s work.

Sentence appeals

73 Other cases Legal Aid has pursued to the High Court involved purported errors in sentencing. Just this year, the following matters were decided:

- ***The King v Hatahet***⁵⁵ - concerning whether the sentencing judge erred by not taking into account the likelihood (if any) of release on parole; and
- ***Hurt v The King; Delzotto v The King***.⁵⁶

⁴⁹ (2016) 259 CLR 641.

⁵⁰ (2018) 265 CLR 196.

⁵¹ (2008) CLR 358.

⁵² (2001) 205 CLR 50.

⁵³ (2002) 212 CLR 124.

⁵⁴ (1991) 171 CLR 468.

⁵⁵ [2024] HCA 23.

⁵⁶ [2024] HCA 8.

the latter involved a joint effort between Legal Aid NSW and Legal Aid ACT with NAAJA acting as intervenor. This was a significant event, involving three community legal organisations joining forces, and some may say, punching above their weight, to advocate in the country's highest jurisdiction. The appeal sought to clarify the appropriate approach to statutory minimum sentences, which have long been the subject of significant debate, having regard to their narrowing of judicial discretion.

Legal Aid was the unsuccessful respondent in *Hatahet* and the unsuccessful appellant in *Hurt*. While unsuccessful in both cases I mention them because if you are not sometimes failing you are not really pushing at the boundaries.

- 74 It would be a challenge to discuss sentencing in Australia without making reference to the process of instinctive synthesis. That method is, of course:

“the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case...”⁵⁷

- 75 This process was famously described by Justice McHugh in *Markarian v The Queen*⁵⁸ in 2005. I note this was yet another appeal run by Legal Aid that went on to shape the criminal law in this country.

- 76 Legal Aid has also played a role in clarifying the parity principle in sentencing. In *Green v The Queen*⁵⁹ a majority of the High Court emphasised that this principle “requires that like offenders should be treated in a like manner”⁶⁰ and “allows for difference sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances.”⁶¹ This has become one of the most oft cited principles in criminal law. Once again, the

⁵⁷ McHugh J in *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [51].

⁵⁸ *Markarian v The Queen* (2005) 228 CLR 357 at 377-380 [50]-[56], 390 [84].

⁵⁹ (2011) 244 CLR 462.

⁶⁰ *Green v The Queen* (2011) 244 CLR 462 at 473 [28] (French CJ, Crennan and Kiefel JJ).

⁶¹ 473 [28] (French CJ, Crennan and Kiefel JJ).

Commission's role in the development of this legal principle cannot be overstated.

77 Other notable sentence appeals include:

- ***Park v The Queen***⁶² - as to how a court must take into account an offender's guilty plea in passing sentence; and
- ***Nguyen v The Queen***⁶³ - considering the principle of totality, and excessive self-defence.

78 I have been far from exhaustive in the cases I have referred to. I am not seeking to lecture you on substantive law but rather to reinforce what I have said about Legal Aid's position as a leader in the criminal law.

Role of the Criminal Defence Lawyer – Pushing Boundaries

79 That position of leadership comes as a result of individuals understanding and performing their roles as criminal defence lawyers. As I come to the conclusion of my address, I would like I say something of the role and importance of the criminal defence lawyer. Before I do so, allow me to detour for a moment to say something of those who prosecute.

80 In our adversarial system of justice, the ethical obligations imposed upon prosecuting counsel are often a focus of attention. It is a well-known legal principle that advocates for the Crown are expected to conduct themselves as model litigants. We rightly demand that prosecutors, or "ministers of justice" as they have been coined, to remain apolitical and independent assistants to the Court in the furtherance of justice.⁶⁴

⁶² (2021) 273 CLR 303.

⁶³ (2016) 256 CLR 656.

⁶⁴ *R v Puddick* (1865) 176 ER 662.

81 Deane J's remarks in *Whitehorn v The Queen* are among the most oft cited in support of this idea. In that case, his Honour said the following:

“Prosecuting counsel in a criminal trial represents the state. The accused, the court and the community are entitled to expect that, in performing [their] function of presenting the case against an accused, [they] will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one.”⁶⁵

82 While there is much case law and academic commentary on prosecutorial responsibilities, much less has been said about the obligations imposed upon counsel for the defence. That is, to a large extent, because those same boundaries do not apply. While it is to some extent a function of the different rights of appeal as between the Crown and the defence, it is of note that appeals based on the conduct of the Crown almost inevitably focus on Crown counsel pushing too hard or failing to do enough to assist the accused by way of disclosure. Appeals based on the conduct of defence counsel are, almost inevitably, focussed on the failure to do enough in furtherance of the client’s cause – often framed as a complaint of incompetence. But it is not incompetence in and of itself, as the High Court has pointed out more than once – it is a failing, leading to miscarriage of justice in the particular case.

83 What I have said is not a call to pull out all stops in furtherance of the client’s cause. Defence lawyers must operate within the limitations imposed by the paramount duty to the court and their ethical obligations. Breaches of these duties might not impact the particular case although they may of course lead to very undesirable professional consequences. But, subject to these duties it is the duty of the defence to do what they can to protect an accused from being convicted except upon admissible evidence sufficient to support a conviction for the offence charged; or to advocate for the most favourable sentence; or for

⁶⁵ (1983) 152 CLR 657 at 663-664.

bail or whatever interlocutory process they may be engaged in. It is the duty of defence counsel to fearlessly uphold the interests of the accused.

- 84 The role of competent defence counsel has been described as being to “supplement the deficiencies of the client ... to bring to the task of persuading the tribunal the faculties or qualities which the client must necessarily lack” most obviously, knowledge of law and legal procedure.⁶⁶ It is the role of a defence lawyer to make the complex more digestible for a client, to obtain instructions and to act upon those instructions to the best of their abilities within the confines of the law.
- 85 The differing positions of defence counsel and prosecutors has been remarked on by some academics as involving prosecuting counsel, “fighting with one hand tied behind their backs” while defence lawyers by way of contrast are said “to have a free hand in the trial.”⁶⁷ This disparity has been asserted to be, in part, a result of a “lack of symmetry in the criminal justice system” which is in turn said to be particularly pronounced in relation to differing pre-trial disclosure obligations on each party⁶⁸. It has been said that in contrast to those who act for the Crown, a defence lawyer has few obligations to disclose their case and “few constraints placed on [their] adversarial zeal for their clients.”⁶⁹
- 86 These observations have been made by way of criticism. But any suggested “lack of symmetry” must be seen in the asymmetry that lies in the very notion of criminal proceedings brought by the State against an individual. There is, of course, no symmetry in the investigation phase. Before an individual is even aware of any suspicion of criminal conduct, investigators will be gathering evidence. That evidence gathering is likely to include the use powers granted by the State to obtain evidence, be it by controlled operations, covert surveillance, the use search warrants, or by telephone interception and listening devices. It may include the actual creation of evidence, such as where a

⁶⁶ The Ethics of Advocacy: J.V. Barry (1941) 15 ALJ 166 at 168. See also: Legal Ethics: Anita Del Medico (1993) (unpublished paper for the Office of Director of Public Prosecutions).

⁶⁷ Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice* (Butterworths, 1995) 223.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* 228.

suspect is enticed into speaking to a person who is cooperating with the police investigation, in circumstances where that suspect would otherwise not speak. Post investigation, the Crown has available, in the ordinary course, a professional witness in the informant. Information gathering powers are ongoing.

- 87 Understanding this asymmetry is important to understanding the role of the defence lawyer. The Crown seeks to build a case. The defence seeks to knock it down, or if not knock it down, to find a way through it. Perhaps I can put it this way. Both the Crown and the defence work within the same system. Both have, as their paramount duty, an obligation to the court. They are bound by the same set of ethical rules – but the particular rules that apply are different as a result of the different roles in the process.
- 88 In musical terms, each is playing within the same basic structure. They each have the same octave of notes from which to choose. But while the prosecution might be limited to playing in a pleasing and orthodox way, the defence lawyer has, like those at the forefront of popular music, the opportunity to rearrange the notes, to play loud, to add distortion – to reinvent the form – without losing the basic form.
- 89 My point is there is always scope for a defence lawyer to think outside the box, to look for creative ways through when a problem in one's case presents itself. To find a way to harmonise the facts and the law. In doing so, look closely at the law. In my time at Legal Aid, I discovered that the facts were not often on my side. When unable to rely on facts, a close grasp of legal principle is all that will help you, making it an essential part of the defence lawyer's armoury. But when you look at the law, ask whether it has to be played the same way it has been played to date. That spirit of problem-solving is part of what makes a career in criminal defence so enticing. It is that spirit that Legal Aid encourages in the work it does, in the High Court, the CCA, and in every court below.

90 I encourage each of you to continue to push the boundaries, to zealously advocate for your clients, as is the Legal Aid way. To return to my analogy, you are the rock stars of the legal world.

Concluding Remarks

91 Having made each aspect of my title relevant let me conclude by saying thank you for inviting me to speak today, and by saying thank you to each of you for your immense contribution and assistance to courts throughout the hierarchy each day. Legal representation and advice for the underprivileged in New South Wales would be out of reach, and an empty ideal, without you. Thank you.
