Reclaiming JUSTICE

Duncan Kerr

The revolution taking place in the justice system in the 1990s.

Those of us involved with the legal profession and the courts today have a responsibility to be active participants in the revolution taking place in the justice system of the 1990s. Those of you who work in the community legal centre network are at the front line of justice and I, as Justice Minister, am part of a government which has committed itself to profound reform of the justice system. It is a system most of us present have worked in and, at times, struggled against: a system whose ideals we strive to uphold and protect, but whose flaws we have come to loathe.

It was once said that the law protects everybody who can afford a good lawyer. No-one should shy away from accepting that sometimes this is indeed the case, but equally it must be said that there are so many fine lawyers who daily strive to uphold the principles of justice, respect for the rights of an individual, accessibility and equality before the law.

Opinion polls suggest there has been a corrosion of faith in the integrity not only of the justice system, but most of our social, corporate, economic and political institutions. The irresponsibility of the 1980s brought the corporate sector, in general, and banks, in particular, into a disrepute from which they are only now beginning to emerge. Many State governments have been tarnished by financial and political mismanagement. Confidence in police forces around Australia has been diminished by instances of corruption, which has in turn led to heroic efforts by new Commissioners and Ministers committed to eradication of such practices.

As a politician, I am made aware every day of continuing cynicism about parliaments and political parties. However, corporations, police forces, parliaments and politicians are all part, more or less, of executive government and, as such, have always been and should always be, closely scrutinised and criticised.

What is different about the present turbulence is the willingness of the public to express doubt and concern about the performance of those institutions whose purpose and function is ostensibly to curb unfettered executive power – especially the media, the judiciary and the legal profession. Traditionally, these institutions have made wide and sweeping claims to be the protectors of the individual's rights, the small person against the state. But the evidence is now quite incontrovertible that judges and lawyers are joining journalists in the pit of low esteem which has always been the dwelling place of politicians.

This erosion of public confidence in the legal profession and the judiciary should be of greatest concern to leaders of the profession, judges and to governments. In a recent speech, the Chief Justice of the High Court, Sir Anthony Mason, left little doubt about his concern over the growing dissatisfaction with the legal system. He said:

> Our adversary system of justice, never completely accessible to all, is still not so. It is costly not only to litigants but also to government which foots the bill both for the court system and legal aid, and judged by the standard of the consumer, the system is not efficient.

He continued,

> The plain fact is that, in contemporary society, people are not prepared to accept at face value what professional people tell them. That attitude, coupled with the ostensible shortcomings of the legal system has generated a debate about the legal system which is quite fundamental in its reach.

Duncan Kerr is Federal Minister for Justice.
This article is based on a speech given at the annual Tim McCoy dinner, 5 November 1993.

I am sure few present would dispute the truth of the Chief Justice's words. I might add, however, that the public's lack of goodwill towards the law and lawyers, in general, is not a phenomenon unique to our time. William Shakespeare described lawyers as perilous mouths. Another great poet, John Keats, once suggested we should class the lawyer in the natural history of monsters.

It is not the lawyer who is the monster in this debate. The legal profession is only part of the problem. The monster we must fight is the dragon of indifference and apathy: indifference to the crisis now confronting the justice system, legal practitioners and users of the courts, and unwillingness to upset the *status quo*. And, let's face it, it is not in the interests of *some* lawyers to be part of an industry which is more competitive, free of restrictive practices, less costly to the consumer and with fewer delays in the courts. I would suggest, however, that the vast majority would support a justice system which is simpler, cheaper and fairer.

In a recent column in the *Sydney Morning Herald*, a council member of the New South Wales Law Society, John Marsden, said the legal profession had very little to fear from the recommendations of the recent Trade Practices Commission draft report into the legal profession. In his words:

> There is no reason that lawyers should be shielded from competition. There is no reason that the restrictive practices of lawyers should be protected by State legislation. There is no reason the profession cannot be united on a national basis and subject to the Trade Practices Act.

John Marsden recognises that the momentum for profound and lasting reform of the legal system is accelerating. Governments – Commonwealth, State and Territory – also recognise this fact.

At the Standing Committee of Attorneys-General meeting in Darwin last June, the Attorney-General, Michael Lavarch, and I sought and obtained agreement from the States and Territories to co-operate on law reform through the Commonwealth's 'reclaiming justice' project. What we aim to do is to return to Australians their sense of ownership of the justice system. To restore their faith.

The question is, as Lenin said, 'What is to be done?' From the Commonwealth's perspective, I believe much can be done and is already being done. We can, for example, simplify our court procedures and our laws. The Attorney-General has embarked on a major re-write of the complex Corporations Law to make it more user-friendly. The *Family Law Act* is also being reviewed to ensure it is written in a language easily understood by those people it directly affects.

By way of illustration, I was at the recent Family Court Judges Conference in Sydney, where Chief Justice Alistair Nicholson admitted to having problems deciphering the complexities of a court document which is supposed to be simple enough for those who come before the court to read and fill out. This is no slight on Chief Justice Nicholson, but a sad indictment on the obstructive language of our courts.

Many other areas of the law are also being translated into plain English, but we have to accept the reality that this simplification process will take many years. Unravelling the tangled web of the law cannot be hurried and will require an enormous amount of consultation and co-operation if we are to succeed.

There is also room for reform in the way our courts work to serve the community. The great Lionel Murphy had a vision of law which he made real in his creation of the Family Court. A court initially set up divested of the formalities of the legal system we inherited from the United Kingdom. But the wigs and gowns, the raised benches, the strict procedures – all have since found their way into the Family Court, distorting the Murphy vision.

Of wigs and gowns, a senior member of the NSW Bar recently said:

> Experience at the Bar shows that witnesses tend to be more honest in courts where robes are worn. The wearing of robes assists in the creation of an atmosphere which is not conducive to lying.

There is not much I can add to this other than to say, if this were the case, some of you might demand that parliamentarians should wear wig and gown. I think not.

Perhaps the last word on this issue should go to Margaret Beasley, then a QC and now a Federal Court judge, who said wigs made 'barristers look like wolves in sheep's clothing'. The removal of wigs and gowns from Federal Courts is one issue the Access to Justice Advisory Committee, which I announced recently, will examine over the next five months. After reviewing the many recent reports on legal reform, on 31 March 1994 the Committee will report back to me on ways the Commonwealth can make justice in its jurisdiction simpler, cheaper and fairer. The Committee will be chaired by eminent Sydney barrister, Ronald Sackville, QC, who is recognised as one of Australia's most outstanding law reformers. His extensive experience at the Bar has made him fully aware of the market-place realities faced by legal practitioners and well able to differentiate between Utopian and achievable reform.

Ronald Sackville will chair a committee comprising members with significant experience in different aspects of the legal and justice system: the business world and the requirements of consumers of the services provided by the system.

Other areas under examination include reducing the cost of legal actions through deregulation and opening the legal market to competition. This might include, where appropriate, allowing paralegals and other professionals to provide some legal services. Deregulation of the profession could include a fused national profession and complementary programs towards mutual recognition of qualifications obtained interstate.

We aim to do away with those structures and procedures that impede access to justice. In some areas, for example, court intervention may be unnecessary to achieve outcomes. Recent and ongoing reforms in the bankruptcy jurisdictions clearly illustrate this. The committee has also been asked to examine whether contingency fee arrangements might be extended.

Many of these options were canvassed in the recent Trade Practices Commission draft report. In recent months we have also seen the various reports of the Senate Cost of Justice Inquiry, the Hilmer Report into Competition Policy and, it is worth noting, the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the need for clearer Commonwealth law. In New South Wales, a major piece of legal professional reform legislation is making its way through the political process.

The literature on legal reform has been prolific. The actu-

al achievements fall a long way short of the desired aim of a more equitable and accessible justice system. The challenge facing government, the courts and the legal profession now is to put those many well-intended words into action – a great challenge to us all.

I know many of you work in community legal centres (CLCs), which I see as being at the cutting edge of service delivery and law reform. The place of CLCs on the legal service delivery map is undisputed in the current Commonwealth sphere. In part, this has come about from an appreciation by the Commonwealth Government of the broad range of services which CLCs offer to many Australians at a very low price to governments. The Commonwealth has reflected its appreciation of the role of CLCs by significantly increasing funding to legal centres over the past three years.

In some company, I would be reticent to show my pride in the Labor Government's achievements in providing the financial support necessary for CLCs to protect the legal rights of those at the most vulnerable end of society. But in the present company, I feel able to express that pride. Most centres have had funding increases of between 50% and 150%. This achievement, particularly when budgetary pressures led to funding cuts in many programs is, I know, a record of which my predecessor and former colleague, Senator Michael Tate, was proud, particularly when you remember that so many other Ministers had to live with zero or even negative growth in their programs. I also aim to ensure the financial viability of the CLC movement is maintained and, where possible, enhanced.

From my own personal experience, CLCs are places where a lot can be done with very little. The lack of resources by necessity makes for resourcefulness. Australia's CLCs are held together by a vast reserve of talented professionals committed to the principle of a justice system which serves all people, especially those who might otherwise be shut out or swallowed up by the system.

The Commonwealth's direct powers to influence and improve service delivery are quite limited. I am, however, hopeful that by taking a greater interest in the administration of justice in our own jurisdiction, we can bring about changes that will ultimately be felt at a State level.

The legal industry in Australia employs some 55,000 people. Its annual turnover is estimated at $3 billion. Its work practices and procedures in some instances are those of a pre-industrial revolution craft guild, while the demands on the system are those of a highly complex, technologically advanced society. There are opportunities for Australian lawyers to export their services in global markets. Japan has recently opened up its huge service market to international competition. This export drive is made more difficult if international firms have to deal with 17 different professional bodies across Australia. The profession must meet this challenge.

In the last ten years or so, every other sector of the economy has had to come to a sometimes wrenching accommodation with the requirements of the market and the needs of the Australian population. In the service industries, telecommunications, post and transport have all been massively restructured to provide better service at lower cost. Even the medical profession and the hospital system – which provide the closest analogy to the legal profession and the court system – have been forced by public opinion to examine and drastically change their practices, performance and standards of professional and financial accountability.

Accountability is one of the central tenets of the 'reclaiming justice' project – accountability to a public which is demanding that the dusty and imposing doors to our courts be opened wide.

Members of the judiciary should not fear this scrutiny. Judicial independence is not under threat. There is a very clear distinction to be drawn between independence and accountability in a democratic society such as ours. If the Australian community is to have confidence in its courts and the justice system, it needs to know that the courts use their resources efficiently and effectively. Our courts do not exist separately from other aspects of public administration. It is no answer for the public merely to accept that the current judicial system operates entirely in its best interests.

So, the time for lasting and effective reform of our justice system is upon us. There can be no resisting the intensity of the mood for change in the Australian community. While there will be resistance to change, I predict the overwhelming majority of those who work in and for the justice system will be, and are already, inspired by the need to improve it.

I believe the Commonwealth's strategy to 'reclaim justice' for the Australian people will ultimately be successful. We are determined to improve access to justice with the co-operation of the States and Territories, the judiciary, the community and the legal profession. At a grass roots level, reform will continue to be driven through organisations such as the community legal centres.

Balancing the scales of justice will require nothing short of a total commitment from all who wish to see justice become simpler, cheaper and fairer.