

Ethel Benjamin Address

Access to Justice – Who Needs Lawyers?

7 November 2014

Her Honour, Justice Helen Winkelmann, Chief High Court Judge

E nga mana, e nga iwi

Tena koutou, tena koutou, tena tatou katoa

I begin by speaking in praise of the New Zealand Law Foundation and the Otago Women Lawyers' Society for hosting this event. I am humbled by the knowledge of the very notable women who have spoken in previous years and honoured to be associated with the Ethel Benjamin Address. This is an important event in the annual legal calendar because it ties us so strongly to a not very distant past in which women, including the young law student and lawyer Ethel Benjamin, fought for the right to equality in New Zealand. It is an event which reminds us that the pioneers in that fight fought hard. They fought hard for equal education, for the right to vote, for economic fairness, and for the right to lead a life free of violence. But I think the most important thing about the Ethel Benjamin address is that it gives us an opportunity to talk and think about the fights that lie ahead.

Ethel's admission to the profession owed little if anything to support for gender equality from within the profession. The legal profession was one of the very last professions to admit women to its membership, and Ethel had to wait upon an Act of Parliament to allow her to use her law degree. The Female Legal Practitioners Act 1896 was just one of a string of Acts of Parliament which for almost a century saw our country at the forefront of social reform as it affected the rights of women. It is easy to trace the legislative initiatives that fed into the slow but not inexorable move toward a greater deal of equality for women; the Electoral Act 1893, the Female Legal Practitioners Act 1896, the 1919 Women's Parliamentary Act. The latter gave women the right to stand for Parliament, leading to the election of the Labour candidate Elizabeth McCombs, although not until 1933. Then the Government Services Equal Pay Act 1961, the Equal Pay Act 1972 and the 1976 Property (Relationships) Act.

The role played by the courts has not been so dramatic, usually clarifying the direction a march which left from Parliament House, not the courthouse, should head. But in numerous decisions the Courts have given effect to women's property rights and acknowledged and attached value to a women's non-monetary contribution to a relationship (decisions such as

Reid v Reid, X v X, Jack v Jack).¹ Through judicial decisions courts have recognised the right of women to live lives free of sexual and domestic violence. As recently as last month the Court of Appeal released its decision in *Terranova Homes & Care Limited v Service and Food Workers Union* breathing new life into the 40 year old Equal Pay Act.²

This thumbnail sketch says something about the courts and the role of our profession. The role the courts play in our society is not generally to lead broad and bold social change. Rather, it is to work out the just outcome in a particular case. Teasing out, and applying how a statute or principle applies to the citizen. This is where justice operates most meaningfully. It is at the level of the individual that we experience every aspect of our society. For centuries judges and lawyers have worked together to ensure that all can enjoy the benefit of the protection of the law, including those who are vulnerable by reason of limited means, limited education, their minority status or their gender.

We know that it was the work of the courts that drew Ethel Benjamin to the legal profession. She was obviously a remarkable child, reading the law papers and listening to her parents discussing the latest case in the courts. In an interview given to the Christchurch Press in 1897 she said:

Is it not desirable that women should be able to consult members of their own sex regarding the many delicate questions on which they daily need to be advised? To the woman lawyer women can speak without reserve, and many whom modesty compelled to suffer in silence rather than confide their troubles to the opposite sex, will now have an opportunity of going to a woman lawyer for legal advice.

Although using language and sentiments appropriate to the time, Ethel was speaking about concepts to which we can all relate today. She was concerned to ensure that women could access justice, identifying as a barrier to that a male dominated profession. It is the idea of “Access to Justice” that I want to speak about in today’s address. At first blush, this is an uncontroversial topic. Who could doubt or challenge the importance of access to justice? We can all agree, that access to justice is a good thing.

However there are developments and trends in how the civil justice system is operating that have implications for access to courts, and to justice before the courts. The first topic I address today is the increasing view of civil justice as a user pays system, a view which places little value on the role that civil justice plays in our society. The second but related topic is the growth in the unmet need for access to justice. This is sometimes referred to by

¹ *Reid v Reid* [1979] 1 NZLR 572 (CA); *X v X* [2009] NZCA 399, [2010] 1 NZLR 601; *Jack v Jack* [2014] NZHC 1495.

² *Terranova Homes & Care Ltd v Service and Food Workers Union* [2014] NZCA 516.

commentators as the “justice gap”. The symptom of this justice gap I focus upon is the increasing number of unrepresented litigants before the courts.

What I would like to do is encourage debate about the first topic, the recasting of civil justice as a private benefit. As for the second, the growing justice gap, I aim to spark the profession to action.

The title to this address, “Access to Justice: Who Needs Lawyers?”, is intended to be provocative, but serious nonetheless. As I reflect upon developments within the civil justice sector I see the weakening of the exclusive and central role that lawyers have played in our courts. Ultimately I believe that if this continues it will be not just to the detriment of the profession, but also to the detriment of civil justice in our society.

A useful definition of what comprises our conception of access to justice is that of Lord Neuberger who says that access to justice:³

... has a number of components. First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the courts; sixthly, an effective legal process; seventhly, effective execution; eighthly, affordable justice.

For today I confine myself to the aspects of that definition that touch upon the need for affordable justice and associated with that access to legal representation. I also limit myself to discussion of access to civil justice. Although access to justice in relation to criminal law is of equal importance, different considerations are engaged. To adequately discuss a topic that broad would require more time than today allows.

Why is access to justice important in the civil sphere? It is because access to justice is the critical underpinning of the rule of law in our society: the notion that all, the good, the bad, the weak, the powerful, exist under and are bound by the law. That condition cannot exist without access to courts.

Courts of law developed as a substitute for self-help remedies. The civil action has been described as “civilisation’s substitute for vengeance”.⁴ They are essential to social order. The courts’ decisions articulate clearly how the law applies to the citizen, and thereby allow others to order their conduct and affairs so as to comply with the law. Through the independent operation of the courts, society also orders itself in the certain knowledge and

³ Lord Neuberger *Justice in an Age of Austerity* (Tom Sargent Memorial Lecture, 15 October 2013).

⁴ E J Couture “The Nature of the Judicial Process” (1950) 25 *Tulane Law Review* 1.

belief that all can have a remedy for a wrong, and that no-one, no matter how rich or powerful, is above the law.

Critical to this belief that underpins civil society is access to courts to challenge the wrongful acts of others. Unless we have this access, we will live in a society where the strong will by any means, including violence, always win out against the weak. This will be a society in which, once binding civil obligations, are recast as voluntary. In 1988 the Chief Justice of Canada put it this way:⁵

[T]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

There are indications that far from being viewed as a democratic institution, civil courts are, for policy purposes at least, regarded as a luxury service for which users should pay. There is a new language that is used in connection with courts; people who come before the courts are called customers, judges and lawyers are referred to as stakeholders, District Court centres are referred to as franchises. We are now to understand that we are part of a market for justice services and our product is being “marketised”.

One feature of this market approach to the courts is the rise in court fees. Court fees are charged by the Executive. The Executive provides the infrastructure for the courts to operate and charges court fees to recoup the cost of this. In New Zealand they are set high, and undoubtedly act as a barrier to accessing the courts.

The imposition of court fees reflects a user pays approach to the provision of civil justice. It undervalues the intrinsic value to society of a civil justice system. It ignores that although the courts produce something of value to the individual litigant, they also produce something of value to our broader society. It is because of the broader role our civil justice system plays that parties who come to court accept that by doing so they forego their right to privacy in relation to aspects of their dispute. They accept that it is the norm that the judgment issued in their case will be a public document, as will the fact that they have sought the courts’ assistance to decide the rights and wrongs in their particular case.

⁵ *BCGEU v British Columbia* [1988] 2 SCR 214.

Commenting upon the court fee regime, Priestley J in his Harkness Henry Lecture, made the following comment:⁶

One extraordinary feature of Ministry of Justice control of the financial aspects of the judicial arm is the entire system of the court fees and hearing fees ... A strong argument can be made that the requirement to pay filing fees and hearing fees amounts to the sale of justice. Is there anything comparable with the other two arms of government? There is not. It would never seriously be suggested that a citizen would have to pay \$100 to consult his or her Member of Parliament, or \$5,000 for the privilege of travelling to Wellington to lobby a Minister. Why is recourse to the judicial arm of government, for the purpose of the courts' constitutional role of resolving disputes, any different?

The Judge was of course echoing the powerful words of the Magna Carta:

To no-one will we sell, to no-one deny or delay right or justice.

Courts in other jurisdictions have seen the issue of court fees as a constitutional issue. In the very recent decision of the Supreme Court of Canada, *Trial Lawyers Association of British Columbia and Canadian Bar Association v Attorney-General of British Columbia*, the Court addressed the limits of the Provincial Government's power to legislate concerning the administration of justice.⁷ Although not doubting the Provincial Government's power to require the payment of court fees, the Supreme Court held that the regime created did not grant adequate discretion to the court to ensure that fees did not prevent access to the courts.

McLachlin CJ said:⁸

The historic task of superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are essential to what the superior courts do. Indeed, it is their very book of business.

In an earlier 1998 English case, *Regina v Lord Chancellor, Ex Parte Witham* the English Court of Appeal struck down a court fees regime that took away an existing exemption from court fees for litigants in person who were in receipt of income assistance.⁹ In delivering the

⁶ John Priestley "Chipping Away at the Judicial Arm" (2009) 17 Wai L Rev 1.

⁷ *Trial Lawyers Association of British Columbia and Canadian Bar Association v Attorney-General of British Columbia* 2014 SCC 59.

⁸ At [32].

⁹ *R v Lord Chancellor ex parte Witham* (1998) QB 575 (HC) at 581.

judgment of the court, Laws LJ founded his analysis squarely on the proposition that access to justice is a fundamental common law right.¹⁰

As I have mentioned, the fees payable in respect of proceedings in the High Court are high. For example for a straightforward proceeding involving a one day hearing, Court fees alone would amount to \$6,700.¹¹

When the most recent review of civil fees was undertaken in 2012, the New Zealand Bar Association provided a thoughtful submission, suggesting a lesser rate of increase was appropriate. The Bar Association observed that the proposed hearing fees for a one day trial would be approximately 49 per cent more than those for a comparable UK trial. This was even though the UK daily fee was set on a cost recovery basis, and included judicial administrative time.

The Bar Association also compared our fees to those charged in comparable jurisdictions in Australia, and concluded that:¹²

...even without converting from Australian dollars to New Zealand dollars, ... individuals and small businesses pay much lower hearing fees in the ... states [of Western Australia, South Australia, New South Wales and Queensland] and in the Federal Court, than the proposed New Zealand daily charge of \$3,200.

I do not contend that there should be no court fees. Although the provision of court services is a public good, in the civil realm there is also an aspect of a private benefit to it. It is reasonable that some contribution to the cost of that be made. But it follows from the public good/private benefit dichotomy that fees should not be set at the level of full cost recovery. Moreover, because access to justice should be available to all, and not just to those who can afford the price set upon access to the courts, only those who can afford that contribution should be required to pay. The fee regime should not operate to deny access to the courts.

¹⁰ The New Zealand Court of Appeal recently cited Laws LJ's judgment as authority for the proposition "that access to the Courts for the purpose of seeking justice, especially when decisions of the Government are involved, is a fundamental right", *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [136].

¹¹ Calculated as follows: \$1,350 for filing an initiating document, \$1,600 for scheduling, \$500 for one interlocutory application on notice, \$3,200 for one day's hearing, and \$50 for sealing of the judgment: see the High Court Fees Regulations 2013, sch 1. The Registrar has power to waive fees for those dependent on income-tested benefits or superannuation, or if the applicant would otherwise suffer undue financial hardship if he or she paid the fee: see reg 19.

¹² New Zealand Bar Association "Civil Fees Review – Public Consultation Paper – September 2012" (9 November 2012).

Although the Bar Association did not carry the day on most of the points it raised in its submission, advocating for a more reasonable level of court fees is something the profession must continue to embrace.

Another manifestation of the growing attitude that civil justice is a private benefit is the continuing pressure on civil legal aid. The provision of civil legal aid is critical to ensuring access to justice. Writing after World War II, when the value of upholding the rule of law was perhaps more readily understood than it is today, the émigré scholar EJ Cohn wrote:¹³

Legal aid is a service which the modern state owes to its citizens as a matter of principle ... Just as the modern state tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law.

Civil legal aid funding (excluding Treaty of Waitangi claims) has reduced from \$60m in 2010–11 to \$49.4m in 2013–14. A fixed fee regime has been introduced and set at a level which has caused many practitioners to decline to do legal aid work. The financial threshold for eligibility for legal aid is set very low.¹⁴ The maximum level of gross annual income for single legal aid applicants is \$22,366, and \$35,420 for an applicant with a partner or one dependent child.

People are encouraged to resolve their disputes outside of the court system. No-one can quibble with the view point that it is desirable that people resolve their disputes without resort to the courts. Disputes should be resolved outside of a courtroom if that can be done in a way that at least roughly reflects the rights and obligations of those affected, but sadly that is not always possible. It is especially not possible for the already vulnerable. Present levels of civil legal aid inevitably mean that many individuals cannot look to the courts to enforce their rights or obtain a remedy for a wrong. To the extent that those unable to obtain legal aid do come to the court unrepresented, this is a false economy. It is a false economy because of the greater demand that is placed upon court resources and court time by the unrepresented litigant, a point I return to shortly.

¹³ E J Cohn “Legal Aid for the Poor: A study in comparative law and legal reform” (1943) 59 LQR 250 at 253.

¹⁴ In the civil justice area, applicants will receive legal aid if they seek to launch an eligible proceeding, if they are an eligible applicant on the basis of financial status and other criteria, and the prospective proceeding has sufficient merit. See Ministry of Justice *Eligibility Guidelines* (8 July 2014).

That takes me to the second challenge to access to justice identified at the beginning of my address: the growth in the justice gap, the unmet need for civil justice in New Zealand. I am going to focus upon a particular symptom of this, the unrepresented litigant.

You might think that people arguing their own cases before courts is the system operating how it should, people are accessing the courts. But fundamental aspects of our system of justice are built upon the assumption that parties will be legally represented. This means that growing levels of unrepresented litigants are a challenge to the functioning of that system. Equally as important, is the fact that those who come before the courts unrepresented risk being disadvantaged by their lack of representation.

In New Zealand, just as elsewhere, more and more people come before the courts unrepresented. Although there is no trend information available, judges and court staff know from observation that unrepresented litigants before the courts are growing in number. The unrepresented litigant is a particular feature of judicial review and appellate work. The Ministry of Justice is able to say that of the 60 civil applications for leave to appeal to the Supreme Court filed this year, 32 have been filed by unrepresented litigants.

In the Court of Appeal, of the 228 active civil files, 56 involve unrepresented litigants (25 per cent). In the Auckland High Court registry 40 per cent of judicial review cases have one or more unrepresented litigant, and 30 per cent of appeals have one or more unrepresented litigant.¹⁵

Why is there this increase in unrepresented litigants? We do not know the answer to that question in New Zealand, but a study currently underway may give us some insight.¹⁶ We know from international studies that by far the most consistent reason for proceeding without representation is lack of money.¹⁷ People cannot afford legal representation because it is too expensive. As legal aid schemes become more and more constrained, both in terms of eligibility and in terms of the remuneration available to lawyers, this problem worsens. If you cannot afford legal representation, and legal aid is not available to you, your alternatives are to represent yourself, or not take your claim to court.

¹⁵ These figures are collated from information provided by High Court registry staff in Auckland. In the Wellington High Court 35 per cent of active judicial review and 20 per cent of active appeals involve unrepresented litigants.

¹⁶ Bridgette Toy-Cronin "Going to Law Without a Lawyer – Self-Represented Litigants in the civil courts" (to be published).

¹⁷ J MacFarlane "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report (May 2013)" at 39, cited in Hazel Genn "Do it yourself law; access to justice and the challenge of self representation" (2013) 32(4) Civil Justice Quarterly 411.

We also know that some litigants come before the court unrepresented because they choose to. Some of these have had bad experiences with legal representation. Some are vexatious or querulant litigants, pursuing repeated and relentless litigation, ultimately without merit. We need to avoid the development of querulant behaviour because of inadequate access to legal advice. Querulant behaviour benefits no-one. It can consume the life and wealth of the querulant and their hapless opponent, and place enormous stress upon the resources of the court and the well being of the court staff.¹⁸

Finally, following on from recent Family Court reforms, some come before the Court unrepresented because they are only entitled to legal representation with leave.

The trend to increasing numbers of unrepresented litigants has to be seen against the background that our systems and rules are not designed to support unrepresented litigants bringing their cases before the court. As Adrian Zuckerman, in his article *No Justice Without Lawyers — The Myth of an Inquisitorial Solution*, says:¹⁹

Since lay persons are not familiar with the substantive law and court procedure, they have difficulty to prepare adequately and to comply with rules and court orders, with the result that the court is forced to devote disproportionate time and effort to cases involving [them].

He refers to this as the “efficiency deficit”.

Information the Ministry of Justice has collected from the Registries of the Supreme Court, Court of Appeal and High Court confirms that unrepresented litigants consume a disproportionately significant amount of Registry time, and that dealing with unrepresented litigants contributes significantly to workplace stress.

The impact of the unrepresented litigant is still greater when the case comes before the court. The unrepresented litigant has none of the knowledge of the law to make decisions as to how a case should be pleaded, or what evidence is relevant to the case. Even if they have undertaken their own researches and attained some mastery of the law and the process, they are embroiled in the dispute. They will not and cannot have the benefit that counsel has of some level of emotional detachment from the dispute, a key feature of effective advocacy.

Most judges and counsel would tell you that a trial with an unrepresented litigant will take far longer to hear than a trial where all parties are represented. Judges regard themselves as

¹⁸ Genn, above n 17.

¹⁹ Adrian Zuckerman “No Justice Without Lawyers — The Myth of an Inquisitorial System” (2014) 33 *Civil Justice Quarterly* 355.

under a duty to do what they can to ensure that the unrepresented party understands what is going on in court and has a good and fair opportunity to present their case. Legal representation allows the hearing to proceed without this level of judicial intervention and also allows for more focused and direct production of evidence and argument of legal principle.

In order to protect their rights, citizens must have a means of accessing and understanding substantive law. It is in the provision of legal advice in advance of trial, that most of the important work is done by lawyers. However assiduous the Judge is in ensuring a fair hearing, if that early work has not been done, those efforts cannot make up for deficiencies in how the claim is formulated, and the evidence selected. By the time the case comes before the Judge the die has largely been cast. Moreover, if there is a serious power imbalance between the parties, such as there may be in relationship property or day-to-day care cases, the Judge may not pick up on that fact. Even where that power imbalance is evident, such as where an individual sues the Crown, the time that a case is before a judge will probably provide too small a window of opportunity to redress that balance. As Zuckerman says:²⁰

No increase in the inquisitorial nature of the proceedings can make up for the adversarial deficit in such situations.

What of the impact on the process itself and the other party? How active can judges be in assisting the unrepresented party place the relevant claim and evidence before the court? How much should they intervene to ensure that the unrepresented party's claim is not skilfully swept away by the represented party, without the true merit of the claim ever being considered?

The adversarial processes, and indeed the rule of law, have at their heart, the notion of the impartial Judge who holds “the balance between the contending parties without himself taking part in their disputations”.²¹ The risk of a judge having to make up for the knowledge deficit and presentation deficit that occurs in an unrepresented litigant's case is that they become an effective participant in the dispute. In her article, “Do it yourself law: access to justice and the challenge of self representation” Dame Hazel Genn puts the matter as follows:²²

The purpose of a Judge's passivity is to prevent her from reaching a view on the case too quickly and failing properly to weigh all of the evidence. Adversarial presentation is thought to be an effective way of combating the human tendency to

²⁰ At 367.

²¹ *Yuill v Yuill* [1945] 1 All ER 183 (CA); and see also the discussions of these concepts by Denning LJ in *Jones v National Coal Board* [1947] 2 QB 55 at 63 (CA).

²² Genn, above n 17.

judge swiftly those things that are familiar. This is the psychological process known as confirmation bias by which we hear and evaluate evidence in a way that is consistent with our pre-existing beliefs, rather than allowing our beliefs to be formed by the evidence. It is a natural and common tendency in human reasoning. One form of confirmation bias is jumping to a conclusion on the basis of a small amount of evidence and then fitting the rest of the evidence to the initial hypothesis.

There is also another aspect to the adversarial model which depends upon legal representation. It is the reliance that judges place upon counsel to never knowingly mislead the court in matters of fact or law. This duty of counsel enables the system to function efficiently and maintains its integrity. It frees the Judge from having to conduct his or her own inquiries to independently check the veracity of what they are told by counsel. For counsel this duty flows from the fact that counsel are officers of the court. It is also a manifestation of the obligation on all lawyers to uphold the rule of law, an obligation now given statutory recognition in the Lawyers and Conveyancers Act 2006.²³

When analysed in this way, it becomes clear that representation for a party is central to the Judge performing the Judge's task.

And what of the understandable tendency for judges to ask the lawyer for the represented party to help out a little in dealing with the unrepresented party? A request that the lawyer point out the sixth schedule to the High Court Rules to an unrepresented appellant may seem innocuous, but what does that do to the represented party's estimation of the court system? What do they make of the court asking the lawyer they are paying to help the party who is suing them?

What I have described up to this point is a growth in the number of unrepresented litigants before the courts and just how it is that the unrepresented are disadvantaged notwithstanding judicial attempts to level the playing field. I have also described how this is causing difficulties for how the court functions and how it risks changing the fundamental nature of the adjudicative task.²⁴

The numbers who forego commencing proceedings altogether are more difficult to assess than the numbers of unrepresented litigants. We can confidently predict that they are far more significant in number than those who choose to represent themselves. The unrepresented litigant is the visible tip of a very large but submerged problem- an unmet need for access to civil justice. This is the problem I earlier referred to as the justice gap.

²³ Lawyers and Conveyancers Act 2006, s 4(1).

²⁴ The right to self-representation offers theoretical access to the courts for litigants that may be illusory. At the same time, the right to act in person can generate significant negative effects and costs for opponents and the court: see Genn, above n 17.

The court system is for many a foreign land and the notion of bringing proceedings without legal representation can be compared to the fearful prospect of being stranded in a foreign land unable to speak the language, and without the money needed to find your way home. We should be very concerned to assess the extent of this unmet need for justice. If courts dispense justice for only the few, what does this mean for our concept that we are a nation that exists under the rule of law?

As pressing as it is to understand the extent of these issues, I suggest that still more pressing is the need to start addressing them. Are there solutions to these problems? In other jurisdictions, the United Kingdom, Australia and Canada, these issues have been the subject of considerable public debate and publicly funded research.²⁵

Solutions that have been proposed to date tend to focus upon making it easier for unrepresented litigants to argue their cases before the courts. Suggestions have included simplifying rules of procedure, but caution needs to be exercised in acting upon such proposals. The current processes of the courts have been developed to ensure fair and open hearings. It is difficult to see just how far simplification of the essential processes, such as pleading and discovery, can be taken without compromising these objectives. In New Zealand attempts in the District Court to simplify the court processes to cater for unrepresented litigants were widely regarded as problematic, producing complexity rather than simplicity, and leading to a drop off in the level of civil proceedings filed in the court. They have now been repealed.

Another suggestion is the creation of information packages to assist the unrepresented. In New Zealand the Ministry of Justice has created a web based resource for the unrepresented. These initiatives are worthwhile, but information packages are unlikely to make up for the advocacy deficit identified earlier.

More hopeful have been various initiatives to provide pro bono legal assistance to assist those wishing to bring proceedings in court. Litigants can thereby access the skill and objective judgement of the advocate. Although these type of schemes in New Zealand are presently very limited, there are very good models we can look to overseas. In Singapore and in most of the Australian states, the Law Societies and the Bar Councils have been active in supporting pro bono legal advice schemes, some located in the courthouse, to assist

²⁵ See for example the Civil Justice Council's "Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice: Access to Justice for Litigants in Person (or self represented litigants)" (November 2011). Also Report of the Judicial Working Group on Litigants in Person (July 2013) available at <www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf>

unrepresented litigants. Some of these schemes are very sophisticated, such as the Queensland Public Law Clearing House.

Another focus of commentators is on assisting the unrepresented litigant in the hearing. It is commonly suggested that judges should adopt a more inquisitorial approach to proceedings before them. Recent reforms in the Family Court assume that there will be no legal representation in certain types of cases without leave of the Judge, and that the Judge will undertake an inquisitorial function. However, as the above discussion I hope outlines, this approach is inconsistent with our present model of justice. It is significant I suggest, that European civil law systems which do depend upon an inquisitorial system, also require that parties be represented. In France, Germany, Italy and other European countries, a party must be represented before the Court.

There is also the suggestion that facilitating the role of the McKenzie friend may solve some of the difficulties of the unrepresented litigant. A McKenzie friend is someone allowed, with the leave of the court, to sit with an unrepresented person. The McKenzie friend may give them advice, but has no right to address the court unless granted leave to do so. As part of its review of the Judicature Act the Law Commission addressed the role of the McKenzie friend, and sought submissions in connection with the continuation or alteration of that role. The New Zealand Law Society supported the retention of the role of McKenzie friend. They said:²⁶

McKenzie friends are able to provide advice and support to a number of the most vulnerable litigants in the court system and accordingly enhance access to justice. Given the new restriction on legal aid, this support is likely to become increasingly important as many litigants will be unrepresented.

It is certainly true that the ability to have the support of a trusted friend or advisor can give some who cannot afford legal representation the necessary confidence to take their case to court, and to argue it. The McKenzie friend who is seated near the party for moral support and advice at hand can be of real assistance to an unrepresented litigant. But the role of McKenzie friend cannot fill the advocacy gap, unless the McKenzie friend has all the attributes of the lawyer. In the United Kingdom there are now professional McKenzie friends. So prevalent is this trend that the UK Legal Services Consumer Panel has released a report on the phenomenon. Summing up the development the report writers said:²⁷

Arguably, lawyers and McKenzie Friends are not in direct competition as their roles are meant to be different and the client base using McKenzie Friends is uneconomic

²⁶ As noted in Law Commission *Review of the Judicature Act 1908: Towards A New Courts Act* (NZLC R126, 2012).

²⁷ Legal Services Consumer Panel Report “Fee-charging McKenzie Friends” (April 2014).

for lawyers to serve. Increasingly, though, the McKenzie Friend role is evolving to mirror the end to end service provided by lawyers - they will offer any form of assistance the client requests. For example, rights of audience are meant to be granted to fee-charging McKenzie Friends only in exceptional circumstance, but some McKenzie Friends told us this is the rule rather than the exception.

Fee charging McKenzie friends are not a significant phenomenon in the New Zealand court yet. But we know that trends that emerge in other common law jurisdictions usually find their way to this land. Whether or not the McKenzie friend is fee charging there are reasons to doubt the utility of the development of this role as a substitute for legal representation. The report writers identify a number of risks associated with the use of McKenzie friends: agenda driven McKenzie friends, poor quality advice, a lack of understanding of the limitation of the role and breach of privacy. McKenzie friends have none of the professional obligations of counsel – they have no obligation of confidentiality, or duties to the Court.

Tribunals are also seen as a way to ease access to justice. Tribunals can operate with less formality, and in some tribunals leave is required for legal representation. Every system needs to allow for the simple and speedy resolution of low value civil disputes, and the Disputes Tribunal in New Zealand performs this role effectively. But tribunals are not the answer to the broader issues. As soon as the issues before a tribunal become complex, the same disadvantages to an unrepresented litigant arise. An English study conducted in the 1980s revealed that in appeals before legal tribunals those with legal representation were significantly more likely to win than those without representation.²⁸ The more complex the matters before the tribunal, the more the tribunal will come to resemble a court.

There are then, no easy answers. But the profession must take an active part in understanding the nature of the problem, and striving for the solution. At the moment we have serious market failure. No-one could suggest we do not have enough lawyers in New Zealand. There is an adequate supply of lawyers. But we have a very large unmet need for legal representation.

The legal profession has to help meet that need if it is to retain the central position it now has in our system of civil justice. It has exclusive rights of audience in court to represent litigants. If the profession is unable to provide that representation in a form and at a price that allows people to use those services, it will not be long before the question is asked why should that exclusivity be maintained?

²⁸ Hazel Genn and Yvette Genn “Effectiveness of Representation in Tribunals” (Lord Chancellor’s Department, 1989) at 113.

There are many strands to be explored. The first is consideration of how legal services are offered. At the moment a 19th century model reigns supreme. The lawyer is engaged and provides services from the commencement of the proceedings to the end, and on a time and attendance basis. There is no incentive for efficiency. The profession could explore different pricing models including fixed price services.

It could also research overseas trends towards unbundling services. For example, a client might come to the lawyer just to have the pleading drafted, and to get some basic advice about the scope of evidence and legal principles, leaving the client to look after the rest.

And supplementing all of this is the provision of pro bono services. The New Zealand profession provides thousands of hours of pro bono legal advice a year, through community law centres and on line legal clinics. However there is currently no focus upon facilitating access to the courts for those unable to afford legal representation. There are many overseas models that could usefully be explored.

Why should the profession do so much for free? The first reason is that it is the right thing for a profession sworn to uphold the rule of law, to do. Public service is one of the defining characteristics of a profession, certainly of the legal profession. And more than that, if the profession wishes to retain its preferred status before the courts, its exclusive right of audience, then it must show that the profession continues to lie at the heart of the collaborative enterprise which strives toward providing access to justice to all.

I conclude with two observations. The first is that for the well-being of our society, its peacefulness and economic prosperity, the public good that civil justice provides must be reflected in the policy settings that impact upon access to the courts. In particular it must be reflected in the level of court fees and the funding of legal aid.

My second observation relates to the challenge of providing legal representation at a level that allows greater access to justice. The profession that Ethel Benjamin fought to enter was not an innovative profession. It failed to understand or respond to the social justice imperative for according women equal status. Back in the 19th century, it took Parliament to put the profession straight on this. The challenges for the profession today are just as pressing as they were then — perhaps more pressing. It is for the profession to play its part, a critical part, in meeting the challenge to provide access to justice for all in our society. To do this, the profession will have to innovate. It will have to be prepared to initiate and engage in debate about these issues and to question, and if necessary change, its current way of doing business.