

**OPENING OF THE TASMANIAN LEGAL YEAR  
Professional Development Seminar**

**Pro Bono Schemes – Is Tasmania Ready for One?**

**FRIDAY 2 FEBRUARY 2007 by John Corker**

Having grown up in Tasmania and practised as a lawyer for over 25 years but never in this State, it is a great privilege for me to have the opportunity to talk to you today as key members of the Tasmanian legal profession.

I have been the director of the National Pro Bono Resource Centre for 3 years now and I enjoy regularly discovering new stories about lawyers who have provided free legal services to poor, marginalised or disadvantaged individuals (or organisations that provide assistance to these individuals). In Tasmania I have discovered the Mental Health Tribunal Representation Scheme, a joint scheme of Advocacy Tasmania, Uni of Tasmania and Mental Health Services (Tas) that primarily uses volunteer graduates and undergraduates from the University of Tasmania to represent mentally ill patients appearing before the Mental Health Tribunal but the scheme also has a couple of long term dedicated legal practitioners from the NW Coast who do appearances and have been involved with the scheme for some years. I am also aware of a Hobart based firm who does a lot of pro bono work for charities. Pro Bono legal work is often an activity that goes largely unnoticed but provides great personal satisfaction to the lawyer who does it. By the way, the Mental Health Tribunal Representation Scheme do provide training and would welcome greater involvement from lawyers (particularly advocates) in the Hobart area.

I am sure that most if not all of you at some stage in your career as a lawyer have decided to take on matter without expectation of a fee on the basis that that person really needs your help and they can't afford it. I don't pretend to be familiar with what occurs in Tasmania but can provide you with a national picture of what's going on and I don't suspect Tasmania is that different to elsewhere in Australia.

The Centre is presently conducting a national survey of the legal profession and its pro bono activities. The survey has been conducted in all States except Tasmania and the NT and we are hoping to have Tasmanian lawyers participate in this shortly facilitated by the Tas Law Society.

Nearly a 1000 lawyers have completed the survey and we have published a report of the QLD lawyers as a pilot exercise. In Queensland, where 39% of respondents came from regional and remote areas, 86% of respondents believed that lawyers should do pro bono work and 80% had done some in the past 12 months.

### **Main Message**

I am not here today to implore you to do more pro bono work or to suggest how you might improve your practice other than to say that greater coordination of existing activities and having a central focal point within the legal community for requests for assistance and coordination of pro bono activities has benefits for the profession and the public.

Pro bono work is voluntary, based on the capacity of a legal practitioner at a given time and any sort of structured change has to be driven by you as service providers. I recognise that there is not the ‘deep pockets’ in the Tasmanian legal profession that exist in some of the other states. That’s not a barrier to better coordination of existing activities and development of a stronger pro bono culture.

The benefits of having a pro bono referral scheme include:

- The public know where to go (no floodgates ACT 54/25)
- Members of the profession have a focus and a referral point. Appropriate matters are more likely to come to the right solicitor – someone who knows the area of law has the time and is willing to take a matter on. You don’t have to waste time ringing around your contacts to try and find someone who might take a matter on or simply turn someone away.
- The courts know where to refer people
- It is likely to help with a positive profile of the legal profession in Tasmania.
- It will help build a stronger pro bono culture amongst members of the profession.

You are lucky to have the overt support of the Chief Justice and the Attorney-General. Their leadership is important in terms of enhancing “the culture of giving” and the visibility of what is done but, with respect, they are not the service providers. To advance the idea of a referral scheme you

need at least one champion in the profession who is enthusiastic about the idea and you need to identify the limited resources required to operate the scheme. The idea as far as possible has to be owned by the whole legal profession. This means involving the community legal centres and legal aid, even government lawyers and law students can play a role. But what you do has to suit your culture.

### **Plan**

I intend to start by looking at why we as lawyers do pro bono work.

Then tell you about what's happening elsewhere in Australia and give you an overview of structured pro bono in Australia.

..and then David will talk about his firm's program, the criteria for selection of appropriate matters, pro bono referral schemes and pathways, particularly the ACT law society pro bono clearing house scheme commenced in November 2004. (in line with the topic today of "Is Tasmania ready for a pro bono referral scheme?")

### **Why we do pro bono**

There are a range of justifications for the so called 'pro bono obligation' of lawyers. *Pro Bono Publico* is a latin phrase that means 'for the Public Good' and so highlights the idea of a lawyer in the service of the public good. It is said that the essence of professionalism is public service and so lawyers must serve the public good (whilst nevertheless still vigorously pursuing their client's interests). In recent times, both the Chief Justice of the High Court, the Hon. Murray Gleeson and the Chief Justice of the Supreme Court of NSW, the Hon. James Spigelman have both said that the willingness of lawyers to undertake pro bono work is a key fact that distinguishes the profession of law from it being a mere business.

It has been said "that the legal profession has a long and noble tradition of giving freely of its services...', a tradition [that is] as old as the profession itself. In examining this proposition I would like to take you quickly through a potted history of development of the idea. An author who traced the historical development of legal aid in Europe ending with the 20<sup>th</sup> century development of state funded legal aid schemes stated that "much of the legal protection of the poor came from the spontaneous charity of individuals" such as Saint Yves of Brittany, now the patron saint of lawyers

[in Europe], who was canonised in part because, “he was a lawyer and yet not a thief, to the wonder of the people”. There is a real point to be made here, one of visibility of the profession’s pro bono activities As the ALRC put it in their discussion paper on the review of the Federal Civil Justice system<sup>1</sup>:

...in a world that sees lawyers in less charitable lights and where the financial and professional imperatives of practice are increasingly demanding, it is appropriate to emphasise the service ideals which characterise the legal professional ideal.

As far back as 1495, The *in forma pauperis* statute of Henry VII, required judges to assign counsel to the poor to represent them in court (including preparation of the necessary writs) with no requirement that the lawyer be compensated for his work. However there is no great evidence of this being successful. I should note that the Centre is strongly opposed to any requirement on lawyers to do pro bono work.

It seems there were two pillars supporting the original charitable and legislative response to the legal problems of the poor in Europe. The first was the Christian belief in the value of charity and the second, “the altruistic ideal of chivalry”.(the unselfish concern for the welfare of others). ”.

These motivations seem alive and well in the Australian legal profession.

Of nearly 1000 lawyers surveyed, when asked “Why should lawyers do pro bono work?, the top two factors identified by over 90% of respondents were given as “out of a sense of professional responsibility” and “to help people who are socially marginalised or disadvantaged”. The factors least cited were ‘employer policies’ and ‘a belief that it might lead to paid work’.

### *Legal Aid*

The early and mid 20<sup>th</sup> century introduction of state sponsored legal aid is said to reflect a shift towards making legal assistance for the poor a ‘legal rather than a mere moral obligation’. The rationale for the State funding of legal aid services and the profession’s pro bono obligation are important to understand so as to be clear about the nature of the so called pro bono obligation and to protect against pro bono being a substitute for government

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<sup>1</sup> ALRC Discussion Paper No 62, para 6.46

funded legal services. This is particularly so in an environment where there has been a decline in real terms to much of the legal aid system over the past 10 years.

In a speech in October 2005 by the Victorian Attorney-General, the Hon. Rob Hulls, he acknowledged that “government bears the ultimate responsibility for vulnerable people who need access to legal advice and representation, and he said that “the first line of defence in the fight for access to justice will always be legal aid, community legal centres and Aboriginal and Torres Strait Islander legal services”. However he referred to government upholding its part of a bargain with the private profession and pointed to a symbiotic relationship between government funding for legal aid and the professions’ pro bono effort, the idea being that the profession and Government should work together to help provide legal services to the neediest of the needy. The Centre endorses this approach but the important point is that pressure shouldn’t come off Government to adequately resource the primary legal service providers. Pro bono legal services must be conceived as complementary to and not a substitute for government funded legal services.

### *Access to Justice*

A second key justification for the pro bono obligation is that it is part of a lawyer’s duty to facilitate access to justice. As the main possessors of legal knowledge and skills and with a monopoly on exercising these, lawyers have a key role to play in ensuring access to the justice system<sup>2</sup>. It is said<sup>3</sup>

“Lawyers have a unique obligation to help legitimize the very system in which they practice.” It arises from the very nature of a system that seeks Equal Justice Under Law.”

We well know that the cost of legal services is directly related to the scope for members of the community to access justice. There are many ways that the law recognises this. For example the regulatory control’s on lawyer’s bills or the recognition by the courts and the legislature of the appropriateness of lawyers taking on certain clients on a speculative fee basis which is premised on promoting access to justice (this is not pro bono). The legal aid system is also premised on this idea. If we accept that the

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<sup>2</sup> See Rhode, D “Pro Bono in principle and in practice” (2003) 53 J. Legal Educ. 413 @430

<sup>3</sup> Eldred and Schoenherr, “*The lawyer’s duty of public service: more than charity?*” 96 W. Va. L. Rev 367 @398-399

profession has a duty to facilitate access to justice then lawyers should take on legal aid briefs, volunteer at a CLC, undertake pro bono work and should feel good about doing so because lawyers are doing their part to facilitate access to justice for people who wouldn't otherwise have access. (Congratulations – the legal aid participation rate in Tasmania is high). Beyond the academic reasons that have been advanced for undertaking pro bono work, primary motivation for Australian lawyers seems to be personal satisfaction. Assisting with a genuine access to justice problem can bring considerable personal satisfaction.

An important principle is that a matter taken on under a grant of legal aid or on a pro bono basis should be given the same care and attention as a fully paid matter. It is simply a matter of professionalism.

### **Overview of pro bono in Australia**

The role of pro bono in the access to justice landscape is becoming increasingly visible.

When the 1994 Access to Justice Advisory Committee, chaired by Justice Ronald Sackville, reported to the then Attorney-General, there was no explicit mention of the role of pro bono legal services in increasing access to justice.<sup>4</sup> This is not to say it didn't exist but since that time, increasing attention has been given to the pro bono contribution of the legal profession and its role in facilitating access to justice.

The evolving “pro bono industry” in recent years is well-illustrated by the relatively recent establishment of:

- formal pro bono referral schemes run by legal professional associations<sup>5</sup>
- Public Interest Law Clearing House schemes largely funded by contributions from their law firm members.<sup>6</sup> NB Vic PILCH assisting Tasmanian respondents in the *Gunns* litigation.

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<sup>4</sup> Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (AGPS, Canberra 1994)

<sup>5</sup> These exist in the ACT, NSW, Victoria, and Western Australia.

<sup>6</sup> These exist only in NSW, Victoria and Queensland. See <http://www.nationalprobono.org.au/documents/ReferralSchemeshistoryreportfinal.pdf> for details.

- legal assistance schemes created by rules of court<sup>7</sup> B Federal Court (O80) scheme and Federal Magistrates scheme apply in Tasmania but has only had 7 referrals in total (none since 2004)
- structured pro bono programs in law firms. 27 firms have dedicated pro bono coordinators.
- the use of disbursement assistance schemes to facilitate pro bono representation. In Tasmania you have the Civil Disbursements Fund administered by the Legal Aid Commission of Tasmania that has been in operation for the last 2.5 years (150 apps made (over 100 granted). Applications for the fund to pay the cost of disbursements (not barrister's fees) may be made when the solicitor is acting on a pro bono basis. Like most of these schemes which exist in most States of Australia, disbursements are to be repaid in full plus a premium applied if successful. If not the debt is waived.
- informal rosters of pro bono lawyers in courts and tribunals taking on a duty lawyers role.
- dedicated pro bono projects<sup>8</sup> and resources<sup>9</sup>
- questions about or analysis of pro bono in surveys<sup>10</sup> and parliamentary inquiries<sup>11</sup>. The Final Report of the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice<sup>12</sup> (the "2004 Senate Report") devoted an entire chapter to pro bono services.
- pro bono awards<sup>13</sup>
- articles in the press about pro bono<sup>14</sup>

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<sup>7</sup> Order 80 pro bono referral scheme, Federal Court of Australia; Order 12 pro bono referral scheme, Federal Magistrates Court; Rule 66A legal assistance referral scheme, Supreme Court of NSW; Rule 28C legal assistance referral scheme, District Court of NSW.

<sup>8</sup> for example, the Victoria Law Foundation supports a Pro Bono Secretariat; and Young Lawyers, a committee of the NSW Law Society is producing a report which outlines the pro bono output of law firms for law school graduates.

<sup>9</sup> See <http://www.nationalprobono.org.au/publications/legalguide/index.html>

<sup>10</sup> for example, the inclusion of questions about pro bono in the Australian Bureau of Statistics survey of the legal profession in 1998.

<sup>11</sup> For example, the specific inclusion of the impact on pro bono services of the capacity of the legal aid and access to justice arrangements to meet community need for legal assistance in the 2004 Legal and Constitutional References Committee in Legal aid and Access to Justice, see

[www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/)

<sup>12</sup> [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/ch09.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/ch09.htm)

<sup>13</sup> for example, the awards sponsored by the Victoria Law Foundation (see <http://www.victorialaw.org.au/Probono.asp>) and the Law and Justice Foundation of New South Wales Justice Awards at [http://www.lawfoundation.net.au/justice\\_awards/](http://www.lawfoundation.net.au/justice_awards/)

- the National Pro Bono Resource Centre ('the Centre')

The Centre was established in 2002 in line with a recommendation made by the Task Force established by the then Attorney-General, Darryl Williams. Its role is to promote and support the legal profession in delivering pro bono legal services. Some key activities of the Centre have been to publish the Australian Pro Bono Practice Manual, conduct two national conferences about pro bono and to broker relationships between legal centres that provide services to disadvantaged and marginalised people, (such as community legal centres and indigenous legal service providers), particularly in regional, rural and remote areas and city based law firms. The Centre has developed a voluntary aspirational pro bono target<sup>15</sup> for Australian lawyers of 35 hours per lawyer and has attracted about 50 foundation signatories to this proposal. This will be launched later this year.

How much is done nationally? From the survey so far) about 850 lawyers), 20% done none in the past 12 months, 26.5% done less than 30 hours, 56.5% had done more than 30 hours, 23% had done more than 90 hours.

According to this survey, as at June 2002, 4,744 private solicitor practices (around 63%) and 2,878 barrister practices (78%) reported doing some sort of pro bono work. Taking only work that appears to have been done unpaid or without expectation of a fee (with the intention of excluding reduced fee legal aid work,) solicitors reported 786,100 hours of pro bono work and barristers 203,300 hours for a total of 989,400 hours<sup>16</sup>.

From other sources, it is estimated that as at June 2002, there were between 2500 and 3500 people volunteering at CLCs throughout Australia, with 1300 to 1700 being lawyers. Based on an average voluntary contribution of 10 hours/month<sup>17</sup>, total volunteer hours at CLCs were approximately 400,000, of

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<sup>14</sup> The Centre has noted a marked increase in articles about pro bono in legal journals and the mainstream press over time, including regular columns dedicated to pro bono news and events in some legal journals, for example, *The Law Institute Journal* in Victoria.

<sup>15</sup> For further details see [www.nationalprobono.org.au/target](http://www.nationalprobono.org.au/target)

<sup>16</sup> There is a great deal of reduced fee work undertaken by the profession which has been excluded, primarily as there is no information on how much the fee is reduced.

<sup>17</sup> Roslyn Melville, *My Time is Not a Gift to Government*, an Exploratory Study of NSW Community Legal Centre Volunteers, University of Wollongong, May 2002

which about 200,000 were performed by lawyers<sup>18</sup>. It has been suggested that the figure may be higher<sup>19</sup>.

Much of the pro bono work done is advice, transactional (meaning advice on matters such as corporate governance, tax, intellectual property to organisations that assist disadvantaged people or that are involved in public interest activities), law reform and continuing legal education. Providing advice rather than litigation tends to be more of a known quantity, in that the scope of the work is usually discrete, unlike litigation and are therefore more digestible to pro bono lawyers. In a recent survey of members of the Queensland law society undertaken by the Centre the most common pro bono legal service provided was advice (48%) followed by litigation, representation and transactional services (each 9%). Anecdotally we know that a number of large law firm programs spend less than 50% of their total pro bono hours on litigation.

It is worth noting that the Victorian government stand out as one that has actively facilitated the legal profession in its State to provide pro bono legal services and has provided an incentive to firms in the form of a condition to their Law Firm Panel Services contract that requires the firm to spend a percentage (suggested by the law firm in the tender process but usually 10-15%) of the amount they receive in legal fees from government on pro bono legal services. Under that scheme the A-G reported that \$6.6m worth of work had been done from 2002-2005.

One aspect of the provision of pro bono legal services is that the call for assistance has been answered most strongly in cases where the unmet legal need is clear, notably in Australia in migration cases. The Chief Justice of the High Court, the Hon. Murray Gleeson, recently noted the tremendous contribution of the members of the WA bar for their work, at the request of the court, in providing pro bono representation for self-represented litigants in asylum cases before the High Court in that State<sup>20</sup>. The US experience is

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<sup>18</sup> ABS 8667.0 2001-02 Survey, tables 2.9, plus estimates based on Roslyn Melville, *'My Time is Not a Gift to Government', an Exploratory Study of NSW Community Legal Centre Volunteers*, University of Wollongong, May 2002, plus personal communications.

<sup>19</sup> See Senate Inquiry into Legal Aid and Access to Justice, (the *2004 Senate Report*) Final Report, [www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/) para 9,16 at p 165 and footnotes therein. These echo difficulties in quantifying the extent of pro bono legal services in Australia.

<sup>20</sup> Speech by the Chief Justice to the National Access to Justice and Pro Bono Conference 2006, Melbourne, 11 August 2006.

similar in that events such as 9/11 and Hurricane Katrina which clearly demonstrated high levels of legal need were met with a strong and widespread pro bono contribution from the US legal profession.

To summarise, Tasmania has some ad hoc pro bono work going on, low visibility for the work that is done, a strong legal aid culture, a civil disbursements fund which could support pro bono work, overt support from your A-G and Chief Justice, some court pro bono referral schemes, some community legal centres and other orgs that can identify legal need. So the signs are good. We think better coordination and greater visibility of this activity will be a positive for the Tasmanian legal profession.

But what you do has to be driven by you as service providers. Small steps are sufficient. Participation in the national survey if promoted adequately should provide some useful data. And perhaps the Law Society can establish a pro bono committee. Now hand you over to David to have a look at how pro bono referrals are managed in other parts of the country.

### **Referrals and Schemes (David Hillard)**

**Return to key message.**

**Questions and Discussion**