

## **Briefing Paper for Plenary 2**

**Title:** *DEFINING PRO BONO: MODELS AND CONSIDERATIONS*  
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### **Introduction**

Various definitions of pro bono work have been in use throughout the common law jurisdictions. In Australia, the most widely recognised definition is that offered by the Law Council of Australia. The Law Council definition was developed after extensive consultation with the profession. However, in legal practice today, we can identify variations in the nature of the work which practitioners choose to define as pro bono.

This briefing paper outlines some of the most commonly employed definitions of probono work. It then goes on to note the strengths and limitations of various formulations as they have been considered in the academic and professional literature and the studies and surveys of pro bono practice in Australia. The discussion of the advantages and disadvantages of various approaches to the definition of probono work has also been informed by consultations with a number of peak professional associations and specialist pro bono organisations. The views of a small sample of probono practitioners, who have been interviewed during the preparation of this paper, are also incorporated in this overview.

The research suggests that, as the nature of legal services becomes more varied, pro bono practice itself has assumed different guises. From the field, there is interest in refining the traditional definitions of pro bono work. At the same time, definitions are best understood as heuristic devices, finding their value in serving particular (and diverse) purposes. While we may be attracted to a common definition, ultimately standardisation may neither be possible or desirable.

## **PART A: THE DEFINITIONS**

### **(1) Law Council of Australia**

- 1 A lawyer, without fee or without expectation of fee or at a reduced fee, advises and/or represents a client in cases where
  - (i) A client has no other access to the courts and the legal system; and/or
  - (ii) The client's case raises a wider issue of public interest; or
- 2 The lawyer is involved in free community legal education and/or law reform; or
- 3 The lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations.

(2) Law Society of New South Wales, Pro Bono Task Force, 1991

Pro bono work is done for no fee or at a substantially reduced rate for those who would otherwise be unable to defend or assert their lawful interests and rights, or is of the nature described below:

Non-profit organisations: Legal assistance to non-profit organisations, educational institutes or statutory bodies in matters which further their public service charters but where the payment of customary legal fees would deplete their resources or be otherwise inappropriate.

Administration of justice: Activity which is designed to increase the availability of justice, improve laws and the legal system, or otherwise improve the administration and dispensation of justice.

(3) *Law Foundation of New South Wales, Centre for Legal Process, definition contained in its 1997 pro bono report*

Pro bono legal services are services that involve the exercise of professional legal skills provided on a free or substantially reduced fee basis. They are services that are provided for

- People who can demonstrate a need for legal assistance but cannot afford the full cost of a lawyer's services at the market rate without financial hardship;
- Non-profit organizations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good; and
- Public interest matters, being matters of broad community concern which would not otherwise be pursued.

(4) *Council of the Law Institute of Victoria, definition proposed 1996*

It is inherent in the professional responsibilities of a legal practitioner to contribute an identifiable part of his or her time to work without charge or at a substantially reduced charges:

- To establish or preserve the rights of the poor, the disadvantaged, or classes of persons who otherwise deserve public support, or
- For non-profit organisations having objects for the benefit of sections of the public, or
- For the improvement of the law or the legal system

(5) *Sample firm definitions*

*Clayton Utz*

*The firm will act free of charge for persons and entities in any type of matter where: legal aid is not available or has been unreasonably refused; the person is unable to afford legal representation; the person would, without legal representation, be likely to suffer an injustice or be prevented or hindered in performing a public service or good; the person appears to be willing to accept the firm's advice when given and to act appropriately according to that advice; and the matter does not create a conflict of interest with existing clients of the firm.*

## Freehills

Under our Pro Bono Program, pro bono work means legal and related services to individuals, corporations or public interest groups who promote the public good or require assistance with matters that are related to the public good, which in either case the firm is qualified and able to meet.

It will usually be necessary to show that the provision of legal services will benefit the organisation concerned in a manner which would not otherwise be available.

There can be no pre-determination of what matters constitute pro bono matters. Each case is decided on its merits. The motivation for the work is concern for the community.

A pro bono matter is *not*:

- The provision of legal services merely for the establishment of a private benefit unless there is a public need for the redress of a wrong;
- Merely something done without charge, although that most often (perhaps always) will be the case;
- A matter done on a concessional basis for acquaintances, family or clients. These matters form a distinct area of work, based on a distinct philosophy, or
- Work undertaken with the motivation or expectation of receiving chargeable work directly or indirectly as a result.

### (6) *Public Interest Law Clearing House Victoria*

*Eligible clients are non-profit organisations with public interest objectives and individuals who are ineligible for legal aid and cannot afford a lawyer. The legal issue must be one of public interest which means it must affect a significant number of people, not just the individual, raise matters of broad public concern, or impact on disadvantaged or marginalised groups, and require a legal remedy.*

### (7) *American Bar Association, Rules of Professional Conduct, 1999 Edition*

Rule 6.1 Voluntary *Pro Bono Publico* service:

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) Provide a substantial majority of the (50) hours of legal service without fee or expectation of fee to:

- 1) persons of limited means
- 2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed to address the needs of persons of limited means; and

(b) *Provide any additional services through:*

- 1) Delivery of legal services at no fee or substantially reduced fee to individuals, groups or organisations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organisations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

- 2) Delivery of legal services at a substantially reduced fee to persons of limited means; or  
Participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organisations that provide legal services to persons of limited means.

## **PART B: Strengths and Limitations of Various Formulations of the Definition**

### **Nature of Services Provided**

The definition of pro bono often begins by restricting the services provided by the lawyer to professional legal services.

#### ‘A lawyer’

##### Advantages

- Focuses on the role and responsibility of the legal professional

##### Disadvantages

- Overlooks the contribution non-lawyers make to providing access to legal services and the resolution of legal problems

#### ‘Services that involve the exercise of professional legal skills’

##### Advantages

- Excludes the general community work lawyers do along with others, for instance as council members in schools, clubs and the arts
- Allows for role in assistance to civic organisations, community legal education and law reform

##### Disadvantages

- Requires a distinction to be made from the lawyer’s use of analytical, organisational, representational and conflict resolution skills generally
- Excludes sponsorships such as financial donations even if they go to support the legal assistance provided by others

### ***Nature of the Client’s Need***

The focus of most definitions is on the need of the client. The favoured subject is predominantly an indigent person - someone without the financial means to pay a lawyer’s fees.

#### ‘People who cannot afford the cost of a lawyer’s services at market rates’

##### Advantages

- Rations scarce resources to those without the capacity to pay
- Distinguishes those who could pay but do not think the services are worth paying for, for instance in terms of what is at stake
- Allows for the fact that services are provided to some extent now competitively at variable rates
- Assumes that reliance on professional legal services is otherwise appropriate
- Accepts client's judgement and does not interpolate professional view of the worthiness of the case

#### Disadvantages

- Requires a means of inquiry into the client's means (such as eligibility for social security)
- Does not insist that clients seek alternatives to legal representation and litigation
- Does not distinguish needy cases which lawyers take for personal reasons such as professional development, publicity or politics

#### 'Without financial hardship'

#### Advantages

- Allows for some clients who could pay at a pinch but at the expense of other pressing needs
- Acknowledges that the conditions attached to legal aid and other public assistance can be hard for some clients
- Possibly allows for some clients who could pay but whose limited resources make the impact of a loss daunting

#### 'A client who has no other access to the courts and the legal system'

Some definitions stress the client's need to go to court, bringing into consideration the availability of alternative means of funding or supplying services to assist with the carriage of a case. Some are more judgemental, conditioning assistance on the seriousness of the client's plight.

#### Advantages

- Recognises that other sources of assistance may be available such as legal aid or conditional fee support
- Places an absolute value on equal access to legal justice, implies public interest in upholding all legal rights
- Does not attempt to weigh cost of lawyer's services against size of claim, severity of loss or penalty etc.

#### Disadvantages

- Does not insist that client pursue alternatives to litigation such as mediation, arbitration, or informal tribunal.

'People who would otherwise be unable to defend or assert their lawful interests and rights/can demonstrate a need for legal assistance/would without legal representation suffer an injustice'

#### Advantages

- Inserts a merits control excluding cases which are frivolous or vexatious
- Introduces consideration of viable alternatives such as self or lay representation
- Allows comparison with strength of other side's case, for example in terms of extent of legal assistance

#### 'For whom legal aid is not available'

#### Advantages

- Provides a clear-cut determinant of eligible cases
- Picks up those whose cases fall outside the matters for which legal aid is available such as civil claims
- May allow for those who just exceed legal aid's strict means test and contribution/security requirements but are still daunted by the prospect of legal fees
- May allow for cases which fail legal aid's strict merits test but are still worthy of assistance, in terms for example of the principle or interest at stake
- Places the primary responsibility on legal aid but concedes that legal aid is not funding, possibly cannot fund, all needy cases

'To establish or preserve the rights of the poor, the disadvantaged, the marginalised, or classes of person who otherwise deserve public support'

#### Advantages

- Begins to soften the emphasis on finances, recognising that access is affected by other factors such as unfamiliarity, remoteness, distrust, alienation, etc
- Begins to introduce a public interest in the legal protection of certain groups, which is beyond the public interest in the defence or assertion of legal rights as such
- Places a further discipline on the rationing of scarce resources

#### Disadvantages

- Suggests more of a charitable relationship, identifying individuals as members of special groups worthy of assistance

#### ***Basis of Funding***

Clearly, another key element is the lawyer's donation of the services, the non-commercial element of pro bono work. The strictest definition requires the services to be rendered entirely free.

#### 'Without fee'

#### Advantages

- Recognises that pro bono is a donation of services, not commercially motivated, with a cost carried by the professional
- Removes all concern for the client about financial burden
- Still allows for client to pay for disbursements or contrary costs awards

#### Disadvantages

- Removes financial discipline from client's judgement, may inflate expectations

#### 'Without expectation of fee'

Increasingly, definitions endeavour to grapple with the fact that some cases are underwritten on a speculative basis, while others may result in costs being obtained when the primary motivation was public spirited.

#### Advantages

- Excludes consideration of the difficult cases of conditional fee and contingency fee based services
- Excludes speculative work where the underlying motivation is a commercial gain, albeit at a risk
- May possibly credit cases where the lawyer is taking a very real risk essentially for the sake of the client

#### Disadvantages

- Does not encourage underwriting cases where fees may ultimately be recovered from the other side
- Benefits the other side when they would normally be expected to pay costs
- Limits pro bono recognition then to those practitioners who can afford to act for no fee at all

#### 'Without expectation of a fee from the client'

#### Advantages

- Allows clearly for cases where an award of costs is ultimately made against the other side
- May still exclude cases where costs are obtained in a settlement rather than an award

#### 'At a reduced fee'

Some definitions are more subtle - conceding that services contain a valuable pro bono element even if the practitioner cannot finance the case completely or the client is capable of making a contribution. But these services must be distinguished from discounting motivated primarily by competitive, commercial considerations.

#### Advantages

- Allows for clients who can pay a contribution but would be deterred by the cost of full fees
- Accommodates contributions made by a third party such as a charitable organisation, philanthropic foundation or public interest group
- Allows for cases which the lawyer needs help to fund, such as large or protracted cases
- Concedes that taking some legal aid referrals involves a pro bono element
- Recognises that an award of costs does not cover all solicitor-client costs
- Recognises there may be mixed motives in taking certain cases, motives of public service and personal livelihood

#### Disadvantages

- Creates difficulty of distinguishing services that are competitively discounted to attract certain kinds of work or to obtain a greater volume of work

‘At a substantially reduced fee’

#### Advantages

- More clearly distinguishes cases where market imperatives and competitive strategies are at work

#### ***Public Interest Criterion***

A public interest requirement (pro bono publico) is a feature of some definitions. It may be established as an alternative criterion to the individual legal needs of the indigent client; however it may become an additional condition.

‘Client’s case raises a wider issue of public interest/matters of broad community concern’

#### Advantages

- Provides an extra filter for rationing of scarce resources, means services are not provided as haphazardly
- Means that services are not provided just for the benefit of the individual client
- Suggests that pro bono services are more than a substitute for legal aid
- Suggests less of a charitable relationship and more of a constructive remedial role
- Screens out services provided free for lawyer’s own benefit or as favours to friends
- Places emphasis on cases which maximise benefits such as test cases, class actions
- Recognises that legal interests do not just concern individuals but may be diffused across society or beyond, for example to the protection of the natural environment
- Screens out some unjust or anti-social causes
- Allows judgement about the benefits to the community and the legal system of disputation and litigation

#### Disadvantages

- Interpolates the lawyer’s own political and social judgements about the worthiness of causes
- Runs risk that unpopular legal causes will not be assisted
- Raises questions about what is a public rather than a sectional cause

‘Excluding certain legal matters such as business law, neighbourhood disputes or personal injuries’

#### Advantages

- Sorts categorically the types of cases which will be assisted
- Excludes cases where clients often can afford to pay or have access to another source of assistance
- Excludes cases where legal services may well not be of assistance

#### Disadvantages

- Excludes assistance to potentially good causes such as business enterprise development within depressed or marginalised communities
- Proves harsh for some individuals who do not have an alternative source of assistance

#### **Services to Non-profit Organisations**

These services are recognised in most definitions. The formulation may endeavour to reconcile this recognition with the general financial need and public interest requirements.

‘Charitable organisations/non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalised

#### Advantages

- Recognises that work need not be for individuals
- Recognises that services need not support litigation but may be pro-active, anticipating problems and enhancing participation, such as work on commercial contracts, employment, trusts, gifts and taxation
- Still directs services towards organisations that work for the disadvantaged and marginalised

#### Disadvantages

- May tend to blur distinction between legal and other work

‘Community organisations/educational institutes/statutory bodies/non-profit organisations which work for the public good’

#### Advantages

- Broadens the range of organisations whose assistance is in the public interest

#### Disadvantages

- Increases the variability of judgements about what causes are in the public rather than a sectional interest

‘Where payment of customary legal fees would deplete their resources or would otherwise be inappropriate’

#### Advantages

- Recognises that pro bono can assist indirectly by relieving the organisations’s legal burden and freeing it to devote its resources to its core work

‘In matters which are designed to address the needs of persons of limited means/to promote matters which further their public charters’

#### Advantages

- Limits assistance to those activities directly concerned with needy groups and worthy causes, compared for instance to fund raising

### **Legal Information for the Public/Community Legal Education and Training**

This constituent reflects a sentiment that the public interest can be served by reducing the public's reliance on professional services and engagement in litigation.

#### 'Lawyer is involved in free community legal education'

##### Advantages

- Recognises that legal services can extend well beyond casework and individual clients, for instance to legal kits, handbooks, and media channels
- Appreciates that access to justice includes access to knowledge about laws and legal processes
- May relieve demand for professional assistance with litigation by heading off disputes
- May economise on scarce professional resources and reduce dependence by enabling people to handle their own legal cases

##### Disadvantages

- May generate further awareness of legal claims and demand for litigation support
- May overrate lay capacity to negotiate legal system without professional assistance

### **Law Reform**

'Lawyer is involved in law reform activity which is designed to increase the availability of justice, improve laws and the legal system'

Acknowledgment of the services lawyers contribute to the reform of legal processes and legal regimes is often the final strand to the contemporary pro bono definition.

##### Advantages

- Appreciates there are systematic ways to improve access to justice such as simplification of laws and legal processes
- Suggests that disadvantaged and marginalised groups may benefit from the design and operation of special procedures and conditions
- Encourages reforms that minimise the need for litigation support
- Acknowledges the public service provided by practitioners, judges and academics generally when advising or staffing law reform inquiries, commissions, reviews and the like

##### Disadvantages

- Raises the question of motivation again and the desirability of distinguishing work furthering the lawyer's own personal and political causes
- Raises difficult boundary questions again, such as the eligibility of activities with indirect benefits, for example lobbying for reform of the tax treatment of charities and trusts

## **Briefing Paper for Plenary 2 – Defining Pro Bono**

Title: ***PROFESSIONS AND THE PUBLIC GOOD***

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Those occupations commonly called “professions”, it is frequently claimed, had their origins in the mediaeval guilds and the church. An oft-cited quotation from Francis Bacon, “I hold every man a debtor to his profession from which, as men do of course, seek to receive countenance and profit, so aught they of duty to endeavour themselves by way of amends to be a help and an ornament thereunto” (Bacon, 1861) helps attest to this fact. Carr-Saunders and Wilson, in perhaps the first systematic account of the professions, in referring to the above statement by Bacon, suggest that it reveals that “the term profession indicated certain vocations with peculiar characteristics and, in this sense, it has been used for centuries” (Carr-Saunders and Wilson, 1933:1).

In support of Carr-Saunders and Wilson’s position, Bruce Kimball (1992), in a recent and influential work, suggests that it is well established that, during the eighteenth and nineteenth centuries, the term “professions” commonly referred to the fields of theology, law, medicine and education – what scholars have sometimes called the four great traditional professions – which originally became associated in the mediaeval universities (Kimball, 1992:6). Initially theology was the most esteemed among these disciplines, with medicine the least. The receding importance of the church saw a gradual increase in the secularisation of the professions, the decline in status of theology and, by the eighteenth and nineteenth centuries, with the coming of the Industrial Revolution, the number of occupations which were to claim professional status began to increase.

This increase was in part a result of scientific advances that led to new fields of practical endeavour, for example physics and engineering, new uses of land and capital and new organisational forms. The outcome of these changes was an increased need for persons with particular skills and the growth of new bodies of knowledge and identifiable occupations ensued. Kimball (1992) suggests that there were variations in eighteenth and nineteenth century lists of “the professions”. He claims that the well-established ranks within the British medical and legal professions never made the transition to the American colonies. Neither did “the profession of arms” which was frequently cited by British observers.

Another potential interloper into the professions at this time was business or commerce. The claim of business or commerce to professional status was perhaps more evident in the United States than in Britain in this early period. Theodore Parker, cited in Kimball, suggested that “the ablest men go into the class of merchants. The strongest men in Boston, taken as a body, are not lawyers, doctors, clergymen, bookwrights but merchants”.

Nevertheless, Kimball claims that “no one from Joseph Priestley in 1764 to John Lalor in 1839, Henry Waugh Jnr in 1847 and Cambridge dons at the end of the century dignified the business of merchandise with the term ‘profession’ for the professional man was expected to avoid the pursuit of wealth” (Kimball, 1992:8). It was only in the twentieth century that some observers such as Lewis Brandeis began to suggest that “business should be and to some extent, already is, one of the professions” (Brandeis, 1914). In much the same vein the historian Tawney (1920) argued for the professionalisation of industry.

These early writers were essentially precursors to what is customarily regarded as the first systematic account of the professions, the book by Carr-Saunders and Wilson (1933) entitled simply *The Professions*. Providing an account of the emergence of the professions in Great Britain, a major thrust of their work was to identify common elements in all occupations called professions and to argue for the positive role of the professions in contributing to societal growth. They saw the emergence of the professions as associated with the application of scientific knowledge to the problems of production and claimed that “the rise of the new professions based on intellectual techniques is due to the revolution brought about by the work of engineers and thus indirectly to the coming of science” (Carr-Saunders and Wilson, 1933:490). Not only were they able to identify new professions that were technologically based, but they were in the forefront of those arguing for the professionalisation of work in general. “In the long run, technical advance implies an increase in the number of those doing more or less specialised work ... and while the extension of professionalism upwards and outwards will be fairly rapid, its extension downwards, though gradual and almost imperceptible, will be continuous” (Carr-Saunders and Wilson, 1933:491). They saw opportunities for specialised training being gradually extended to all and “we may therefore look forward to a system of careers open to trained and tested talents” (Carr-Saunders and Wilson, 1933:494).

Interest in the professions waned in the United Kingdom in the immediate post-Second World War period but surfaced across the Atlantic in the United States and for around twenty years the Americans dominated the scene. Any account of writings on the professions in North America has to acknowledge the original work of Talcott Parsons. In 1939 Parsons wrote an article entitled “The professions and social structure” in which he argued that the capitalist economy, the rational-legal social order and the modern professions were contemporary historical developments. Professions were characterised by collegial organisation in which authority rested on functional specificity, that is the restriction of their sphere of activity and the application of impersonal standards on a universalistic basis without regard to the personal characteristics or circumstances of the professionals or their clients.

Parsons was the stimulus for a great deal of work in the 1950s and 1960s. A number of writers during this period saw as their major task the identification of characteristics that distinguished professions from other occupations. Goode (1960) and Greenwood (1957) were prominent. Goode argued that there were two core characteristics that distinguished professional groups: a prolonged specialised training in a body of abstract knowledge and a collectivity or service orientation. He argues that a number of characteristics evolved from these two aspects of a profession. They are the following:

1. The profession determines its own standards of education and training.

2. The student professional goes through a more far reaching adult socialisation experience than the learner in other occupations.
3. Professional practice is often legally recognised by some form of licensure.
4. Licensing and admissions boards are serviced by members of the profession.
5. Most legislation concerned with the profession is shaped by that profession.
6. The occupation gains in income, power and prestige ranking and can command high calibre students.
7. The practitioner is relatively free of lay evaluation and control.
8. The norms of practice enforced by the profession are more stringent than legal controls.
9. Members are more strongly identified and affiliated with the profession than are members of other occupations with their occupations.
10. The profession is more likely to be a terminal occupation. Members do not care to leave it and a higher proportion assert, if they have to do it over again, they would choose that type of work (Goode, 1960:903).

Important benefits follow from the possession of skills and knowledge on the one hand and a recognised service orientation on the other. These have to do with being granted autonomy to practise and having a monopoly over particular services. Both clients and practitioners benefit as a consequence of this situation. Clients come to recognise that they are in the hands of experts and practitioners are rewarded by the services they provide.

How is all this controlled? Greenwood believes that the answer lies in an understanding of “the culture of a profession” (Greenwood, 1957:52). The attribute that distinguishes professions from other occupations is their professional culture. This comprises values, beliefs, attitudes, skills, knowledge and behaviours. The culture is transmitted during training and reinforced during social interaction with other professionals following the completion of training. Social values of the professional group are its basic and fundamental beliefs, the unquestioned premise upon which its existence rests. Foremost among these values is a belief in the essential worth of the service which the professional group extends to the community. The profession considers that the service is a social good and that community welfare would be impaired by its absence. The separate but twin concepts of professional autonomy and monopoly also possess the force of a group value. Thus the proposition that in all service related matters, the professional group is infinitely wiser than the laity is beyond argument (Greenwood, 1957:52).

This view was to hold sway for quite some time. There was considerable argument as to what were the defining characteristics of a profession but there was never any serious debate that a service orientation was a key feature of professional work, or that a systematic body of knowledge and a set of skills acquired during a period of prolonged training characterised practitioners. Taking up some of the earlier observations of Carr-Saunders and

Wilson, Wilensky (1964) argued in an influential article for the gradual professionalisation of a great number of occupations.

This somewhat benign view of the professions was perhaps consistent with the mood of the times but it was not to last. In the words of Paul Starr, “the dream of reason did not take power into account” (Starr, 1982:1). Claims that professions made to a service orientation, altruism in dealing with the public and other similar traits, were to be questioned. The declining legitimacy of so-called consensus theory in sociology (Dahrendorf, 1959) was accompanied by a resurgence of interest in class analysis (Wright, 1985; Poulantzas, 1975). This ideological shift was reflected in a change in emphasis of subsequent theorising about the professions “away from their role in holding society together and towards issues of conflict and power” (Freidson, 1994:3). Prominent in this change in orientation were Freidson (1970a, 1970b, 1994; Johnson, 1970; Larson, 1977; Abbott, 1988). In both *The Profession of Medicine* (1970a) and *Professional Dominance* (1970b), Freidson emphasised the ideological nature of many professional claims and justified aspects of monopolistic privilege enjoyed by the profession and the way in which professional organisations created and sustained authority over clients and associated occupations. Freidson argued that the key feature for distinguishing professions from other occupations is the fact of autonomy, “a position of legitimate control over work” (Freidson, 1970b:82).

Writing around the same Terence Johnson (1972) defined profession as a method of controlling work, one in which an occupation exercises control over its work. He emphasised the role of power in establishing and maintaining such control. Johnson questioned the existence of a service orientation among professionals, suggesting that the professions might well be seen as bringing knowledge to the service of power and he argued, as did C. Wright Mills (1951) quite some time ago, that a fusion of knowledge and power had created a new kind of professional technocrat who was at the beck and call of existing ruling elites.

From a somewhat similar viewpoint, Malgali Larson (1977) argued that professionalisation was the process by which the producers of special services sought to constitute and control a market for their expertise. Professions are a particular class of organisation who organise themselves in particular ways to attain market power. For Larson, professions seek to translate specialised knowledge into a marketable commodity which leads to income being earned on the basis of transacted services. The necessary factors are a body of abstract knowledge, susceptible to practical application, together with a market (Larson, 1977).

A number of writers have argued that, at the core of every profession, is the objective of gaining a monopoly over services within a competitive market (Berlant, 1975; Larson, 1977; Abbott, 1988, MacDonald, 1995). A monopoly is maximised by establishing exclusive competence in the delivery of particular services. What underlies exclusive competence, Abbott argues, is an abstract system of knowledge, and control of the occupation or profession lies in the control of the abstractions that generate the practical techniques that can be observed in professional behaviour. This characteristic of abstraction, Abbott asserts, is the one that best identifies the professions. Any occupation, he says, “can obtain licensure or develop an ethics code but only a knowledge system governed by abstractions can redefine its problems and tasks, defend them from interlopers and seize new problems” (Abbott, 1998:9). Abstraction enables survival in the competitive system of professions.

This very brief review has suggested several persistent themes: first that professions are characterised by a service orientation, that professional skills, knowledge, values and behaviours are acquired initially through an extended period of training; secondly that professions have a great deal of autonomy, both in setting conditions and standards of service and in their work. Professions assert their views about recruitment and training and attempt to protect members from outsider bureaucratic interference as they carry out their tasks. They also set standards of conduct and claim to have means of disciplining members who violate these standards. Associated with the notion of autonomy is the idea of exclusive competence based on access to an abstract body of knowledge. Professions attempt to ensure that a person who is not trained and not duly certified to membership is not allowed to practise a professional task. Finally, a profession is recognised by its own members and perhaps by the society in which it exists as having considerable expertise.

The success of claims by the profession for autonomy, exclusive competence and the right to monopolistic control of a field of endeavour rests on their ability to maintain what Paul Starr as described as “cultural authority”. Simply stated, cultural authority is the probability that particular definitions of reality and judgments of reasoning and value will prevail as valid and true (Starr, 1982:13). For the profession, this means wide societal acceptance of their claims to autonomy, exclusive competence and monopolistic control. Patently this is less widespread than it was a decade or so ago.

The watershed in Australia was perhaps 1992 when, as part of their micro-economic reform agenda, the Australian government instituted an independent committee of enquiry into the need for a national competition policy. The resulting Hilmer Report (Hilmer, 1993) heralded the universal application of competition laws to all businesses throughout Australia. In 1994, the Council of Australian Governments (COAG) agreed to enact the necessary legislation and the work of professionals such as doctors, lawyers, architects and engineers was made subject to Part 4 of the *Trade Practices Act 1974* (TPA) and its counterpart, the *Competitive Code*. The legislation took effect in 1996 and sought to prohibit anti-competitive practices: for example, any action likely to lessen competition in the market, any agreements that contained exclusionary provisions and price-fixing agreements.

Not surprisingly, the professions objected that the rules prohibiting anti-competitive conduct should not apply to them on the grounds that the conduct in question was designed by the professions to protect the public (Fels, 1997a). The Australian Competition and Consumer Commission (ACCC) remained unconvinced by this argument and in 1997 its Chair, Professor Alan Fels, was prompted to enquire “what was it about the fiduciary relationship which required a professional to engage in actions which contravened Part 4 of the TPA?” Given the wide range of matters which constituted a public benefit, the ACCC challenged professionals and their organisations to “articulate and demonstrate” the putative public benefits of their actions (Bhojani, 1997). Earlier that year in an address to the health sector, which was pleading its special case, Commissioner Bhojani had bluntly stated that the health sector would have to “learn to live with the TPA” in the same way that other businesses were required to do (Fels, 1997b). The professions were learning not to expect special treatment from government.

Expanded government legislation and recent legal rulings demonstrate that while the professions perhaps deem themselves as special cases, their cultural authority is on the wane. Partly this is due to the emergence of competing groups offering similar services, partly it is

due to an improved community awareness of the activities of the professions and their declining mystique and partly it is due to the actions of the state spread or spurred on by an ideology of free markets and economic rationalism.

Despite these increasing calls for accountability and a perhaps declining cultural authority, the professions occupy a significant position in Australian society. In absolute numbers alone, they have grown from around 9.5 per cent of the labour force in 1965 to a little over 14 per cent thirty years later in 1995 (Australian Bureau of Statistics, 1987, 1996).

We might group them in the following ways. The legal profession, we would argue, is concerned with the maintenance of law and order, in both civil and criminal matters; medical and allied health and human services professions are concerned with the community's health and well-being; engineering and the technological sciences including information technology are concerned in a sense with society's material infrastructure; education is concerned with a critical appraisal and transmission of culture; while the social sciences including economics provide a basis for policy decisions in both the public and private sectors as well as an understanding of the factors contributing to societal change and stability.

All professions can, in a sense therefore, be seen as contributing to the public good as there are a number of activities crucial to the continuation of a society as a more or less ordered identity which the professions are particularly well equipped to undertake. This is not to say of course that these activities could not be addressed in other ways, but it is to say that, at the present time, in our society and in others loosely described as Western democracies, the professions are performing these tasks. In this sense then, the professions, through their activities, have consequences which are functional for the continuation of society as we currently understand it. Social order is made more likely because particular societal demands are met and the professions have a significant role in meeting these demands. The professions, in this sense, are contributing to the public good but there is of course another sense in which the same claim could be made.

This is more concerned with going the extra mile, strongly espousing a service orientation in work and being strongly committed to the welfare of one's clients. It is to these issues we would like to turn to now. We will look first at what the literature has to say and then discuss briefly some results from a longitudinal study, *The Professions in Australia Project* (Western *et al.*, 2000).

The contribution of professionals to the public good conceived as we have just alluded to, has not enjoyed systematic study in sociology. The notion of a service orientation has figured prominently in a number of the accounts of professional practice but the measurement, discussion and theorisation of *pro bono publico* work, an indicator of this orientation, remains on the fringes of the sociology of the professions. The lack of academic reporting on the topic however does not reflect the debates in some professions, perhaps most notably law, over the importance and place of the public good in professional work.

The following review uses contemporary discussions of the importance of *pro bono* work in lawyering as a way of focusing on the philosophical and ideological claims surrounding these issues. It then presents an overview of findings on the service orientations

and activities of people working in health services, law and business, highlighting the breach between the ideal of public service and professionals' understanding of their career activities.

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## **Briefing Paper for Plenary 2 – Defining Pro Bono**

Title: ***DEFINING PRO BONO - CHALLENGING DEFINITIONS***  
Author: **Andrea Durbach**  
**Director, Public Interest Advocacy Centre**

### **Abstract**

Whilst the resolution of legal disputes is becoming more layered and elaborate and courts are asked to determine rights and interests in matters which increasingly involve complex ethical, commercial and technological considerations, effective access to justice continues to elude those most socially and economically disadvantaged. In this context, the provision of pro bono legal services requires renewed focus.

*Challenging Definitions* will argue that cuts to legal aid, soaring costs associated with litigation and the changing cultural, social, and economic configuration of Australian society, have contributed to an expanded need for pro bono legal assistance. As the legal system adapts to manage the impact of these changes on the delivery of justice, pro bono work is demanding a redefinition which challenges traditional views and accommodates the changing profile of the pro bono litigant. This process of redefinition is essential for the effective participation of the private legal profession in the development of a vibrant legal system which seeks to guarantee legal rights, particularly the right of access to justice.

**A traditional definition revisited:**

**from the charitable to the challenging**

In a recent interlocutory judgment in Federal Court proceedings commenced by the Tobacco Control Coalition against Philip Morris (Australia), His Honour Mr Justice Wilcox said that while the claim sought to be litigated by the Coalition was clearly "motivated by a concern for the public interest" and had the potential to ameliorate a major public health problem, His Honour concluded that

it is not enough for litigants and their advisers, both zealous in the public interest, to have their hearts in the right place; their heads must be there also<sup>1</sup>.

Traditionally, pro bono legal work has taken the form of assistance by lawyers to indigent clients, charitable work for worthy causes, community or public-spirited activities. Whilst this work can, and often does encompass work for mates or family and contributions in kind towards favoured political or social initiatives or interests, it has very rarely required the significant intervention by lawyers utilising their skills and expertise to undertake innovative and challenging work which results in benefits for a range of people. There is no doubt that this work fulfils a vital community function, particularly in geographical areas or regions where solicitors are often required to assume a variety of roles - lawyer, financial and property adviser, counsellor, social worker and mediator. However, the do-good or welfare-based approach to pro bono work and the accolades which often follow suit, has allowed the profession to remain stuck in a mind-set that fails to challenge the real utility of this work beyond its local or parochial confines.

That the lawyers who undertake this pro bono work "have their hearts in the right place", is not questioned. What is at issue, and this constitutes the first argument proposed in my paper, is the need to revisit the traditional definition of pro bono legal work in the context of increasingly layered and elaborate dispute resolution where courts are being asked to determine rights and interests in matters involving complex ethical, commercial and technological considerations. More and more, these disputes are not solely the domain of those individuals and corporations who can afford their protracted adjudication. Citizens, consumers, children, women, the disabled, those discriminated against on the basis of their race, age or economic status (or often a combination of all three), housing tenants, pensioners and refugees, those most socially marginalised and economically disadvantaged, are increasingly exposed to costly and extensive legal proceedings as they do battle with business and the banks, inept and shuttered bureaucracies, developers and negligent professionals.

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<sup>1</sup> Per Wilcox J in Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd [2000] FCA 1004 (27 July 2000) (unreported)

If lawyers are to offer a valuable service to those least able to afford quality legal assistance, they need to ensure that their hearts **and** heads are “in the right place”. This requires that pro bono work is conceptualised not as patronage of the poor, but as the articulation, assertion and protection of rights on behalf of those whose rights are under threat, including the right of access to justice. It calls for legal intervention which is founded on competence, dedication, intellectual rigour, professionalism and creativity, in relation to the fashioning of redress or a just and effective outcome, often with severely limited resources. It means not shying away from taking on difficult cases, cases that pose risks and offer challenge – as in the case of an American law firm who was asked to appear pro bono in a death penalty case where the client was a notorious and unrepenting man, with a string of serious convictions explained by a grotesque and abusive upbringing and desperate life. The firm rejected the pro bono request saying they would prefer a client who was innocent.

The redefinition of pro bono work also suggests an inclusive or comprehensive approach to dispute resolution, one which acknowledges that a reliance on legal practice and procedure, which is often indicative of a reactive or defensive approach to dispute resolution, may overlook opportunities for proactive intervention at a policy or political level. As Don Robertson wrote in a paper presented to the PIAC *Public Law Summit* in 1993:

There is a very large role for lawyers to be involved in advocacy outside the courts - to use their professional standing and political influence to advocate reform.<sup>2</sup>

Importantly, what is essential for the redefinition process, is that what we call pro bono is **in fact** pro bono legal work, based not on rubbery figures and self-determined or self-interested concepts, but on an authentic reflection of rigorous legal activity where legal advocacy, not necessarily limited to an adversarial setting, is utilised to make a difference to people’s lives.

### **A misguided focus on access**

The second argument my paper seeks to advance, is that the focus of pro bono work, particularly by professional or competing private service providers, has been misguided in that it has tended to highlight access to justice as opposed to justice itself. Thus, reforms offering access are seen (erroneously) as synonymous with providing and enhancing justice.

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<sup>2</sup> Donald Robertson, *Pro Bono - new strategy for public interest litigation?*, Alternative Law Journal, vol 19 No 1 February 1994 at p. 17

To demonstrate the virtues of pro bono work by claiming, for example, that 800 individual litigants had secured pro bono legal representation over a 6 month period, to clock up numbers of matters undertaken as illustrative of securing access, seems to ignore the importance of equally demonstrating the actual quality and content of the justice secured. This approach to evaluating the success or otherwise of the delivery of pro bono legal assistance, runs the risk of sacrificing outcome (being the content of justice) to output (increasing accessibility to the legal system).

Historically, many pro bono initiatives have been formulated and implemented as a response to calls for access to justice. What this response raises is whether the provision of pro bono advice and representation does in fact effectively meet demands for substantial measures of justice. As His Honour Justice Murray Gleeson AC, Chief Justice of Australia, noted at a recent Australian Law Reform Commission conference entitled *Managing Justice*

if we are setting ourselves the objective of making the process of civil litigation available to a substantially wider group of people ..., then we need some understanding of how the system would cope if such wider availability were achieved. If we have no plan for this, then all we are doing is creating greater access to an increasingly inefficient system.

The Chief Justice goes on to say

If we are serious about giving people more access to justice, then we need a reasonably clear understanding of the kind of justice to which such access would be worth having.<sup>3</sup>

Similar sentiments were expressed by the President of the Canadian Law Commission, Roderick Macdonald, whose paper to the conference addressed the question of whether there was any point to redesigning institutions of civil justice in order to facilitate greater access. He said:

I ... once believed that achieving access to justice was essentially a matter of removing barriers to courts such as cost, delay and complexity. Now I no longer see the objective in purely structural terms. Rather the challenge runs much deeper. It is to rethink our attitudes about what law in a modern, pluralistic society actually comprises<sup>4</sup> Often policies and schemes which declare themselves axes to justice, bear little correlation to

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<sup>3</sup> Hon. Murray Gleeson AC, *Managing Justice in the Australian Context*, at p.8 (contained in proceedings of the Australian Law Reform Commission conference Managing Justice - the way ahead for civil disputes, 18-20 May, 2000)

<sup>4</sup> Prof. Roderick A. Macdonald, *Implicit Law, Explicit Access* contained in the ALRC conference proceedings (see above) at p. 2

the needs that appeared to prompt their development and implementation. Indeed, in the words of the Chief Justice, they are founded on a lack of a "clear understanding of the kind of justice to which access would be worth having." Again, with reference to a paper presented at the ALRC conference which, based on a report of the results of an ambitious survey of 4000 respondents in England and Wales, sought to establish the frequency with which members of the public are faced with problems for which a legal remedy exists and whether and where they go for help<sup>5</sup>, Professor Hazel Genn of the University College London and the National Centre for Social Research, demonstrated that much of the debate in relation to access to civil justice in the United Kingdom, "was based on assumptions and anecdote rather than hard evidence about the experience of the public in dealing with civil disputes and problems"<sup>6</sup>

The national survey found that about 40% of the population had experienced one or more civil problems or disputes over the previous five years. About 40% of those facing problems either took no action at all or failed to obtain advice. Interviews with respondents revealed a number of barriers to obtaining legal advice and representation<sup>7</sup>:

- "a sense that nothing could be done about their problem - which flows from the generally low levels of understanding about legal rights and procedures";
- respondents feared the (hidden) costs of seeking legal advice and initiating legal proceedings which were seen as lengthy, potentially traumatic and expensive.

Although cost is often cited as the primary barrier to commencing litigation and accordingly, a barrier to access to justice, Her Honour Justice Catherine Branson of the Federal Court has argued<sup>8</sup>, by reference in particular to the Native Title Jurisdiction of the Court, that a failure to appreciate the customs and cultural history and experience of litigants, either by their legal advisers or members of the judiciary, and not cost, presents a critical barrier to access to justice for indigenous and non-English speaking people;

- respondents also stated that "previous experience had shown that obtaining free advice was too difficult - limited opening times, queues running into the street, telephones that are never answered".

Services providing free advice, often stipulate a condition of limited time - for example, they offer a first free advice which is limited to 20 or 30 minutes client. The frustration with

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<sup>5</sup> Prof. Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford, 1999)

<sup>6</sup> Prof. Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* contained in the ALRC conference proceedings (see above) at p. 1

<sup>7</sup> *ibid.* at p 4

<sup>8</sup> In a paper presented to a conference entitled Partnerships Across Borders: A Global Forum on Access to Justice held in New York (The Association of the Bar of the City of New York), 6-8 April 2000.

this approach is obvious - often one problem, when it begins to unravel in the telling, does not fit neatly into a 30 minute appointment. Problems, particularly in relation to those suffering economic and/or social disadvantage, cluster and impact on one another. An unfair dismissal may precipitate an eviction due to inability to pay rents, a repossession of a motor vehicle etc. In addition, the offer of free advice can give rise to unmet expectations of ongoing assistance and resolution.

If we are, as pro bono lawyers, setting ourselves the objective of facilitating access to justice and securing justice per se, then we do have to have a working plan to achieve this end which is informed by the reality of human activity and social interaction. We must devise that plan by eliciting information from and about those people we envisage as the apparent beneficiaries of pro bono assistance. It is perhaps trite to assert that for law and justice reforms to be effective, they need to coincide with public experience and expectations about resolving legal problems. Frequently, however, private practitioners, government legal advisers and professional organisations who undertake pro bono work, are not exposed to such experience or expectations, simply by virtue of the framework and demands of their primary legal practice or work. Where that information is often located, is within the files and surveys, research papers and submissions of legal aid commissions and community legal centres, whose daily work takes lawyers and policy workers, counsellors and advisers into the legal problems of marginalised communities.

By representing individuals and communities who are least able to articulate and assert their rights and secure remedies, legal aid and community legal centre workers confront barriers to and demands for justice and fashion creative interventions and resolution. Their work with communities, government agencies, private lawyers, judges, the police, social workers, expert witnesses, and the media means they are in a position to effectively determine and declare legal needs and provide, as the Genn study revealed, the critical empirical foundation and contextual information necessary to shape and evaluate the effects, impact and efficacy of the various components of a justice system that purports to guarantee rights.

### **The estrangement of law and justice: seeking a necessary convergence**

In the movie of the novel by South African author, Andre Brink, *A Dry White Season*, there is a salutary moment when the white liberal lawyer, played by a very expansive Marlon Brando, representing the wife of a black man killed at the hands of the security police - an alleged suicide in a cell at John Vorster Police station in Johannesburg - warns his client at the start of the inquest: "Justice and law are distant cousins and here in South Africa, they are not even on speaking terms."

The final point which I wish to address goes to the boundaries of the definition of pro bono legal work. While pro bono work should be viewed as part of a justice system which seeks to enhance the quality and effects of legal service delivery, it has tended to assume the position of outsider. It is overwhelmingly promoted as special and distinctive, seen and articulated as an appendage to legal practice rather than intrinsic to it. While its contained or exclusive ranking may serve as a useful mechanism to attract converts and highlight and assert its need and role within the practice of law - with the establishment of schemes, committees and co-ordinators within firms, eligibility criteria - its separateness underscores the estranged relationship between law and justice.

This severing of pro bono legal work from day-to-day practice, may have its roots in the following factors:

- the dictates of commercial practice, the bread and butter of most private law firms, and the focus on business, rather than on legal, practice;
- the emergence of corporate responsibility and the perceived benefits of show-casing pro bono or public-spirited initiatives to existing or potential clients;
- the selection of law firms for government contracts being determined by the firm's commitment to (not necessarily record of) pro bono work; and, by way of contrast,
- the clear indication from some Federal government departments, notably the Immigration Department, that the inclusion of immigration work (ostensibly on behalf of refugees or asylum seekers) in a firm's pro bono portfolio, may in fact mitigate against the firm's selection in relation to government tenders;
- Finally, Federal government cuts to legal aid budgets, to the Human Rights and Equal Opportunity Commission and to the community sector, itself struggling to accommodate the fall-out from cuts to these institutions, suggest Government indifference, at best, to areas of social justice which warrant priority.

Government's abrogation of its duty in relation to the rights of its citizens (by effectively dismantling civil legal aid) does not justify a call for advancing or extending the professional responsibility of the private profession by way of pro bono work. The latter (the provision of pro bono work by the private legal profession) simply serves to supplement, not substitute the former (the provision of legal aid by the state). Indeed, without well-resourced essential legal services in the form of the salaried legal profession and a community legal service with its access to community legal need, and legal information services offering a range of technological access, pro bono work is not sustainable.

Without support for and collaboration with these fundamental services, pro bono work operates in a vacuum encased by the letter of the law, uninformed by the experiences and expertise of those lawyers and para-legals who grapple with poor and marginalised individuals and communities and shape solutions appropriate to their realities. The impact of these services, which combine a variety of strategies - legal advice and representation, research and policy interventions, submissions to government and campaigns, community legal education and training - is a tribute to the effective and efficient utilisation of public funds to inform public policy to realise greater social justice, in essence, to attain the necessary convergence between law and justice.

Over the last few years, we at PIAC and the Public Interest Law Clearing House in new South Wales, have witnessed law students and young lawyers increasingly request a commitment by law faculties and law firms to the practice of public interest law which addresses systemic harm and injustice arising out of unfair, deceptive, cruel and discriminatory practices and conduct. These students and lawyers are attracted to the use of law because of its aspiration towards justice and are keen to ensure that pro bono and public interest legal work is not relegated to after-hours activity but acknowledged as endemic to legal practice. To this end, late last year PIAC and PILCH, in conjunction with the University of Western Sydney (Nepean) and PILCH member firms, developed a course for law students, *Practicing in the Public Interest*. The course was run as a pilot during the University of Western Sydney Winter School this year with 14 final year law students. It comprised three days of training on the practice of public interest law and a 2 day clinical component during which students were placed at PILCH member firms and exposed to opportunities, within the private profession, for undertaking pro bono work. The course will be run as a summer school with other participating universities in January 2001.

### **Conclusion**

In conclusion, as litigation becomes more and more expensive and as areas traditionally associated with the pro bono litigant expand to become more complex and grave in their consequence, as the character of legal and social problems undergoes change, the definition of what constitutes pro bono work - both in terms and content and procedure or strategy - demands renewed focus. Our responsibility as lawyers in facing the challenges of reconciling the needs of the contemporary pro bono litigant with the limitations of strained resources and an overburdened legal system, means that we must rethink our attitudes about what justice in a modern, complex and multi-layered society actually comprises and how best to attain it. If we are to ensure that the practice of law coincides with notions of justice, the redefinition of pro bono work requires a consensus in relation to its content and consistency and innovation in relation to its implementation. This process of redefinition is essential for the effective participation of the private legal profession in the development of a vibrant legal system which seeks to guarantee procedural and substantial rights, the kind of

system "to which access would be worth having."

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## **Background for Session 1A – Creating a Pro Bono Friendly Legal System**

### **Recommendations**

- That disbursement fund, fee waiver options and court schemes and rules as tools in the creation of a pro bono friendly legal system be examined on a national basis;
  - That pro bono service providers in each state work towards establishing their own secretariat in order to create a network of secretariats throughout Australia;
  - That the network, having been established, work towards creating a national register of pro bono services and providers in order to encourage information sharing and communication between existing providers;
  - That a national pro bono secretariat be established to produce a generic state-based pro bono model and to then fund each state secretariat to adapt and implement the model.
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## **Briefing paper for Session 1B – Pro Bono: Practical Ethics**

Title: *Commercial Conflicts of Interest Reconsidered*  
Presenter: **Elisabeth Wentworth**  
**Legal Counsel**  
**Office of the Australian Banking Industry Ombudsman**

### **Introduction**

"Commercial conflict", or "indirect conflict", is an expression commonly used to express the reason for an unwillingness to act, usually in a pro bono matter, because of concerns that existing or potential clients will question a law firm's allegiances.

Concerns about commercial conflicts are usually raised in debate about mandatory pro bono regimes. A new context arises from some indications by government that a demonstrated commitment to pro bono work may be taken into account in awarding tenders for legal services.

The session will consider and discuss the following:

- The modern Pro bono context - Access to justice;
- Examining the basis of the concern:
- The fragile fabric of the modern lawyer/client relationship;
- Indirect discrimination in the tender process;
- Issues of expertise and industry knowledge.
- Strategies for moving forward:
- Protocols with Government;
- Protocols with institutional clients;
- Protocols within the profession;
- Adapting the cab-rank principle to pro bono service provision;
- Communication with clients - the Good Corporate Citizen analogy;
- Creative pro bono services and the role of ADR.
- Case Studies.

This briefing paper provides an outline of the issues, some relevant materials, some possible strategies, and 2 case studies. It is hoped that these will provide a basis for discussion during the conference session.

### **The modern pro bono context - access to justice**

The importance of pro bono in the access to justice debate arises from the relative expense of legal costs in litigation for individual parties, at the same time that there are restrictions on access to legal aid. Pro bono as a mechanism for enhanced access to justice sits alongside solutions such as "no-win no-fee" costs agreements, state-based schemes such as Victoria's Law Aid, and the advice and representation provided by community legal centres (including legal centres specialising in, for example, consumer credit and mental health law). Pro bono plays a particular role in addressing what may be considered to be systemic issues where the public interest is served by identification and redress.

The ALRC Report No. 89, *Managing Justice: A review of the civil justice system* (ALRC Sydney) 1999, discusses the role of pro bono in Chapter 5. The following is an extract from the Executive Summary of Chapter 5:

*"Many of the parties involved in legal disputes are unable to pay the full costs of the legal advice and representation they require. They frequently receive assistance from lawyers for less than the market cost of their services, for no cost (pro bono) or on a deferred or delayed charge basis. The lawyer and client may agree there is no charge if the case is unsuccessful or set a fee uplift (a set percentage increase) which is generally drawn from the client's award if successful, or other contingency fee arrangement. There are some restrictions on contingency fee arrangements. The Commission found these arrangements, and significant pro bono work from the legal profession, were common practices in federal jurisdiction. In some case types, lawyers carry much of the financial risk and provide considerable low cost assistance in litigation. The Commission commends and supports such practices."*

Pro bono services may be provided on a formal basis, for instance where a law firm or sole practitioner is a member of an organisation such as the Public Interest Law Clearing House and accepts referrals from that organisation. Pro bono services may also be provided on an

informal basis, as is common at the Victorian Bar and, presumably, the other independent bars, where a judge hearing a matter involving an unrepresented party may request the Chairman of the Bar Council to nominate counsel willing to appear in the matter on a pro bono basis.

A slightly different context is what might be called "unintended" pro bono service provision where at the completion of a case it is clear that the client will not in fact be able to pay the legal costs and the law firm or barrister makes a policy decision to waive the costs.

Pro bono service provision may occur as a result of a stated commitment of an individual lawyer or law firm to a certain number of pro bono cases or hours per year or it may arise as an ad hoc response to a one-off request or recognition of need. In the writer's observation, it is more widespread than most non-lawyers realise, despite there currently being no mandatory requirement for most Australian lawyers to provide pro bono services.<sup>i</sup>

Concern about commercial or indirect conflict has been raised in the past as a reason not to have mandatory requirements relating to pro bono services. The argument is that it would impact unfavourably on firms that usually act for the defendants in public interest cases. This issue has been raised more recently in response to a suggestion by the Victorian Attorney General, The Honourable Rob Hulls MP, that pro bono service provision might be one of the criteria taken into account when deciding tenders for government legal services work.<sup>ii</sup> The stated reason was a desire on the part of the Attorney General "to encourage greater involvement by the legal profession because it is central to the profession's core value of providing access to justice".<sup>iii</sup>

There is insufficient information at this stage to assess the extent to which commercial conflict concerns are a barrier to an expanded role for voluntary pro bono work in the justice system.

### **Examining the basis of the concern**

Indirect or commercial conflict needs to be distinguished from conflict of interest in the professional conduct sense.<sup>iv</sup> Lawyers providing pro bono services are, of course, subject to all relevant rules of professional conduct and it is trite but perhaps necessary to say that the pro bono client's expectation of and entitlement to professional service is no less than would be the case were fees to be charged.

A shorthand statement of the usual professional conduct rule is that a lawyer may not act for both parties to a transaction or to a court proceeding.<sup>v</sup> Commercial or indirect conflict, in contrast, is an expression used to describe the situation where there is a perception that existing or potential clients may feel some unease if the firm acts for particular litigants whose interests are seen to be in conflict with the client's own. Indirect conflict is also called commercial conflict most probably because it is seen as having commercial ramifications in the form of lost or reduced work from clients in the firm's existing or target market.

Examples of perceived commercial or indirect conflict might be:

- Acting for the plaintiffs in a class action against a corporation, institution or government department, where unrelated legal advice has been provided in the past to the defendant

institution or a related department or corporation and a relationship is perceived to have been established;

- Accepting instructions to act pro bono for an individual plaintiff or defendant in an action against a member of an industry in which many of the firm's existing clients are engaged - even if the firm has not acted for the particular industry member;
- Accepting instructions to act pro bono for what is seen as "the other side" in an area of litigation, such as industrial relations, where there tends to be a traditional demarcation between lawyers who act for employers and lawyers who act for employees.

A latent fear may also be that existing corporate clients will resent the firm's willingness to act without cost for individuals in cases against corporations where the other party's costs may be high and unavoidable.

The concern is perhaps more acute in the current environment of intense competition for legal work, the increasing use of the tender process for legal services, and a willingness on the part of corporate and institutional clients to "shop around" at regular intervals, regardless of long-established relationships with particular lawyers or law firms.

Some of the questions which might be discussed as part of an analysis of these concerns are:

- How realistic are these concerns - are we underestimating our clients?
- Does pro bono work provide a competitive advantage or a competitive disadvantage?
- Indirect discrimination in the tender process - is it an unrealised fear?
- Expertise and industry knowledge - can they be used fairly in pro bono work?

It is anticipated that delegates will be able to contribute lessons from their own experiences to a discussion of these issues.

### **Strategies for moving forward**

Research and discussion is currently being carried out by the Voluntas Pro Bono Secretariat of the Victoria Law Foundation (Voluntas) with a view to addressing the concerns of practitioners about commercial or indirect conflicts. Some of the strategies currently being discussed within the profession and with government include:

- Protocols with Government;
- Protocols with institutional clients;
- Protocols within the profession;

Other, less direct, solutions present themselves. These include:

- Adapting the cab-rank principle to pro bono service provision;
- Communicating with clients about pro bono work using the "Good Corporate Citizen" analogy;
- Using expertise and industry knowledge in ADR processes as an alternative to direct representation in litigation;

### **Adapting the Cab-rank principle**

The Cab-rank principle is a fundamental ethical obligation of members of most independent bars. The essential components of the principle<sup>vi</sup> are that:

- Subject to availability, a barrister must accept instructions in a matter in a field in which the barrister practises or professes to practise if it is within the barrister's skill and experience, the fee is acceptable and the barrister is not prevented by another rule of conduct from acting;
- It is expressly stated that a barrister who is generally available to accept a brief shall not discriminate, in any way, for or against a client, or class of clients.

The value of the cab-rank principle in common law legal systems and in a democracy is that, subject to the above conditions, barristers are positively obliged to act for clients who might otherwise be regarded as promoting unpopular causes or be "undesirable" clients. The principle has acute significance in the criminal justice system where public revulsion or outrage at a crime and a lack of public understanding of the presumption of innocence might otherwise deter legal practitioners from being associated with some defendants.

The cab-rank principle's usefulness to members of the bar is that it gives them an unassailable reason for acting in a particular case. They do not have to explain their decision, at least to informed lawyers (although they will usually have to rely on their professional associations to explain it to the public).

The principle, or an appropriate variant of it, might be useful in the pro-bono context, including the current voluntary regime. If it were to be an accepted principle that practitioners willing to undertake pro-bono work considered themselves obliged to accept instructions without discrimination, subject to availability and expertise, this principle might itself provide a basis for explaining the decision to existing or potential clients, to the extent that is seen as necessary.

### **The Good Corporate Citizen Analogy**

In the modern business context there is a growing willingness - some would say a pressure - to be seen as a good corporate citizen. To be so seen is often a declared public affairs strategy - it is regarded as having concrete commercial benefits, apart from providing the intrinsic human satisfaction of philanthropy to corporate personnel. It may take the form of charitable contribution or sponsorship or, in a more formal sense, a declaration of commitment to ethical investment.

Pro bono work fits easily into this context and is also consistent with the underlying and important role which can be played by lawyers in a democracy - speaking for those who may not be able to speak for themselves. Corporate clients who are themselves subject to the good citizen imperative may readily understand a pro bono commitment in this context. On a more prosaic level, pro bono work can also be communicated as a professional obligation, even in a voluntary regime. The Council of the Law Institute of Victoria agreed last year, for example, to urge members to dedicate at least one hour per week to pro bono work.<sup>vii</sup> It is certainly the case that a healthy voluntary pro bono environment provides a good argument against imposing a mandatory regime.

## **Providing Pro Bono services in an ADR context**

Pro bono services may be provided in a variety of ways. Lawyers should think laterally about how they could make a contribution. If real concerns about indirect or commercial conflict prevent a lawyer or firm from providing representation to particular litigants, it may still be possible to use valuable experience and skill in the range of Alternative Dispute Resolution (ADR) processes available to modern disputants, for example as pro bono mediators or conciliators or as providers of neutral evaluation. The availability of industry-based dispute resolution schemes, which are usually free to complainants, should also not be forgotten. In some cases, a lawyer may be of real assistance at little cost, in locating the appropriate scheme and assisting the complainant to formulate their claim. Formal representation is often not necessary.<sup>viii</sup>

Apart from the increasing use of court ordered mediation, ADR is assuming significance as an imperative for governments. The following extracts from the ALRC report<sup>ix</sup> provide the context for this imperative:

*"6.146 In the United States, the Administrative Dispute Resolution Act<sup>x</sup> specifies that agencies may use ADR proceedings to resolve issues relating to an administrative program, if the parties agree. In February 1996, President Clinton issued an Executive Order directing agencies to employ ADR techniques as a way to reduce the civil litigation case load. All United States federal agencies were expected to implement at least one new administrative dispute resolution program by the end of September 1999.*

*6.147 In Canada, the Department of Justice also has initiated dispute resolution arrangements, including by working with the Treasury Board to remove disincentives to early settlement, providing ADR training to government employees, and developing ADR pilot schemes in government agencies. ...<sup>xi</sup>*

*6.148 The federal Attorney-General's Department has sought information on how departments and agencies use ADR, but there is, as yet, no government-wide initiative comparable to those in the United States and Canada to encourage government departments to utilise ADR for broader conflict and dispute management. .... In any assessment of the cost-effectiveness of such dispute prevention schemes, the direct and indirect costs arising from government disputes should be calculated."*

While the availability of ADR processes can never be a substitute for an effective court system, ADR has a useful role to play in promoting early resolution and reducing costs.<sup>xiii</sup> Lawyers and law firms with experience in ADR as well as specialised corporate or government experience may be able to use their skills on a pro bono basis, where appropriate, to support this relatively new use of ADR in government-related disputes in addition to other more traditional pro bono activities.

It is hoped that other strategies will emerge from the discussion at the conference.

### **➤ Case Studies**

#### *Case Study 1*

A law firm is contacted by a community legal service in relation to a referral from an individual who had a complaint against a State Government Department (Department A). The firm is interested in taking on the matter but is concerned about the potential reaction of Department A or other Government departments. The firm has acted for Department A in the past and another department, Department B is a current client.

What approaches might the law firm take?

### *Case Study 2*

A firm is asked whether it will accept instructions to act pro bono for a disabled man in a complaint of discrimination against a transport provider for which it had previously provided advice in an unrelated area. The firm accepts the instructions but then receives a call from the corporation concerned asking for an explanation.

What might the firm do in this situation?

### **References & Further Reading**

ALRC Report No. 89, *Managing Justice: A review of the civil justice system* ALRC Sydney 1999, particularly Chapters 5 & 6.

ALRC Issues Paper 25 *Review of the adversarial system of litigation: ADR -- its role in federal dispute resolution* ALRC Sydney 1998 (ALRC IP 25)

N Gratton & A Roberts, *Access to justice- working together*, (2000) Vol. 74, 4 *LIJ* 29

F Regan, *Assessing Pro Bono Legal Aid Schemes*, (1999) Vol. 73, 11 *LIJ* 30

R Buckley, *Mandatory Reporting of Pro Bono*, (1998) 72 *ALJ* 590

M Rayner, *The Same Old "Conflict"* (2000) Vol. 74, 2 *LIJ* 35;

Department of Justice, Canada '*Policy on dispute resolution*' 9 December 1997 at <<http://canada.justice.gc.ca/en/ps/drs/dr/dm/892.html>> (20 January 2000)

Department of Justice, Canada '*Dispute resolution '98 -- the way ahead*' 23 March 1998 at <<http://canada.justice.gc.ca/en/ps/drs/dr/dm/att252.html>> (20 January 2000).

ACCC *Benchmarks for dispute avoidance and resolution -- A guide* AGPS Canberra 1997.

Standards Australia *Guide to the prevention, handling and resolution of disputes* (AS 4608-1999) Standards Australia International Sydney 1999.

Australian Banking Industry Ombudsman *Terms of Reference* at [www.abio.org.au](http://www.abio.org.au)

## **Briefing paper for Session 1C – Pro Bono as Professional Legacy**

Title: *From Time Immemorial: A Historical Perspective on the Provision of Legal Services to the Politically and Economically Disadvantaged*  
Presenter: **Donald Robertson**  
**Partner, Freehills**

### **Giving the Poor a Voice**

*The historical traditions of the law which give the lawyers who work in it a self-conscious sense of their location in a continuing adventure with a past and a future as well as a present, act as a counterweight against the forgetfulness, the obliviousness to time, which characterizes our life today with its rush of transient moments each disconnected from the rest in a contented but timeless present where the partnership among the generations; “the great primeval contract of eternal society” as Edmund Burke called it, is literally disintegrated and forgotten. Much of the shallowness of our life today, our fickle fascination with celebrities for example, and the brevity of their fame, is the result of this loss of a sense of location in time and all those forms of work for which a sense of historical depth continues to be needed should be valued for the resistance they offer to this temporal flattening of experience. Among these forms of work the practice of law is especially important.<sup>1</sup>*

Why study the history of lawyers’ involvement in pro bono work? There are many reasons people study history.

We study to learn the lessons for the future - of course, being careful not to assume that history determines our fate. We are more than creatures of our past. Some study to deny past injustices and evils; others to mine the past for materials to invent traditions.<sup>2</sup> This study shows a conscious decision to break with the past in the law’s attitude to legal assistance to the disadvantaged and marginalised. A study of the role of lawyers in making this break shows that over time the attitudes of lawyers to providing this assistance has changed considerably but that rarely have lawyers been the originators of such assistance.

The provision of legal assistance to the poor was originally an important feature of the ancient world which helped maintain the established order. The emergence of the Christian world view transformed the role of the poor in society and society’s attitude to them. This revolution is the single most important influence on the medieval legal order in so far as it relates to legal assistance to the poor. A proper understanding of the Christian motivation for the provision of legal aid to the poor is essential for an understanding of the English legal position. This motivation has for many centuries been the key reason for lawyers being

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<sup>1</sup> Anthony T. Kronman, “Legal Ethics: Professionalism: 2 *Journal of the Institute for the Study of Legal Ethics* 89 at 96 (1999).

<sup>2</sup> On the invention of traditions as a means of shaping the present and the future see Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983).

involved in the provision of legal services to the poor. Increasingly, however, in the age of revolutions (industrial, social and religious) legal assistance is no longer seen in terms of mercy and charity (in the senses to be explored) but as a matter or right for the individual, in order to obtain substantive equality.

Ronald Dworkin has recently argued for a continuous theory of justice that is drawn from and respects two main ethical principles. The first holds that it is important that the lives of people go well, and that it is equally important that each person's life go well. The second insists that each person has a special responsibility for his own life.<sup>3</sup>

*Any society faithful to these two principles must adopt legal and institutional structures that reflect equal concern for everyone in the community, but it must also insist, out of respect for the second principle, that the fate of each must be sensitive to his own choices.*

Thus the "special and indispensable virtue of sovereigns" of which Dworkin speaks is that of equal concern. And if people are to have choice, they must have the power to participate in the political community. Law is an essential element of that political community and especially so in a democracy, for it is by reasoned discourse that conflicts are resolved and community values formed.<sup>4</sup> The failure to give the poor a voice in this debate may lead to other alternatives, such as exit from the system. It will not engender loyalty and social stability.<sup>5</sup> The study of the origins of legal assistance to the poor reveals throughout this whole period the critical role played by rulers and the state in setting the tone for the part played by legal representatives in the provision of these services.

## The Ancient World

*Speak up for those who cannot speak for themselves,  
for the rights of all who are destitute.*

*Speak up and judge fairly;  
defend the rights of the poor and needy.*<sup>6</sup>

As King Lemuel clearly articulated in this proverb, the necessity of giving the poor a voice in society is one of the fundamental aspects of the system of justice.

The ancient world relied heavily on the system of patronage to provide this voice. Under the original Roman law *legis actio* system no representation was allowed. However, after the introduction of the formulary system, it was possible to appoint *cognitores* and, a little later and less formally, *procuratores*, to act as representatives. These persons differ from the modern attorney, however, in that they, in effect, became the parties to the suit.<sup>7</sup> Though the

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<sup>3</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge, 2000), 324.

<sup>4</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, 1996). Habermas' discourse theory can be read several ways, but the main significance of his work is that it emphasises the need to consult those who will be affected. It is thus "dialogical" rather than "monological", a feature especially of Rawls' early theory of justice. For a recent reading of Habermas see Christopher McMahon, "Discourse and Morality" (2000) 110 *Ethics* 514-536.

<sup>5</sup> AO Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press, Cambridge, 1970).

<sup>6</sup> Proverbs 31:8-9.

<sup>7</sup> W Buckland & A McNair, *Roman Law and Common Law: A Comparison in Outline* (Cambridge University Press, Cambridge, 1936), 323-324.

party must be present he could not give evidence, apart from answering some limited interrogations. The actual conduct of the case was in the hands of advocates (*advocati, patroni*). These were not lawyers: they were orators.

Throughout the major portion of Roman history, the services of *advocati* were brought within the reach of the poor through the clientele system, which flourished during the Republic and early empire. Patronage was an enduring bond between two persons of unequal social and economic status, which implied and was maintained by periodic exchanges of goods and services.<sup>8</sup> This system to some extent helped bring advocates' services within the reach of the less well to do since they were able to pay by providing agricultural produce, especially if they were rustic clients.<sup>9</sup>

The patronage system was a powerful one.

*The wheels of Roman society were oiled - even driven, perhaps - by two notions: mutual services of status-equals (I help you in your affairs; I then have a moral claim on your help in mine) and patronage of higher status to lower.*<sup>10</sup>

A client-patron relationship could be entered into voluntarily. The fact that the word "*patronus*" came also regularly to mean an advocate stresses the importance in law of the relationship. The patron paid the money for the litigation, paid the debt to prevent him being hauled off and stood by as his representative.

Everyone, no matter how high in the social ladder, save the Emperor, had someone above them to whom homage was owed. Daily life was full of the comings and goings of clients calling upon patrons. In the scale of duties, those to clients came below none but parents and wards. And there was, above all, the patron *par excellence* - the Emperor himself.

The Roman citizen formally had ready access to the system of justice both in Rome and in the provinces. No matter how humble in station in life the Roman citizen could, like St Paul in his battles with the Jewish state, utter the words "*I appeal to Caesar*".<sup>11</sup> Indeed, like any judge the Emperor was a victim of overwork, and despite his exalted status, was often abused by those who appeared on appeal from the provinces. His tribunal has been said to suggest: *more the familiarity and popular tumult which surround the justice of an Eastern pasha seated on his divan in the patio of his seraglio; but it is endlessly complicated in addition by the subtleties and sonorities of the long-drawn-out Roman procedure.*<sup>12</sup>

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<sup>8</sup> Andrew Wallace-Hadrill (ed), *Patronage in Ancient Society* (Routledge, London, 1989).

<sup>9</sup> Mauro Cappelletti, "The Emergence of a Modern Theme" in Mauro Cappelletti, James Gordley and Earl Johnson Jnr (eds), *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (Oceania, New York, 1975), 8 fn 14.

<sup>10</sup> JA Crook, *Law and Life of Rome* (Thames & Hudson, London, 1967), 93.

<sup>11</sup> Acts 25:10-11 Paul states: *I am now standing before Caesar's court, where I ought to be tried. I have not done any wrong to the Jews, as you yourself know very well. If, however, I am guilty of doing anything deserving death, I do not refuse to die. But if the charges brought against me by these Jews are not true, no one has the right to hand me over to them. I appeal to Caesar!* This may have been a rejection of a corrupt court for the personal jurisdiction of the Emperor. On appeals to the Emperor see Fergus Millar, *The Emperor in the Roman World* (Cornell University Press, Ithaca, 1977), 507-516, and as to his jurisdiction at first instance 516-527. Specifically on Paul and the Roman law see A N Sherwin-White, *Roman Society and Roman law in the New Testament* (Baker, Grand Rapids, 1963), chapter 3.

<sup>12</sup> Jerome Carcopino, *Daily Life in Ancient Rome* (Penguin, London, 1941), 212.

The Roman law's attitude to the provision of legal services to the poor was generally callous, as it was in the rest of the ancient world. The Christian notion that the poor are blessed was not within the Greco-Roman world of ideas. Charitable acts, when they did occur, were directed to the community rather than to the poor (unless within the context of a patronage or familial relationship). Finley says one can cite exceptions, but can almost count them "and that is the decisive fact".<sup>13</sup>

The legal procedures adopted were complicated and impossible for the poor to follow alone. Attempts were made to regulate legal fees, but to little avail. A law of 204 BC prohibited lawyers taking fees or suing clients to recover money from their clients on any pretext. But this law was not easily enforced and there are records of violations. It was possible to make a permanent living out of litigation.<sup>14</sup>

Litigation became in practice a political struggle in which wealth and power weighed heavily in the balance. There were enormous differences in wealth, power and prestige and a climate of moral ideas which allowed these differences to be thrown into the scale. The poor were in a position whereby the physically stronger had a clear advantage in the litigation process - often being able to avoid the process altogether in the case of proposed litigation by social and economic inferiors. The factors weighing against social inferiors included one's advocate being afraid to turn up out of fear of offending the adversary!

The poor did not, in practice, have the same access to justice as the rich. The idea of equality before the law co-existed "in a curious way" with the law's recognition of a large range of formal differentiations according to rank - including distinctions in punishments according to social standing.<sup>15</sup> Kelly concludes that:

*the administration of justice, civil as well as criminal, tended both in the pre-classical, classical and post-classical periods of jurisprudence to be subject to the influence of powerful men; sometimes that influence found expression in the outright bribery of judges, advocates, or witnesses; more often it operated by fear, by favour, and by personal connexions. The theory of an equal and objective justice was perfectly familiar, but no one reckoned on finding it applied in practice.*<sup>16</sup>

The *Digest* of Justinian refers on two occasions to the obligation of a proconsul to appoint counsel to petitioners. Ulpian provided:

*It will also be his duty in most cases to allow the use of counsel by petitioners who are: women, **pupilli**, those otherwise under a disability, or those who are out of their minds, if anyone seeks this. Even if there be no-one to seek it, he ought to give them it anyway. But if someone should represent himself as being unable to find an advocate because of*

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<sup>13</sup> MI Finley, *The Ancient Economy* (Penguin, London, 2nd ed, 1985), 38-39; Peter Brown, *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (University of Wisconsin Press, Madison, 1992), 92 warns that we should not exaggerate the hardheartedness of attitudes to the poor in ancient society.

<sup>14</sup> Finley, *The Ancient Economy*, 57; JA Crook, *Legal Advocacy in the Roman World* (Cornell University Press, Ithaca, 1995), 43 and 129-130 (fees always were taken, in practice). Only in the reign of Claudius are fees finally acknowledged as a legal reality, but with a legal limit set - the judge setting the fee up to the limit, depending on the nature of the case and the skill shown: *The Digest of Justinian* (translation of Alan Watson, University of Pennsylvania Press, Philadelphia, 1985), 50.13.1.10-11 (Ulpian).

<sup>15</sup> JM Kelly, *Roman Litigation* (Oxford University Press, Oxford, 1966), who gives a highly negative view as to the level of substantive equality the poor enjoyed before the court; *A Short History of Western Legal Theory* (Oxford University Press, Oxford, 1992), 70-72.

<sup>16</sup> Kelly, *Roman Litigation*, 61; Crook, *Legal Advocacy in the Roman World*, 131 is less critical than Kelly.

*his opponent's power, it is just as much incumbent on the proconsul to give him one. But it is wrong for anyone to be oppressed by the sheer power of his opponent; in fact, it tends to harm the reputation of a person who has charge of the province, if someone gets away with such overpowering behaviour that everyone is afraid to take instructions as an advocate against him.*<sup>17</sup>

Ulpian also holds:

*The praetor says: "If they do not have an advocate, I will appoint one." The praetor is accustomed to show this consideration not only to the persons mentioned above [the young, those with a disability such as deafness] but also to anyone else who for certain reasons, because of either intrigues or duress on the part of his opponent, has not found an advocate.*<sup>18</sup>

However, it is not at all clear that these provisions were intended to help the poor, but appear to apply to those ordinary citizens who were oppressed by an even greater opponent. There is no mention of the poor in these rescripts and, as stated, even the assignment of an advocate may not have helped much for the advocate may be frightened out of his wits. What chance then the poor litigant?

The reality of Roman legal justice may therefore have been that money was able to buy a better brand of justice. Petronius sums up the discrimination evident in the Roman legal system in a poem about the lower classes:

*Of what avail are laws  
where money rules alone  
and the poor suitor can never succeed?  
So a law suit  
is nothing but a public auction,  
and the knightly juror who listens to the case  
gives his vote as he is paid.*<sup>19</sup>

And lawyers do not escape criticism. Apuleius asks of Paris:

*Why then do you marvel, if the lowest of the people, the lawyers, the beasts of the courts, and advocates that are but vultures in gowns, nay if all our judges sell their judgments for money.*<sup>20</sup>

Although the Roman system for dealing with the exigencies of legal representation for the poor produced a form of equal justice, a number of features detract from that system as an ideal. It depended upon patronage - an uneven system which treated social rank as embedded within it and which it was designed to protect. Power and favour were pervasive elements within the system. It was also limited in scope. Paul could appeal to Caesar because of his Roman citizenship. Those who were not citizens were not given the benefit of Roman justice. The Roman system depended upon well structured power relationships in society. Those who

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<sup>17</sup> *The Digest of Justinian*, 1.16.9.5.

<sup>18</sup> *The Digest of Justinian*, 3.1.1.4.

<sup>19</sup> Petronius, *Satyricon*, 14, 2 quoted in K. Wengst, *Pax Romana and the Peace of Jesus Christ* (SCM Press, London, 1986), 40.

<sup>20</sup> *Metamorphoses* X, 33.

had power trumpeted it to the world. Obligations of patronage too easily turned to opportunities for corruption, and the ancient literature is full of accusations to this effect.<sup>21</sup>

Although Alan Watson can assert that, “*Rome’s greatest legacy to the modern world is undoubtedly its private law*”,<sup>22</sup> this is not the case in so far as its attitude to legal assistance to the poor is concerned. Only upon the adoption of a dramatically different view of the exercise of power and of the place of the poor in society do we see a shift from patronage to charity and mercy as governing ideals.

### **Christian Influences on Medieval Views of Justice for the Poor**

*Blessed are you who are poor for yours is the kingdom of God  
But woe to you who are rich, for you have already received your comfort.*<sup>23</sup>

“*It is impossible to understand the revolutionary quality of the Western legal tradition without exploring its religious dimension.*”<sup>24</sup> This is true generally and specifically of the role lawyers have played in the provision of legal services to the socially disadvantaged and marginalised.

The dramatic conversion of Constantine after his vision on the Milvian bridge in 312AD is often taken as the starting point for the Christianisation of western Europe, and a dramatic revolution in the relationship between the state and religion. However, whilst revolution did occur, it is easy to forget the continuities. Christian morality, in relation to giving to the poor, followed Jewish models.<sup>25</sup> Indeed, Peter Brown has concluded:

*The rise of Christianity altered profoundly the moral texture of the late Roman world. Yet in moral matters the Christian leaders made almost no innovations. What they did was more crucial. They created a new group, whose exceptional emphasis on solidarity in the face of its own inner tensions ensured that its members would practice what pagan and Jewish moralists had already begun to preach.*<sup>26</sup>

The Jewish scriptures make it plain that the godly should alleviate the distress of those who are poor and shield them from the rich.<sup>27</sup> It was a fundamental judicial attribute that impartiality be shown, whether the case was between native Israelites, or between an Israelite

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<sup>21</sup> Ramsay MacMullen, *Corruption and the Decline of Rome* (Yale University Press, New Haven, 1988), 132-137.

<sup>22</sup> Alan Watson, *Roman Law & Comparative Law* (University of Georgia Press, Athens, 1991), 3.

<sup>23</sup> Luke 6:20, 24.

<sup>24</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, Cambridge, 1983), 165.

<sup>25</sup> Wayne A. Meeks, *The Origins of Christian Morality: The First Two Centuries* (Yale University Press, New Haven, 1993), 106-108.

<sup>26</sup> Peter Brown, *Late Antiquity* (Harvard University Press, Cambridge, 1987), 24.

<sup>27</sup> Deuteronomy 24:14-14 (do not take advantage of the poor and needy; pay his wages each day before sunset because he needs them).

and an alien, and regardless of the wealth of the parties.<sup>28</sup> Neither the rich *nor* the poor were to receive favouritism - each was to be treated fairly.<sup>29</sup>

The early church took special care of the poor, and, following the model of Jesus, regarded assuring justice to the poor as a work of mercy.<sup>30</sup> However, it was not until the Council of Chalcedon in 451AD that church policy on legal aid for the poor was formalised. Clergymen should not engage in the general practice of the law but they could - indeed they should, out of fear and in the imitation of the Lord - furnish legal counsel and representation to widows, orphans and those who lacked resources of their own.<sup>31</sup> Prior to the papal revolution in the 11th century, which altered forever the relationship between the secular and the spiritual realms, the jurisdiction exercised by ecclesiastics did not draw sharp distinctions between the sacred and secular spheres. Ecclesiastic jurisdiction - in the sense of legislative, administrative and judicial competence - lacked precise boundaries. Secular and ecclesiastical authorities overlapped in the type of cases that came before them.<sup>32</sup>

In a remarkable transformation of the ancient Roman model, and of the significance that the poor played in society, the Bishops became patrons of the poor. They were the “lovers of the poor”, creating a Christian populism which flouted the culture of the governing classes. They harnessed the masses and created an important social role for the Bishop and the clergy. In turn they helped unleash a force which ultimately fused with other ideals in the post-Enlightenment period to create modern democratic values. The Bishops’ very activities in helping the poor - the churches replacing temples as new gathering points for the needy - drew attention to the important place of the church in this activity.<sup>33</sup> Further, the definition of the “poor” was widened beyond the simply destitute:

*They were **all** persons - beggars, artisans, small householders, clients - who found themselves dependent on the mercy and good graces of the powerful.*<sup>34</sup>

This is a role which the church continues to play, even today when modern secular society asserts its priority over the spiritual. Like other lawyers, lawyers who served in the medieval church courts did not enjoy good press. However, there are numerous examples of litigants being assigned as advocates and proctors for no fee. Despite modern scepticism about the quality of pro bono services<sup>35</sup> there is no indication that these litigants received a lesser service.

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<sup>28</sup> Deuteronomy 1:16-17: *And I charged your judges at that time: hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike. Do not be afraid of any man, for judgment belongs to God.* See also Exodus 23:6: *Do not deny justice to your poor people in their lawsuits.*

<sup>29</sup> The Jewish scriptures exhibit a realistic attitude towards the risk of a society in which the poor achieved favouritism in court: Exodus 23:3 (do not follow the crowd when giving judgment and do not favour the poor in their lawsuit); Leviticus 19:15 (do not pervert justice by favouring either the poor or the great).

<sup>30</sup> Augustine, *City of God*, 9.5.

<sup>31</sup> James A Brundage, “Legal Aid for the Poor and the Professionalization of Law in the Middle Ages” 9 *Journal of Legal History* 169.

<sup>32</sup> Berman, *Law and Revolution*, 221. Berman’s treatment of the importance of the 11th and 12th century events for legal history and theory remains the best available.

<sup>33</sup> Peter Brown, *Power and Persuasion in Late Antiquity* contains an extensive analysis of the transformation of the place of power in late antiquity under Christian influence.

<sup>34</sup> Brown, *Power and Persuasion in Late Antiquity*, 99.

<sup>35</sup> Richard L. Abel, *American Lawyers* (Oxford University Press, New York, 1989), 129f is typically sceptical of the services provided on a charitable basis.

*The formal entries of these cases give no indication of casual or inattentive behaviour by the lawyers involved.*<sup>36</sup>

This is not to say that democracy was introduced by the medieval Christian church. Feudal society was also stratified and was expressed in the relationship between the lord and vassal. Vassalage was important in medieval times because it arose when there was very little idea of impersonal, public obligations at all and when kinship ties may have become weaker. It is important to not impose modern distinctions upon medieval society, nor classifications adopted within Roman law.<sup>37</sup> The medieval world, like the Roman world, was one of inequality, which was an accepted premise of almost all social and political thought.

It was left to the leavening influence of the Christian ideals of charity and mercy to slowly infiltrate the legal system. The church's influence was felt extensively throughout Europe - so that from the mid-thirteenth century onwards towns and cities began to make provision for legal services to the poor. The provision of this legal aid was part of a broader movement in Europe for the relief and regulation of the poor. In some cases the method of financing this legal aid was by making it a professional responsibility. Municipal statutes required advocates to provide legal services to the poor without receiving fees, gifts, or other compensation. By the mid-thirteenth century there was a recognition that the provision of legal aid was a civic as well as a religious obligation. Indeed, increasingly in medieval Europe, attorney's fees were paid out of tax revenues or the public treasury.<sup>38</sup>

These developments came at an important time for the legal profession, which was starting to see itself as a unified body of professionals. It is difficult to separate cause and effect here, but in England at this time a number of developments occurred which sped the recognition of lawyers as a distinct group of professionals. These changes included the initiation of the General Eyre and central royal courts in Westminster, the gravitation of litigation to the Court of Common Pleas and the increased specialisation of judges - all creating the need for expert assistance.<sup>39</sup> At the same time the lawyers practicing before the courts increasingly came to be regulated.<sup>40</sup>

There is a clear linkage between the increased professionalisation of lawyers and their involvement (willingly or otherwise) in the provision of legal aid to the poor. As Brundage expresses it:

*In the period before 1250 the burden of legal aid fell largely on canon lawyers; after 1250 civil advocates also began to assume responsibility for it. It is not coincidental, I would argue, that the period in which the lawyers began to bear a major share of the responsibility for furnishing legal aid to the poor and disadvantaged was also the period in which those same lawyers commenced to define themselves as members of a profession. Like physicians, who likewise began in this period to identify themselves as*

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<sup>36</sup> RH Helmholz, "Ethical Standards for Advocates and Proctors in Theory and Practice", in *Canon Law and the Law of England* (Hambledon Press, London, 1987), 47.

<sup>37</sup> Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford University Press, Oxford, 1994), chapter 2, examines the difficulties in the concept of vassalage and modern conceptions of the lord-vassal relationship.

<sup>38</sup> Brundage, "Legal Aid for the Poor" 174-175; also see Cappelletti "The Emergence of a Modern Theme" for further background on European developments.

<sup>39</sup> See generally Paul Brand, *The Origins of the English Legal Profession* (Blackwell, Oxford, 1992), 14-32.

<sup>40</sup> Jonathon Rose, "The Legal Profession in Medieval England: A History of Regulation" 48 *Syracuse Law Review* 1 (1998).

*professionals, rather than simply as practitioners, medieval lawyers regarded it as one mark of their superiority to other craftsmen that they furnished their specialized skills to economically and socially disadvantaged persons without compensation. Providing the benefits of expert skill and knowledge for those to whom a profit economy would deny them was from the beginning an integral characteristic of professional status.*<sup>41</sup>

These influences are also felt in the case of England - an integrated part of Europe in this period - which from an early period enshrined the Christian principle of charity in legislation. Thus legislation became an important source of principle in the development of the common law.<sup>42</sup>

## THE ENGLISH APPROACH TO LEGAL SERVICES FOR THE POOR

*Nulli vendemus, nulli negabimus aut differemus rectum acti iusticiam.*<sup>43</sup>

Most writers start, and almost finish, with the middle English period and the statutory innovations which are soon to be described. Although Maguire states that the obvious starting point is *Magna Carta*,<sup>44</sup> this in fact had little to do with making justice available to the poor. Indeed, as Holt demonstrates,<sup>45</sup> the judicial provisions of the charter are designed to give the tenant-in-chief what the undertenant already enjoyed: that is, to give the magnate a legal security like that enjoyed by the freeman. “*The protection of the law moved up, not down, the social scale.*”

To start with this period and the judicial provisions of the great charter also fails to give proper recognition to the motivation for the legislative innovations and misses the point that lawyers did *not* spontaneously start to give legal aid to the poor in common law courts. This was a state initiative, although one which was first prompted by the concerns of Christian charity and justice. Later, state security concerns were to intervene, with political security being a motive to suppress dissent. This was an even more important factor on mainland Europe where the poor were less “ordered” and “respectable” and where various countries had been shaken by civil wars, rebellions, and chronic unrest - the poor being seen as enemies of the state.<sup>46</sup> But in England the poor were seen as a necessary part of the Christian Commonwealth - the poor being seen as Christ’s representative.<sup>47</sup> Starting with the English legislation in relation to paupers also improperly severs developments in the English legal world from the rest of Europe - a mistake which could have been made at the beginning of the 20th century, but not in the new Europe of the 21st century which has recovered the European linkages between England and the rest of Europe.

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<sup>41</sup> Brundage, “Legal Aid for the Poor”, 175.

<sup>42</sup> JW Tubbs, *The Common Law Mind; Medieval and Early Modern Conceptions* (Johns Hopkins University Press, Baltimore, 2000) emphasises the role of legislation as a source of principle as compared to custom. Legislation has a poor name as a source of principle, but one which is being revived: Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, Cambridge, 1999).

<sup>43</sup> *To no one will we sell, to no one will we deny or delay right or justice*: clause 40, *Magna Carta* (1215).

<sup>44</sup> JM Maguire, “Poverty and Civil Litigation” 36 *Harvard Law Review* 361 at 364 (1923). This clause, incorporated into the United States Constitution, has been used by some US states to justify the grant of legal aid to the poor.

<sup>45</sup> JC Holt, *Magna Carta* (Cambridge University Press, Cambridge, 2nd ed, 1992), 123.

<sup>46</sup> See, for example, from a later period, Robert M Schwartz, *Policing the Poor in Eighteenth-Century France* (University of North Carolina Press, Chapel Hill, 1988).

<sup>47</sup> P Slack, *Poverty & Policy in Tudor and Stuart England* (Longman, London, 1988), 19.

It is also important to not wrench the history of legal aid to the poor from the changing structures of society or the broader social history of poor relief and attitudes to the poor. We tend to think too easily of a dichotomy between the rich and the poor, and of a simplistic relationship between lawyers and the alleviation of poverty. Of course, the picture is actually quite complex. As the medieval economy gives way to new economic models through enclosure and the moral economy of the *ancien regime* collapses, enormous social pressures built up.

By the 17th and 18th centuries England was experiencing profound changes to its economic and social structures, from which it was not obvious it would escape without widespread revolution and bloodshed.<sup>48</sup> By this time welfare was being seen by the poor as a “right”. Just as lawyers employed the myth of the Norman Yoke to justify new political rights, so the poor employed the myth of an ancient compact between church and the gentry, on the one hand, and the labourer, on the other, to justify claims to new social rights.<sup>49</sup>

Although the language used was often the nostalgic ideas of the “historic rights of the poor” we are close to revolutionary conclusions in the writings of Cobbett, Fielden and others, who each in their own way decried the repeal of the old Poor Laws and called for a redistribution of property.<sup>50</sup> There were:

*new claims maturing, for the community to succour the needy and the helpless, not out of charity, but as of right.*<sup>51</sup>

Lawyers did not live in a vacuum, and as community attitudes to the poor changed so did those of lawyers. These changes had started to gather pace in Tudor and Stuart England, amidst the stirrings of revolutionary ideas but reached new levels by the beginning of the 18th century, by which time England had a welfare apparatus unparalleled anywhere else in the world.<sup>52</sup> To gloss over this period, however, is to miss the fact that the legal system had difficulty in maintaining order and that this must have imposed pressures on the legal profession to respond, either sympathetically to the plight of the poor or in reaction to it.

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<sup>48</sup> There is not room to discuss these issues, but a useful starting point on the collapse of the ancient economy and the support systems which existed within society is the work of EP Thompson. See for example his classic study, *The Making of the English Working Class* (Penguin, London, 1980) arguing that the enclosure movement “(when all the sophistications are allowed for) was a plain enough case of class robbery”: 237; also his essays in *Customs in Common* (Penguin, London, 1991), extending his studies of the English working classes. Christopher Hill also highlights the importance of the poor as a source of revolutionary fervour, noting the radical biblical messages upon which the poor drew: *The English Bible and the Seventeenth-Century Revolution* (Penguin, London, 1993), chapter 6, “Poverty, Usury and Debt”.

<sup>49</sup> Thompson, *The Making of the English Working Class*, 837.

<sup>50</sup> The repeal of the old Poor Laws and the passage of the new in 1834 was seen as a betrayal by the labouring poor. They were universally hated and seen as destructive of local communities by the greater control that they gave over the bodies of the poor. Freiderich Engels states that the new Poor Laws were inspired by the Malthusian vision of competition and that poverty was a crime. It was, he says, an attempt by the rich to declare the poor superfluous: *The Condition of the Working Class in England* (Oxford University Press, Oxford, 1993; 1st German edition in 1845), 290.

<sup>51</sup> EP Thompson, *The Making of the English Working Class*, 836.

<sup>52</sup> See for modern treatments of these changes Slack, *Poverty & Policy* (surveys all of the literature of this period); William P Quigley, “Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Non Working Poor” 30 *Akron LR* 73 (1996) (a more technical overview of the poor laws).

The changes in attitude to the poor manifested themselves in many forms. Giving to the poor increased dramatically in the period - tenfold over the century 1550s to 1650s, fourfold when we allow for inflation. Over the same period the population doubled, so there is a real *per capita* increase. This does not take into account all forms of philanthropy which took place such as the creation of almshouses, and the giving to beggars on the streets.<sup>53</sup>

Although we do see courts at this period expressing concerns about the excessive litigation by the poor (perhaps a reaction to the increasing radicalism evident amongst the poor), we also see a softening of attitudes in some quarters. Muldrew comments on the relatively lenient treatment of the poor in the 17th century local courts. Although he expected his investigations to reveal that the poor were more prone to judgment than the rich, the opposite was true. This he puts down to the quality of mercy that was seen as a virtue - a theme in much of the literature of the period.<sup>54</sup>

A further feature must temper our consideration of the role of lawyers in the provision of legal aid. Many cases simply did not get to court because of the forgiveness of debts. As Muldrew says:

*Much has been written about giving and positive charity, but forgiving has received too little attention.*<sup>55</sup>

In an economy in which credit was an increasingly important feature (but without the extensive banking and consumer credit system which we enjoy today), the forgiveness of debts was especially important.<sup>56</sup>

We do not know how plaintiffs were counselled by their lawyers in their disputes - whether or not they were influential in instilling the Christian virtues in their clients. What this does indicate, however, is the importance of broader societal changes in attitudes to the poor if the problem of poverty in relation to disputes is to be resolved.

### **Suing and being sued as a pauper**

The maxim that no man should pay for justice was accepted by the time of Henry III.<sup>57</sup> This culminated in the statute of Henry VII of 1495, “An act to admit such persons as are poor to sue in forma pauperis”. As Maguire states, this was “an excellent bit of legislation and seems, so far as the common law courts were concerned, to have opened a new era with regard to poor persons’ suits.”<sup>58</sup>

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<sup>53</sup> Slack, *Poverty & Policy*, chapter 8 summarises the earlier work of Jordan and subsequent criticism and adjustments.

<sup>54</sup> Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Macmillan, London, 1998), chapter 8, “Disputes and Levels of Litigation”.

<sup>55</sup> Muldrew, *The Economy of Obligation*, 305.

<sup>56</sup> *Wealth was not so much a state of being, or inclusion in a privileged class, as a continual process of ethical judgement about credit, in which those with credit decided who were the most credit trustworthy, and which communities lacked credit*: Muldrew, *The Economy of Obligation*, 303.

<sup>57</sup> F Pollock and FW Maitland, *The History of English Law*, (Cambridge University Press, Cambridge, 2nd ed, 1899), 195 (that some writs were to be had for nothing and that the poor were to have them for nothing was an accepted maxim).

<sup>58</sup> Maguire, “Poverty and Civil Litigation”, 370.

The legislation is worth quoting in full:

*An act to admit such persons as are poor to sue in forma pauperis*

*Prayen the Commons in this present Parliament assembled, That where the King our Sovereign Lord, of his most gracious Disposition, willeth and intendeth indifferent Justice to be had and ministered according to his Common Laws, to all his true Subjects, as well to [the] Poor as Rich, which poor Subjects be not of Ability ne Power to sue according to the Laws of [this] Land for the Redress of Injuries and Wrongs to them daily done, as well concerning their Persons and their Inheritance, as other Causes; For Remedy whereof, in the Behalf of the poor Persons of this Land, not able to sue for their Remedy after the Course of the Common Law; be it ordained and enacted by your Highness, and by the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by Authority of the same, That every poor Person or Persons which have, or hereafter shall have Cause of Action or Actions against any Person or Persons within this Realm, shall have, by the Discretion of the Chancellor of the Realm for the Time being, Writ or Writs Original, and Writs of Subpoena, according to the Nature of their Causes, therefore nothing paying to your Highness for the Seals of the same, nor to any Person for the writing of the same Writ and Writs to be hereafter sued; and that the said Chancellor for the Time being shall assign such of the Clerks which shall do and use the making and writing of the same Writs, to write the same ready to be sealed; and also learned Counsel and Attornies for the same, without Reward taking therefore; And after the said Writ or Writs be returned, if it be afore the King in his Bench, the Justices there shall assign to the same poor Person or Persons, Counsel learned, by their Discretions, which shall give their Counsels, nothing taking for the same: And likewise the Justices shall appoint Attorney and Attornies for the same poor Person or Persons, and all other Officers requisite and necessary to be had for the Speed of the said Suits to be had and made, which shall do their Duties without any Reward for their Counsels, Help, and Business in the same; And the same Law and Order shall be observed and kept of such Suits to be made afore the King's Justices of his Common Place, and Barons of his Exchequer, and all other Justices in the Courts of Record where any such Suit shall be.*

This was not a statute simply about lawyers giving free legal services. This statute does talk of both counsel and other assistance of an administrative kind being given for free. However, it related not just to legal services but court fees and all other assistance in order to provide “indifferent” (impartial) justice to the poor.

Although, as Cappelletti states, the aid provided by these means cannot be confused with the modern idea of state aid, an idea that would not even have been intelligible before the modern state emerged,<sup>59</sup> we cannot accept his further conclusion that there was at this time a rigid distinction between the Christian ideas of mercy and justice. There was no such distinction, as the churchmen (including the judges who were largely drawn from the church) clearly understood. The relationship of justice and mercy was described by the canonists as equity,

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<sup>59</sup> Cappelletti, “The Emergence of a Modern Theme”, 13.

and also tied this idea to the need to take account of particular circumstances when judging.<sup>60</sup> The two aspects - justice *and* mercy - were inseparable aspects of God's character. The desire to provide for justice for the poor flowed directly from a proper theology.<sup>61</sup> Nor, for this reason, can it be accepted that this, among other measures, was the product of "somewhat sporadic personal charitable impulses of both lords and kings". For it was the fundamental obligation of Christian rulers to provide for justice. In mainland Europe and in England this obligation was fulfilled from an early stage:

*The king must act as kinsman and protector to all persons in holy orders, strangers, poor people, and those who have been cast out, if they have no one else at all to take care of them.*<sup>62</sup>

## Royal Jurisdiction

The Act of 1495 neither gave nor restricted Chancery's powers.<sup>63</sup> Maguire talks of the "surprising humanitarianism of kings from 1216-1495". And indeed, there were a number of means by which royal jurisdiction provided for the poor prior to the enactment of the 1495 statute. These included, bills in Eyre as the King did his circuit. Whilst pledges for prosecution were customary, where a complainant could not find pledges the judge might permit him to take an oath instead.<sup>64</sup> Chancery's practice (as one might expect) was also (upon specific instructions from the king) to see that no party suffered wrong because they were poor. Where the poor could not pursue the common law the Chancellor took jurisdiction. The Court of Requests, originally known as the Court of Poor Men's Causes, was active as early as 1493 and originally attended the royal progresses, although after 1525 it usually sat in Westminster.<sup>65</sup> As Maguire states:

*Despite some accounts to the contrary, this tribunal did a roaring business, gained great popularity, and retained that popularity until it "died a natural death" in or a little after 1642.*<sup>66</sup>

The procedure of the Court was equitable. Typical of the cases that it dealt with were the dealings between poor tenants and their grasping landlords. In the era of transforming

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<sup>60</sup> The canonists drew on both Christian ideals and Aristotle's concept of equity as being merciful to the weakness of human nature: *Rhetoric* (ed Jonathan Barnes, Princeton University Press, Princeton, 1984), 1374<sup>b</sup>9. Generally on earlier medieval concepts of equity encompassing the idea of mercy see Tubbs, *The Common Law Mind*, 80-93. On the relationship of mercy to legal thought and judicial reasoning see Martha C Nussbaum, "Equity and Mercy" (1993) 22 *Philosophy and Public Affairs* 83-125; reprinted in *Sex and Justice* (Oxford University Press, New York, 1999), chapter 6.

<sup>61</sup> The Bible often tied justice and mercy together, most notably in Micah 6:8: *He has showed you, O man, what is good. And what does the LORD require of you? To act justly and to love mercy and walk humbly with your God.*

<sup>62</sup> *Leges Henrici Primi*, (ed by LJ Downer, Oxford University Press, Oxford, 1972), 10.3. See also 21.1 (jurisdiction over the poor); 78.5 (compensation for slaying of the poor).

<sup>63</sup> Maguire, "Poverty and Civil Litigation", 363.

<sup>64</sup> Maguire, "Poverty and Civil Litigation", 367.

<sup>65</sup> Baker traces its origins to 1483 and the promotion of an official who had been dealing with "bills, requests and supplications of poor persons" to be a "clerk of the council of requests". The allegation of poverty became an increasingly disingenuous means by people of substance of taking advantage of simple procedures: JH Baker, *An Introduction to English Legal History* (Butterworths, London, 3rd ed, 1990), 138-139.

<sup>66</sup> Maguire, "Poverty and Civil Litigation", 369.

economic relations and the emergence of the market as a principle of ordering social relationships, these were particularly important cases.

The procedures of the Royal jurisdiction were in competition with the common law courts and the 1495 statute opened even more opportunities for the poor. The difficulty was the slowness of the procedures and, especially in the case of Chancery practice, the complicated nature of the pleadings.

### **The Effect of the 1495 Legislation**

The 1495 statute made the common law courts more attractive to the poor. At a later time, Lord Chancellor Eldon was to give the impression that paupers received *more* favourable attention than others:

*The effect of the privilege of a pauper is, that his case is apt to receive from the Court and the Bar protection, not merely full as zealous, but exceeding the attention, given to the affairs of suitors in different circumstances.*<sup>67</sup>

Indeed, the statutory regime stayed absolutely constant for about four centuries until the introduction in 1883 of new rules of procedure. However, there were a number of obvious deficiencies in the 1495 statute. As was pointed out on a number of occasions, the legislation strictly only applied to plaintiffs, not defendants although, through a process of equitable extension, Chancery did apply its principles to defendants.<sup>68</sup> The common perception was that the legislation gave rise to excessive litigation by the poor and this led to resentment and harsh counter-measures, considered later in this paper, for those losing their suit. The judges were at great pains to point out that the ability to sue as a pauper was a privilege not to be abused:

*To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides, it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be clearly made out.*<sup>69</sup>

Thus the privilege of suing as a pauper was not to “*be allowed to be converted into an engine of vexation*”.<sup>70</sup>

The orders in Chancery for 1623 complain of a plethora of pauper suits and for 1687 speak of Poor Men’s Causes as having “*savoured more of clamour than of any equity.*”<sup>71</sup> This may explain why, despite the theory of the 1495 statute, the administration of poor persons proceedings were in fact to be *not* free. In about 1786 the minimum preliminary fees payable

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<sup>67</sup> *Whitelocke v Baker* (1807) 13 Ves Jun 509; 33 ER 385.

<sup>68</sup> *The King v Reynalds* (1828) 1 Black W 230; 96 ER 126; *Oldfield v Cobbett* (1845) 1 Ph 613; 41 ER 765.

<sup>69</sup> *Lovekin v Edwards* (1809) 1 Phill Ecc 180; 161 ER 953 at 955 per Sir John Nicholl.

<sup>70</sup> *Pearson v Belchier* 4 Ves Jun 627; 34 ER 875; *ex parte Shaw* (1796) 2 Ves Jun 40; 34 ER 760: *A court is, indeed, always tender as to dispaupering a plaintiff, but, it must be recollected, that the principle upon which paupers are entitled to the assistance of the bar, and have equal claims with the opulent upon the Court, is, that they may themselves have justice; but they will not be allowed so to pervert this privilege, as to do injustice to others.*

<sup>71</sup> Maguire, “Poverty and Civil Litigation”, 374.

by a pauper applicant to common pleas was 6 shillings and 6 pence; if the applicant were admitted and won a verdict of more than 5 pounds he would have to pay something like 4 pounds more before receiving a penny on his recovery. In Kings Bench a pauper litigant had to pay 4 pounds 12 shillings and 8 pence before collecting any award in proceedings. This was just 7 shillings and 4 pence less than the maximum he was permitted to own at the commencement of suit.<sup>72</sup>

Further, the poor faced a catch-22 in seeking to start proceedings. From a date prior to 1744 the rules required that those seeking to sue as a pauper should:  
*have a Counsel's Hand to his Petition, certifying the Judge to whom the Petition is directed, that he can see the Petitioner have good Cause of Action.*<sup>73</sup>

In the absence of the equivalent of a modern clearing house for public interest cases, it is difficult to see how this requirement would be met in practice.

Further limitation upon access to justice was the 5 pounds assets limit, set as a means test at a time not quite known. This limit was not changed until 1883, when it was lifted to an inadequate 25 pounds.<sup>74</sup> There were also technical rules which made the 5 pounds limit a practical impossibility to meet. Thus, for example, if the person had property worth more than 5 pounds but this was mortgaged to its full extent, the person was still not allowed to sue as a pauper, presumably on the theory that if you could own such property in the first place you were not in that category of persons entitled to relief. This emphasised rather than circumscribed the importance that property played in opening access to the doors of justice.<sup>75</sup>

Thus the 1495 statute was capable of achieving formal equality only and there was a natural tendency for restrictive rules to grow up around it. It is perhaps remarkable that it did survive for four centuries without repeal.

### **Assignment of Counsel**

Despite the deficiencies in the statute there is evidence in the reports and year books that counsel were assigned in fact to the poor without fee. As we have seen, in Ecclesiastical courts counsel were assigned by the Bishop from a very early period to act without fee.

By the 1290s the justices in eyre were assigning Serjeants to the service of poor clients, perhaps (but not certainly) for free, it being one of the fundamental aspects of the role of a serjeant to act in that capacity.<sup>76</sup> Serjeants were more than barristers. They were true officers of the court, holding a special place in the hierarchy with an effective guarantee of wealth and judicial preferment. The position of a serjeant was more a degree or title than a professional qualification, competing with a knighthood or a doctorate. The serjeants had a monopoly before the Common Pleas. Although their fees were high they (alas!) had to deal directly with their lay clients. The serjeants took an oath pledging to serve the king's people. Their obligation to serve the poor was thus derivative of the king's.

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<sup>72</sup> Maguire, "Poverty and Civil Litigation", 377. The issue of costs in proceedings is looked at later.

<sup>73</sup> Maguire, "Poverty and Civil Litigation", 377.

<sup>74</sup> Maguire, "Poverty and Civil Litigation", 380. This was at the same time that plaintiffs were allowed to have relief.

<sup>75</sup> *Spencer v Bryant* 11 Ves Jun 49; 34 ER 1078.

<sup>76</sup> Paul Brand, *The Origins of the English Legal Profession*, 104, 46-49.

Indeed, to refuse such service would be to expose the serjeant to committal as Hale CJ was to state in a case dealing with a serjeant's ability to plead privilege from attending in a suit brought against him:

*But the court held, that a serjeant had no such privilege against this court; though he shall against an Inferior Court, and so shall his servant ... because a serjeant is not upon any account bound to attend there, but here he may; as if the Court should assign him to be counsel, he ought to attend; and if he refuse, per Hale, C.J., we would not hear him, nay, we would make bold to commit him; and though an officer be sueable by bill in his own Court, yet his servant is sueable by original.*<sup>77</sup>

If not committed, they could lose their right of audience. If he refuses to plead, “we cannot make him no longer a serjeant, if he has title given by the King, but we may exclude him from the bar, so that he shall not be received to plead”.<sup>78</sup>

The law books are replete with reports of plaintiffs being admitted to sue as a pauper and of courts appointing counsel for them. This was so even in instances where one gets a strong sense that the Bar was reluctant to appear, as in the following case:

*Trevanion an ancient decayed gentleman at the Bar, having brought false imprisonment against an attorney of the Court, moved to have an attorney assigned him, for none would voluntarily appear for him; and the Court appointed one at his own nomination.*<sup>79</sup>

Although we do not have complete statistics - to start with, we need to look beyond the central courts to see what was happening at the local level - what we do have indicates that the poor sued surprisingly often. Muldrew's survey of local material in the 17th century indicates the poor sued less frequently and for smaller sums than the rich (as we would expect), but they did sue rich neighbours and poor. Proportionally, the times that their cases get to hearing (that is, they are not forced to compromise their claims out of fear or lack of funding) is as high or higher than for the rich.<sup>80</sup>

One feature which explains this pattern is the evidence that attorneys at the local level were willing to extend their services on credit if they thought that there was a just case and they were likely to get a costs order. The account books in the years of 1671 to 1694 of the Hitchins' attorney George Draper, for example, shows he was engaged in 1,954 cases for just one of those years. Nearly all of his services were provided on credit. In one sample year 25 per cent of his fees remained unpaid altogether.<sup>81</sup> Lawyers were in an excellent position to judge the creditworthiness of clients and performed the services of small-scale bankers. This was a feature of the local community support systems working.

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<sup>77</sup> Sir William Scroggs & JS (1674) 1 Freeman 390;81 ER 289.

<sup>78</sup> Chief Justice Brian (1471), YB II Edw 4, pl.4, extracted in IV W Holdsworth, *A History of English Law* (Methuen, London, 4th ed, 1936), 491 n 4; a translation appears in D Shapiro, “The Enigma of the Lawyer's Duty to Serve” 55 *New York University Law Review* 735, 746 (1980).

<sup>79</sup> *Anonymous* (1702) 12 Mod 583; 88 ER 1535.

<sup>80</sup> Muldrew, *The Economy of Obligation*, 242-255.

<sup>81</sup> Muldrew, *The Economy of Obligation*, 258.

## Criminal Cases

The distinction between the criminal and civil law was a blurred one in the early history of English law. It is obscured in another distinction between pleas of the Crown and common pleas, mainly concerned with private adjustment of rights but the Crown being likely to step in to exact fines and amercements of a punitive character.

Of course, today we regard it as a fundamental right that a person has access to counsel as integral to the right to a fair trial.<sup>82</sup> However, as early as 1115 a statute seemed to prohibit counsel being assigned in such cases.<sup>83</sup> The accused was generally denied defence counsel until the end of the 17th century, at least in the case of felony and treason.<sup>84</sup> The main justification for this rule was that the court itself was to ensure that, in matters of law, the accused would not suffer. As Chief Justice Hyde put it by way of attempted comfort to one unfortunate treason defendant, “*we are to be of counsel with you*”.<sup>85</sup> In respect of the facts it was thought that the accused was more expert than any counsel in telling the story. And, so the story goes, the standard of proof being high and the onus being on the Crown, once this was discharged it was vain to deny the accusation. This rule was relaxed somewhat, even in cases of felony and treason, when a complex point of law arose. Despite the obvious difficulties with this reasoning, the rule may not have been quite so draconian in practice, for the juries were old hands at the criminal trial, many jurors sitting often and one jury often hearing many cases on end. Jury nullification is not a new phenomenon.

In 1696 there was a limited statutory recognition of a right to counsel in the cases of treason (but not ordinary felony).<sup>86</sup> This was an important statute in that it gave the indicted a right to a copy of the indictment (but not the names of the witnesses) at least five days before the trial so that they could confer with their counsel. Where they desired counsel the court was “*authorised and required immediately*”, upon his or their request, to assign counsel, not exceeding two, as the persons desire “*to whom such counsel shall have free Access at all reasonable Hours; any Law or Usage to the contrary notwithstanding.*” It was not until the 1730s, however, that we see the “lawyerisation” of the criminal trial - with examination and cross-examination occurring.

So contrary to the assertion of the 1945 UK Radcliff Committee report on legal aid, the right of dock briefs does not seem to be one existing from “*time immemorial*” for the right to counsel in some criminal trials is recent in legal memory.<sup>87</sup> Nevertheless it is true that in

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<sup>82</sup> This does not depend on the strength of the case against the defendant. “*Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice*”: Murphy J in *McInnes v R* (1979) 143 CLR 575 at 583; *Dietrich v R* (1992) 177 CLR 292.

<sup>83</sup> *Leges Henrici Primi*, cc47-48 (no counsel can be sought unless upon being impleaded he immediately denies the charge without request for counsel at that stage).

<sup>84</sup> But, curiously, not in the case of misdemeanours where life was *not* at stake. The misdemeanour category covered a range of civil and regulatory matters: John H. Langbein, “The Criminal Trial Before the Lawyers” 45 *University of Chicago Law Review* 263 at 308 (1978).

<sup>85</sup> In a case tried in 1663, cited by Langbein, “The Criminal Trial Before the Lawyers”, 308. The flaw in this argument was immediately apparent and judges were accused of having a conflict of interest because of their allegiance to “*their better Client, the King*”.

<sup>86</sup> 7 and 8 William III, c3. In the case of a felony the rule lasted until 1836: 6 & 7 William IV, c114.

<sup>87</sup> Cited by L. Shapiro, “The Enigma of the Lawyer’s Duty to Serve”, 742.

criminal trials in this later period there are a number of examples in the law reports of counsel being assigned to represent the accused.<sup>88</sup>

But the practice here also seemed to be out of favour with the legal profession right up to the modern period. Egerton notes that the obligation to act on dock briefs was sometimes evaded and sometimes accepted with bad grace, reporting an incident observed by JH Thorpe KC at Middlesex sessions in 1944:

*The general scuttle of counsel to get out of court when a prisoner expresses a wish from the dock to be represented is neither seemly nor in the public interest.*<sup>89</sup>

Often, but not always, it was the inexperienced who were appointed. This was the case even in the Ecclesiastical courts.<sup>90</sup> Worse still, there were other costs to be paid.<sup>91</sup>

The dock brief system was replaced in England in 1903 by the statutory provisions in the *Poor Prisoner's Defence Act* to something approaching the modern system.

## Costs

The rule that the poor man would not pay costs may not be as generous as it first seems. There were complications - both if the poor lost the case and if the poor won the case.

Stemming from a statute of 1531<sup>92</sup> courts had a discretion to inflict severe punishment upon losing poor plaintiffs. This is seemingly a consequence of the perception that rapidly grew up, that the removal of the costs barrier gave rise to vexatious litigation. They were not to pay costs but this was little comfort, for a more severe remedy was supplied. It was provided: *that all and every such poor Person or Persons being Plaintiff or Plaintiffs in any of the said Actions, Bills, or Plaints, which at the Commencement of their Suits or Actions shall be pursued or taken, to have their Process and Counsel of Charity, without any Money or Fee paying for the same, shall not be compelled to pay any Costs by Virtue and Force of this Statute, but shall suffer other Punishment, as by the Discretion of the Justices or Judge, afore whom such Suits shall depend, shall be thought reasonable; any Thing afore rehearsed to the contrary hereof notwithstanding.*

A number of cases indicated that if the pauper be non-suited they would either pay the costs or they would be whipped.<sup>93</sup> Holt CJ however, upon a motion that a pauper be whipped for non payment of costs upon a non suit doubted that the practice existed saying “*he had no*

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<sup>88</sup> *R v Morgan* (1745) 2 Strange 1214; 93 ER 1138; *R v Wright* (1736) 2 Strange 1042; 93 ER 1020.

<sup>89</sup> R. Egerton, *Legal Aid* (Kegan Paul, French, Trubner, London 1945), 20.

<sup>90</sup> Brundage, “Legal Aid for the Poor”. Prest says that it was by no means the most junior or inexperienced members of the bar who were appointed, even if the lack of a fee made pauper clients “as welcome as Lazarus to Dives” as far as most lawyers were concerned: Wilfred Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Oxford University Press, Oxford, 1986), 22.

<sup>91</sup> *R v Reynalds* (1828) 1 Black W 230; 96 ER 126 (a recognizance to be paid to the prosecutor in some instances).

<sup>92</sup> “*An Act that the Plaintiffs, being non-suited, shall yield Damages to the Defendants in Actions personal, by the Discretion of the Justices*”, 23 Henry VIII, c 15.

<sup>93</sup> Anonymous (1702) 7 Mod 115; 87 ER 1132; *Anonymous* (1698) 3 Salk 108; 91 ER 721; *Munford v Pait* (1676) 1 Sid 261; 82 ER 1093; cp *Blood v Lee* (1769) 3 Wils KB 24; 95 ER 942 (non-suited pauper seeking writ to be discharged from custody).

*officer for that purpose and never knew it done*".<sup>94</sup> This was a transparent re-writing of history, for there was plenty of authority that it did in fact happen. The footnote to *Drennan v Andrew*<sup>95</sup> notes at least one case in which Sir Thomas Egerton LK (Lord Chancellor Ellesmere) ordered a female pauper plaintiff to be flogged. Lord Ellesmere was a strict disciplinarian and on a number of occasions expressed his concern about too much litigation and the poor stirring up unjustified suits.<sup>96</sup> It may be that Lord Ellesmere in fact was the Chancellor to commence the practice. Holdsworth quotes Munro in *Acta Cancellaria* saying of orders for whipping:

*I have not found orders of this kind previously to the time of Lord Keeper Egerton; but while he presided in the Court of Chancery, and long time after, they were very far from infrequent.*<sup>97</sup>

As Maguire concludes in understated terms, it was doubtless that this rule deterred some thin-skinned souls.<sup>98</sup>

Even if the pauper won, there was some doubt as to the rule for recovery of costs. There were many inconsistent decisions. The very uncertainty of the law on this point must also have acted as a disincentive upon counsel to freely give their time to the poor.

At common law, a practice arose that if the plaintiff won, the poor person could pay their counsel. This was on the apparently sensible basis that the rule was designed to benefit the poor, not his opponents.<sup>99</sup> As Blackstone was to express the point:

*It seems however agreed, that a pauper may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to him, but not to his antagonists.*<sup>100</sup>

But this practice was said to fly in the teeth of the 1495 statute which provided for no such thing. In *Dooley v Great Northern Railway Company*<sup>101</sup> it was said the rule was contrary both to the letter and spirit of the law. The change brought about by the 1883 rules was said to put an end to the evil arising from harassing actions brought in the name of paupers but in reality on speculation to obtain costs. Lord Campbell CJ stated that the speculative actions when he first became Chief Justice was an "*evil prevailing to a frightful extent*". The judges expressed the over-optimistic and naive view that if there is a just cause of action held by the pauper there will be no difficulty in finding members of both branches of the profession ready to give their assistance freely.

The point was also made in submissions before the Court before *Wallop v Warburton*, by the Solicitor-General who submitted that the costs order in that case:

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<sup>94</sup> *Anonymous* (1698) 2 Salk 507; 91 ER 433.

<sup>95</sup> (1866) Ch App 300.

<sup>96</sup> LA Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Ellesmere* (Cambridge University Press, Cambridge, 1977), 111 (concern with increase in the number of legal practitioners causing "*great dissensions, disorder, suits and plaints*"), 128 and 274 (legal tract with suggestions to avoid "*the Infinite multiplicity of sutes*"); IV Holdsworth *A History of English Law* (Methuen, London, 3rd ed, 1995), 538; Blackstone, *III Commentaries on the Laws of England* (1765), 400.

<sup>97</sup> V Holdsworth, *A History of English Law*, 233.

<sup>98</sup> Maguire, "Poverty and Civil Litigation", 745.

<sup>99</sup> *Scatchmer v Foulkard* 1 Eq Ca Abr 125; 21 ER 931.

<sup>100</sup> Blackstone, *III Commentaries*, 400.

<sup>101</sup> (1854)4 EL & BL 339; 119 ER 131.

would be holding out great encouragement to paupers and their attorneys to make experiments in desperate suits (which was contrary to the policy of the Court) in as much as if the pauper failed the attorney would lose nothing but his trouble; and if he succeeded, the attorney would be in a better situation than usual, as he would be paid the usual costs without having been under the necessity of making the usual disbursements in the course of the cause.<sup>102</sup>

However, that was a case in Chancery, whose practice was different. Chancery had extended the rule in the common law courts that only plaintiffs could sue in the form of a pauper. Using the familiar equitable theory of the “equity of a statute” the scope of the 1495 legislation was enlarged and “reformed” to apply to situations the parliament never had in mind.<sup>103</sup> In a period when statutes are long and overly-precise, such an extension seems impermissible, but we must remember that early statutes were conceived in a different light. As Sir Carelton Allen puts it:

*They were not so much exact formulas emanating from a supreme Parliamentary authority, as broad rules of government and administration, intended for guidance rather than as meticulous instruction, and meant to be applied on elastic principles of expediency.*<sup>104</sup>

Chancery, on the other hand, did not until 1774 allow for appeals in pauper proceedings. Lord Eldon later thought it “a very singular proposition that a pauper could not appeal. He could not see why, because a party was poor, the Court could not set itself right.”<sup>105</sup>

There was a practice of providing for so-called “dives costs”, a type of costs which was obscure in the extreme. The judges in *Parson v Pickersgill & Sons*<sup>106</sup> made enquiries but could find no one who knew much about the subject. Bowen LJ found the question to be “extremely difficult and obscure”. However, dives costs seemed to have been those costs which would have been due to counsel if they had been employed by an ordinary suitor. As a number of cases held, there was no reason for counsel and solicitors to give the benefit of their services to a losing defendant. The problem of scandalous actions on the part of a pauper plaintiff was partly dealt with by a costs order against him and, it was also noted, counsel were also personally liable to such orders for their own involvement. So the costs order, in a pauper suit was a discretionary matter.<sup>107</sup> It was also noted in one case that the pauper could be committed for filing an improper suit.<sup>108</sup>

Despite the difficulty at common law and the recovery of costs, *Parson v Pickersgill* did lay down the rule that counsel and solicitors acting for pauper plaintiff should not be out of pocket. Although they were not entitled to fees because a fee could not be marked upon the brief they were entitled to their *actual* expenses even though dives costs may have been abolished.<sup>109</sup>

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<sup>102</sup> (1795) 2 Cox 409; 30 ER 189.

<sup>103</sup> On the equity of statutes see CK Allen, *Law in the Making* (Oxford University Press, Oxford, 7th ed, 1964), 451f; Tubbs, *The Common Law Mind*, 116f.

<sup>104</sup> Allen, *Law in the Making*, 454.

<sup>105</sup> (1820) *Bland v Lamb* 2 Jac & W 402; 37 ER 680. The usual order for setting down the case for appeal was made, but it was compromised before final judgment.

<sup>106</sup> (1885) 14 QBD 859.

<sup>107</sup> *Rubery v Morris* (1849) 1 Mac & G 413; 41 ER 1324; *Ratray v George* 2 Ves Jun Supp 437; 34 ER 1168.

<sup>108</sup> *Ex parte Shaw* (1796) 2 Ves Jun 40; 34 ER 760.

<sup>109</sup> See also *Richardson v Richardson* [1895] P 276 - “actual and necessary costs” are recoverable; *Phillipe Gent v Baker* (1824) 1 Car & P 534; 171 ER 1305.

It is now recognised that the entitlement to costs depends upon the terms of the retainer between the pro bono plaintiff and counsel and solicitors. Nothing turns upon the title “pro bono”, so finally pro bono legal practitioners are in the same position as those acting for those better able to bear the ordinary costs.<sup>110</sup> It is surprising that the principle has taken so long to be established.

### **Into the Modern Period**

*Use of lawyers is an acquired habit; most people never surmount the barriers of fear, ignorance, and unfamiliarity.*<sup>111</sup>

The regime established by the 1495 legislation continued essentially unchanged until 1883 when new court rules were introduced to expand the availability of legal aid to the poor. However, there was very little by way of theoretical analysis of the provision of legal aid to the poor. One of the first modern theorists to endorse pro bono activity was Edward O’Brien who was determined to interject religious and moral values into professional ethical guidelines. He regarded the legal profession as a “calling”, a word pregnant with theological overtones, and followed the medieval tradition that the lawyer’s knowledge and skills are a gift of God and a sign of grace. Hence, they need to be exercised on behalf of the poor, for a lawyer’s “doors are ever open to the poor as well as the rich”.<sup>112</sup>

The 1883 procedures however became almost inoperative and the conditions attached to the legal aid in terms of first obtaining counsel’s opinion as to the reasonableness of the proceedings and an affidavit of the applicant or his solicitor were regarded as prohibitive. In 1912 and 1913 there was considerable agitation in England for reform and a new scheme was introduced which provided the foundation for the modern English (and other countries’) practices.<sup>113</sup>

A significant development occurred in the 1890s in England with the rise of “*Poor Man’s Lawyers*”. These were legal centres in the slums of London and provincial cities. The first was Mansfield House in Canning Town in 1890. The initiative for the centres flowed out of the social workers who found themselves being asked for help on legal questions. Although a common law right of seeking access to a magistrate for advice existed, often magistrates themselves were not lawyers and there was an understandable reluctance to enter a court building to obtain that sort of help.

Egerton describes the procedures followed by the Poor Man’s Lawyers:

*Several lawyers would come down together; rotas were formed; at some centres clerical help was obtained and records kept for use at subsequent interviews; a few reference books were provided. At each centre the rules and methods varied, so that it might be said that the only thing that they had in common was the central idea of*

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<sup>110</sup> *Wentworth v Rogers* [1999] NSWCA 403. The difficulty is overcome in NSW, at least, by the provision in the 1993 *Legal Profession Act* reforms which provides in section 184 expressly for costs agreements which are contingent on a successful outcome.

<sup>111</sup> Richard Abel, *American Lawyers*, 129.

<sup>112</sup> Edward O’Brien, *The Lawyer, His Character and Rule of Holy Life: After the Manner of George Herbert’s Country Parson* (1843), quoted in MH Hoeflich, “Legal Ethics in the 19th Century” 47 *Kansas Law Review* 793 (1999). O’Brien expressed this obligation in terms of service to his fellow man.

<sup>113</sup> The English procedure between 1914 and 1944 is described by Egerton, *Legal Aid*, chapter III.

*providing legal advice free to poor people through the charitable efforts of solicitors and barristers.*<sup>114</sup>

In 1913 a conference of Poor Man's Lawyers approved a constitution and regulation for the "Poor Man's Lawyer Association of London", although the Association never formed.

From this initial and unpromising start other legal advice centres were formed and developed. Although it is said that co-operation was never the strong point of these organisations - each centre preferring to maintain its own methods and independence - associations of the centres eventually did form in the major towns.<sup>115</sup>

Although Egerton states that Mansfield House was the model for the first of a similar association in Jersey City in the United States in 1894,<sup>116</sup> this was not the first legal aid organisation established in the United States. At the end of the 19th century legal aid organisations were established to meet the legal needs of narrowly defined social groups, such as newly freed blacks, immigrants, children and women. The first of these organisations, such as the New York German Society (1876) and the Woman's Club of Chicago, who in 1886 established the Protective Agency for Women and Children, developed to address the specific needs of their target populations. The first true legal aid society, with neither ethnic nor gender requirements, was the Chicago Ethical Cultural Society which opened the Bureau of Justice in 1888.<sup>117</sup> In many instances these initiatives were not those of lawyers but of reform-minded business people.

The development of legal aid societies in England, the United States and in Australia deserve a separate history on their own. Later papers in this session will discuss Australian developments. It is sufficient here to note that legal aid centres developed in Australia in the 1970s. The first aboriginal legal service was established in 1970 in Redfern.<sup>118</sup> The first general community legal centre was established in Fitzroy in late 1972 and rapidly followed in other parts of Australia.<sup>119</sup> These centres arose in a climate of political change, with the Whitlam labor government coming to power in December 1972 and the reports of commissions of inquiry by Professor Henderson into poverty in Australia revealing the depth of poverty in Australia and the desperate need for legal assistance. Although these were not the first means for providing legal aid in Australia, they are the important precursors for the current situation.

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<sup>114</sup> Egerton, *Legal Aid*, 27.

<sup>115</sup> Egerton, *Legal Aid*, chapter IV provides a history of these centres. Brian Abel-Smith & Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (Heinemann, London, 1967), chapter VI provides further detail including of criminal legal assistance and of the attempts post-1912 to reorganise legal aid in England.

<sup>116</sup> Egerton, *Legal Aid*, 27.

<sup>117</sup> Tigran W Eldred & Thomas Schoenherr, "The Lawyer's Duty of Public Service: More Than Charity?" 96 *West Virginia Law Review* 367 at 369 (1993); Jack Katz, *Poor People's Lawyers in Transition* (Rutgers University Press, New Brunswick, 1982), chapter 2.

<sup>118</sup> Gregory Lyons, "Aboriginal Legal Services" in Peter Hanks & Bryan Keon-Cohen (eds) *Aborigines and the Law* (George Allen & Unwin, Sydney, 1984) sets out the background to aboriginal legal aid centres.

<sup>119</sup> The history and background of legal centres in Australia is discussed by John Basten, Regina Graycar & David Neal, "Legal Centres in Australia" (1985) 7 *Law and Policy* 113. See also Judd Epstein in Frederick H Zemans (ed), *Perspectives on Legal Aid: An International Survey* (Frances Pinter, London, 1979); David Weisbrot, *Australian Lawyers* (Longman Cheshire, Melbourne, 1989) 245.

The development of community legal centres mark a new era in the provision of legal aid by lawyers and deserve separate treatment for this reason. The departure from the previous models include:

- a collective rather than an individualistic approach to the provision of legal services (mirroring the developments in the organisation of legal practices generally from sole practitioners to partnerships);
- the greater emphasis on social reform rather than on a case by case basis (the modern world calling for changes to institutional structures rather than just the righting of individual wrongs); and
- the partnership with non-lawyers (who often initiate the provision of the services), approaching legal problems in the context of the total needs of the disadvantaged.

These are themes which continue into the twenty-first century. No longer is there one concept of what it means to provide legal services to the poor.

Today, the role of lawyers in pro bono services is keenly debated. Most importantly, the question agitated in the United States is whether or not pro bono services should be mandatory or not for lawyers and law students. With an overlay of constitutional division<sup>120</sup> schemes are continually put up and debated for the requirement of pro bono services but these are yet to come to any fruition. As the history cited here shows, mandating pro bono services is not historically controversial. What is also not controversial is the moral value of pro bono services or the close relationship between professionalism and the provision of those services.

## Conclusions

I started by asking why we should look at the history of pro bono services to the disadvantaged. A number of themes can be drawn out of this short survey of the professional obligation to provide such legal services.

In the formative period of English law generally, and in relation to services for the poor in particular, the Christian concept of charity has been the main impetus for the provision of those services. This is not to say that charity is divorced from the concept of justice. As I have sought to make clear, justice and mercy are not separate concepts. We talk too little of mercy as a foundation of our attitude to those who are disadvantaged and in our judgments. Legal services for the poor are not “charity” in a pejorative sense but are a fundamental aspect of a just legal order.

Many of the services provided to the poor by the legal profession has been mandated by statutory means as part of a broader civic initiative. These statutes became an important

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<sup>120</sup> The great majority of decisions hold that there is no constitutional prohibition to mandating pro bono services: Charles Wolfram, *Modern Legal Ethics* (West, 1986), 952-953 and see the decision in *US v Dillon* 346 F2d 633 (1965) utilising the legal history of pro bono services to discard the argument that mandatory pro bono is unconstitutional. A search of the US law reviews reveals an enormous literature on the question of whether pro bono should be mandated. A representative overview is found in Shapiro, “The Enigma of the Lawyer’s Duty to Serve”; Deborah Rhode, “Cultures of Commitment: Pro Bono for Lawyers and Law Students” 67 *Fordham LR* 2415 (1999); Michael Millemann, “Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question” 49 *Maryland LR* 18 (1990); SH Byers, “Delivering Indigents’ Rights to Counsel While Respecting Lawyers’ Right to their Profession: A System ‘Between a Rock and a Hard Place’” 13 *St John’s Journal of Legal Commentary* 491 (1999).

source of principle in the development of the understanding of what role lawyers play in the provision of legal services. Non-lawyers have been important initiators of schemes to provide legal services to the poor.

Lawyers have not always been willing participants in such schemes, although as their sense of professional unity developed they recognised how integral to their status as a profession and their very identity is the provision of legal services to the poor. A true understanding of professionalism now requires participation in pro bono schemes. It is a mark of failure of the profession if these services must be mandated.

Despite the statutory mandates, the poor have generally been treated disfavouredly by the legal system. They have received a form of formal equality but not substantive equality. It is important that substantive equality be delivered. Increasingly, this requires attacking the total causes of poverty - legal services alone will not deliver justice. New models for the provision of these services need to be, and are being, developed.

The State has always been involved in the provision of legal services to the poor. It is a fundamental obligation of the State that such services are provided. Especially in a period which articulates principles in terms of rights supportive of the political community, rather than kinship or local community obligations, the role of the state is important as a guarantor of the rights which the poor have. There is no right without an obligation. It is not just a matter of the state or the private legal profession, but a matter of joint co-operation in providing those services. This is especially so when a holistic solution is required to achieve the ultimate goal of the creation of a just society.

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## **The First National Pro Bono Law Conference**

Summary of the views expressed during the Round Table  
Discussions, at Lunch, Friday 4 August 2000

prepared by

Professor David Weisbrot, Conference Host

### **Definition of 'Pro Bono'**

*How do you/your firm define "pro bono" work? How is the definition applied in practise?  
- are there any problems with the definition?*

Should we be attempting to define 'pro bono'?

- Concern was expressed about the term itself: *pro bono* isn't – and isn't likely to be – widely understood by the media or in the general community, and a 'Plain English' term would be preferable.
- Some suggested that we shouldn't even try to define the term: it's too hard to do; a restrictive definition might stifle activity and innovation, and reduce acknowledgment.

However, cf:

- Some suggested that we *must* try to define the term: this is necessary for media/promotional purposes; and firms need to be able to define *pro bono* activities for their internal budget and planning purposes.

What does 'pro bono' legal work encompass?

- Some urged a CLIENT-centred approach, emphasising:
  - client disadvantage/power imbalance, poverty law practice;
  - matters in which a client would suffer serious consequences;
  - an expansive definition, without the superimposition of 'an overriding requirement of a public or community benefit' – which might prevent otherwise deserving and needy parties from receiving assistance;
  - matters in which the client is itself an organisation which assists the disadvantaged (eg community welfare groups, the Salvos);
  - the pursuit of public interest test case litigation (and a reminder that overly strict merits tests are not always productive – sometimes losing cases lead to positive change).
- Some urged (in effect) a LAWYER-centred approach, including:
  - any work done for no fee, or a reduced fee;
  - any work done 'on spec' or on contingency (NB – there were very mixed views about this);
  - perhaps even legal aid work, given the low level of fees?
- Some urged the inclusion of non-litigious work within the concept, eg:
  - involvement in ADR processes, mediation, and 'preventative law';
  - involvement in law reform work, lobbying on justice issues, making submissions to parliamentary committees, inquiries, and law reform commissions, etc;
  - involvement in the regulation of the legal profession, or service on professional association committees;

- offering community and/or continuing legal education;
- broad community service work (eg general legal advice/assistance to community groups).
- There was a widespread view that it is very important to distinguish the professional/ethical obligation to do pro bono work from the fundamental community/government responsibility to provide adequate levels of legal aid. Therefore, there was appreciation of the Attorney-General's express assurance that the Government's encouragement of pro bono activities was *not* a precursor to decreased levels of legal aid funding. Serious concern remained about current levels – however, there also was recognition that even dramatically *increased* levels of legal aid funding would not relieve the demand for pro bono work, given the high level of unmet legal need.
- The general view was that pro bono work should remain a voluntary activity, with no formal requirements making it compulsory (eg for maintenance of a practising certificate), even if aspirational goals are expressed. However, there also was some reference to the experience in the US, where compulsory pro bono (in some states) has led to a market in 'tradeable credits'.

## **Pro Bono and the Image of Lawyers (self-image, public image)**

### ***What is the relationship between pro bono work and lawyers' image?***

- *of themselves as a profession?*
- *public image/and the obligations of the profession to the community?*
- *duty to the client, the court and the legal system?*
- There is a need for greatly increased community education and promotion about pro bono practice -- to improve the image of lawyers, but even more importantly to increase the awareness of and access to such services.
- There is a need to overcome negative stereotypes of lawyers in popular culture and in the media – indeed, there appears to be a prevailing 'contempt' for lawyers in the media. This should involve:
  - utilising the leaders of profession -- Attorneys-General, Chief Justices and others to lead the development of a "Pro Bono culture" and to promote this to the community;
  - better liaison with the media, including the promotion of stories about pro bono "heroes" (although this was attempted by the AG's office prior to this conference, and virtually none of these stories – some of them quite inspirational – were picked up);
  - facilitating media training for lawyers;
  - acknowledging/celebrating outstanding pro bono contributions through annual awards, probably at the national level (merging with or running along side some of the existing State/territory awards);

- less cynicism radiating from lawyers themselves about their profession.
- Participation in pro bono practice helps lawyers to feel valued. Such practice:
  - would reduce the levels of professional dissatisfaction evident from repeated surveys of lawyers (in Australia and America), and thereby decrease the numbers of lawyers ‘fleeing’ the profession;
  - would improve the “collective mental health” of the profession;
  - involves more work, but it actually tends to “refresh” lawyers rather than further exhaust them;
  - should not be regarded as being the preserve of *young* lawyers – experienced lawyers are often heard to comment that pro bono work reminds them why they “became a lawyer in the first place” (and there is also the danger that a public perception could develop along the lines of “pro bono schemes are ones in which young and inexperienced lawyers learn their craft at the expense of the disadvantaged”);
  - always must involve legal services of the highest quality – not “second rate justice”.
- However, there were also reports that pro bono work had to be ‘disguised’ – or at least rationalised – in some firms, as ‘marketing’ or ‘client development’ in order to gain acceptance (eg for the purposes of ‘making your billing targets’).

## **Role of Legal Education**

### ***What should be the role of pro bono in legal education and continuing legal education?***

- ***how do we build pro bono ethos in law schools?***
- ***during articles and admission programs?***
- ***in continuing legal education (eg as part of CLE points?)***
- There was virtual unanimity about the critical importance/central role of legal education in fostering “a pro bono culture” – with ‘legal education’ seen to encompass university law schools, PLT courses and articles (but less support for continuing legal education).
- There was more diversity of opinion, however, about whether (a) this is currently being done sufficiently well, and (b) this should be a compulsory or an elective part of a law school degree program.
- Suggested means/attributes for fostering a pro bono culture through legal education included:
  - the need to start early – inculcating this ethos from the first days at law school;
  - reflective courses on role of law and lawyers in society;

- well structured and well supervised programs of experiential learning: clinical legal education programs; placements with community legal centres; internships/externships with a public interest focus;
  - choosing graduate speakers who represent/emphasise this ethos; and
  - ensuring that careers fairs for students include representation from the pro bono/public interest/legal aid/CLC sectors.
- Law school programs which contribute towards the development of a pro bono ethos should be supported by the legal profession and by Government – for example, by:
    - funding of a “pro bono scholarship scheme” (as has been done in the US following an initiative by the Soros Foundation, with matching funds from the American Bar Association and others);
    - seconding lawyers from time to time to assist in the supervision of such programs;
    - ensuring that the rules governing legal practice are sufficiently flexible to permit (or expressly permit) law students to engage in pro bono practice in accredited clinical programs or as volunteers, under strict supervision.

## Structural Problems

*How could we better integrate pro bono work into the legal system and legal practice?*

- *structural problems (eg court rules/disbursement fund/other*
  - *economic (conflict of interest problems/economic pressures of practice)*
  - *internal (organization culture/problems of supervision/promotion/work value)*
- 
- We (professional associations and others) need to clarify the ethical framework for pro bono – this involves a recognition that pro bono practice involves different circumstances, but not lower standards of ethics or quality of service.
  - There was frequent comment that the challenges of ‘Hilmerisation’ have not yet been fully thought-through or addressed – ie, if law is ‘just another service industry’, legal services are subject to competition policy, and lawyers are instructed to act more ‘business-like’, then what remains of ‘professional’ values, such as the ‘service ideal’, which underpin the pro bono ethos?
  - There was some suggestion that there is a pressing need to equalise the burden of pro bono practice – that at present ‘too much work is being done by too few’.
  - There is a dearth of services in rural and regional Australia – including pro bono legal services.
  - It is difficult for smaller firms to engage in pro bono practice. Such firms:
    - lack the size, flexibility, and economies of scale to “leverage” the legal and other resources (eg administrative support) necessary for active pro bono practice;
    - are most at risk of being ‘swamped’ by a single pro bono matter which blows out unexpectedly;
    - have more difficulty in establishing and maintaining the systems necessary to monitor/track the hours/value of pro bono work performed.
  - A possible solution to both of these problems (rural and regional, small firms) might be ‘twinning programs’ with larger, metropolitan firms, which would permit the sharing of personnel, expertise, systems, etc, especially in aid of disadvantaged communities.
  - Large firms may have the resources for extensive pro bono practice, but they also face challenges. These include:
    - developing a healthy ‘pro bono culture’ in the firm – the attitude of senior partners in this respect is critical in setting the right tone;
    - ensuring that pro bono activities are integrated/built into the structure of the firm, and are not regarded as a ‘side activity’ or an ‘add-on’ to the ‘real work’ of the firm;
    - ensuring that there is equal treatment of pro bono files, in terms of quality, resources, the seniority of lawyers involved, and inclusion in group/departmental/divisional budgets.

- Responsibility for *non*-legal costs is a major disincentive to pro bono practice. These include court fees (which are not always waived, even where the lawyer is acting on a pro bono basis), disbursements, indemnities, and party-party costs. There was evidence of inconsistent policy/practice with respect to law firms' handling of disbursements – some absorb the expense themselves as part of pro bono practice; others feel that pro bono practice extends only to legal fees, and they pass (or at least attempt to pass) other costs on to the clients.

## **Matching needs with services**

### ***How do you match (pro bono) needs with appropriate (pro bono) legal services?***

#### ***- how is it done in your firm? (eg pro bono partners/pro bono committee/professional organization referral service/shopfront/direct requests)***

- There was a clear consensus that there needs to be much better coordination of pro bono activities, both in terms of referrals and the provision of services.
- Among other things, there was disturbing evidence that despite the high level of unmet legal need, and all of the controversy over the level of legal aid funding, there were nevertheless some large firms which are unable to *spend* their annual pro bono budgets (because of insufficient referrals).
- Suggested remedies for this mismatch included:
  - the development of a 'one-stop', central website, database, clearinghouse or hotline (or perhaps State-based or regional ones) to match clients with lawyers more efficiently and effectively – while being very careful not to subsume individual organisations into some form of centralised bureaucracy, or to divert scarce resources from service provision to administration;
  - learning from – and building upon – the bodies that presently do a good job in this area; special was made, eg, of PIAC, PILCH, the WA Law Access Referral Database
  - more visible sites for pro bono services – eg shopfronts in appropriate communities;
  - better outreach services, making a more concerted effort to publicise the availability of pro bono services, and then do the matching;
  - learning from the outstanding success of some low cost, non-legal support programs – eg Court Network in Victoria, which provides support for litigants and their families (but *not* legal advice or assistance). This is essentially an all-volunteer operation, which runs on only c\$65,000 pa of public funding.
- There was also a strong view that the provision of pro bono services should not be driven entirely on the basis of what lawyers were prepared to offer. Rather, there

is an urgent need to ‘map client needs’ – and if corresponding legal resources are not available, then there should be a concerted effort to recruit and/or lawyers with the necessary skills and expertise, and provide the necessary back-up support. (Concern was expressed that it sometimes happens that well-meaning lawyers do clients a disservice by providing pro bono services in areas in which they have no specialist expertise, such as family law or migration.)

## **Overcoming problems, promoting pro bono**

*How might some of these problems be overcome?*

*- are there any examples of ways in which these have been resolved/minimised; ie “what works?”*

*- are there any other measures which can be implemented to facilitate and promote pro bono legal work?*

*Are there any other measures which can be implemented to facilitate and promote pro bono legal work?*

- There was a general view that there needed to be much more cross-sectoral cooperation in order to expand and improve pro bono legal services. Among other things, there is a need to facilitate effective ‘partnerships’ between:
  - city firms and country firms;
  - large firms and small firms;
  - private firms and community legal centres;
  - the practising profession and university law schools (supporting clinical legal education and internship/placement programs);
  - law firms (cross-firm), in order to share expertise, resources and processes in support of pro bono activities.
- There is an urgent need for policy development by the professional associations (and others) to promote greater consistency on issues such as treatment of disbursements, and identifying and handling conflicts of interest.
- There should be more pressure placed on expert witnesses to waive (or at least reduce) their fees, too, in pro bono matters – perhaps a matter that could taken up by the Law Council of Australia with the peak body, the Australian Council of Professions.
- There is strong need to facilitate access and entry into the legal profession of more persons from disadvantaged backgrounds, who can then provide (or liaise in the provision of) legal services for their communities.
- We should not lose sight of the overarching goal of reducing the costs of justice generally – which will also make pro bono services go further.
- There needs to be more opportunity for networking and information sharing – including this sort of conference! However, this should include (to a greater

extent than was the case at the conference) significant opportunities for community organizations and services to describe to the profession their 'coal face experiences', needs and requirements – and in particular, to advise the profession what assistance they required in dealing with the problems faced by the clients of community organisations.

- There should be greater tax incentives for pro bono service providers.
- There needs to be much more active monitoring/follow up/evaluation of referred files. (PIAC was said to be good model in this regard.)
- There has been relatively little academic research in Australia on pro bono practice (cf the UK and, especially, the US and Canada). Research would be of interest, and of practical benefit, on such issues as:
  - how do pro bono schemes develop within law firms (from the top down? from bottom up?)
  - how are such schemes managed? by a partner? by committee?
  - do compulsory pro bono schemes (as in the US) result in the greater provision of services to the community?
  - what is the dynamic relationship between pro bono practice and legal aid funding?
  - what effects have the application of competition policy to legal services had on the provision of pro bono services? (And, related to this, what does it mean to be a 'professional' or to maintain a 'service ideal' in a competitive market?)
  - what is international best practice in terms of ensuring high quality and high standards of ethical behaviour in pro bono practice?

## **Briefing paper for Session 2B – Pro Bono at the Bar**

Title: *Advocating for those without means*

Presenter: **Peter Martino**

### **Introduction**

In this paper I have drawn largely from my personal experiences. I have noted from the abstracts of the papers of the other speakers in this session that they too are speaking at least in part of their personal experiences.

Why do barristers do work for which they have no significant prospect of being paid? No doubt there are a number of reasons ranging from philanthropic to self interest. There is no doubt that pro bono work can be personally rewarding.

My experiences however have not always been the type of experience I would have looked for. They have revealed that while there is a community concern about the availability of legal representation the community response to increased availability of legal services is not the universally welcoming response you might expect. They have also demonstrated that advocating for those without means sometimes requires advocacy outside of the courts and tribunals.

### **Personal Injuries**

In the last 25 years or so there seems to have been a very large increase in the number of barristers and solicitors who are willing to act for plaintiffs who have suffered personal injuries where the lawyer will in fact only recover payment if the plaintiff can establish that the injury was suffered as a result of the defendant's negligence.

A lawyer might think that acting for plaintiffs in those circumstances has nothing to do with pro bono work, that lawyers who do cases on spec make a commercial decision about what cases they will act on and that decision is based on which claims will give them a reasonable prospect of being paid. However it is not unusual for pro bono schemes to provide that if an

order for costs is made in favour of the practitioner's client then the practitioner can recover legal costs.

An example is Order 80 of the *Federal Court Rules* which establishes the scheme for court appointed referral for legal assistance in the Federal Court. I will speak further about the operation of that scheme later in this paper. At this stage I want to mention only two things about it. The first is the purpose of the scheme. The second is the recovery of fees. Order 80 Rule 1(2) provides:

"1 (2) The purpose of this order is to facilitate, where it is in the interest of the administration of justice, the provision of legal assistance to litigants who are otherwise unable to obtain assistance."

Order 80 Rule 9(2) provides:

"9 (2) However, if an order for costs is made in favour of a litigant who is assisted under the scheme, the legal practitioner who has provided the legal assistance is entitled to recover the amount of fees and disbursements that another party is required to pay under the order."

More importantly whatever the reasons lawyers have for acting for injured plaintiffs in those circumstances the consequence has been the almost universal availability of legal assistance to injured persons. An injured person is able to get advice on a claim from a practitioner who practices in the field at little or no cost. If that advice is that the person has reasonable prospects of success in an action that person is able to have a lawyer act for them in pursuit of their claim.

Over the last decade throughout Australia there have been restrictions imposed on the ability of injured persons to recover damages for personal injuries. Those restrictions have not been accompanied with universal adequate compensation schemes. The restrictions have been introduced primarily to reduce the cost of employers' liability and motor vehicle drivers' liability insurance.

It may be that insurance premiums have risen as a result of the combination of almost universally available legal assistance in such cases and the development by the High Court of the law of negligence in cases such as *McLean -v- Tedman*<sup>121</sup> where the High Court held an

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<sup>121</sup> (1984) 155 CLR 306

employer negligent in requiring an employee to cross roads and *Nagle -v- Rottnest Island Authority*<sup>122</sup> where the respondent authority was held to be in breach of its duty of care to an employee in failing to warn him that if he dived into a rocky pool he might hit his head on a rock and suffer injury. State governments have certainly endeavoured to reduce premiums by introducing the restrictions to which I have referred.

One response to these developments, at least in Western Australia has been to attempt to deflect criticism of the government by blaming it on the lawyers. This occurred in West Australia in 1993 when restrictions on the ability of injured workers to recover damages were first introduced.

The President of the Law Society at that time was Ted Sharp. Ted is a naturally reserved person who was not a Law Society President who courted publicity. He has described his experience of dealing with this issue as one of the most time consuming and difficult problems the Society has had<sup>123</sup>. He felt compelled to call the society's first press conference at which he pointed out the effects of the legislation, including its retrospective operation.

As a result of his efforts and those of others the legislation was amended so that the retrospective operation was ameliorated, although not entirely removed. The political response the Minister was to brand the Society childish.

### **Contingent Litigation Funds**

One response to the need for widening the availability of legal services has been the establishment of contingent litigation funds. The aim of those funds is to be self funding from part of the proceeds of litigation that has been funded. Such a scheme, called the Litigation Assistance Fund, was established in Western Australia in 1990. The *Legal Practitioners Act* was amended to permit the Law Society to enter into agreements with clients of practitioner for payment to the Society of a contribution dependant upon the result of proceedings that were funded.<sup>124</sup> The fund was established with \$1 million, of which \$500,000 came from the Public Purposes Trust, a trust funded by part of the interest on

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<sup>122</sup> (1993) 177 CLR 423

<sup>123</sup> Brief, Volume 20, No 9, August 1993, p 2

<sup>124</sup>Section 63(2) *Legal Practitioners Act 1893*

solicitors' trust accounts and the balance was a grant from the Lotteries Commission of Western Australia.

The solicitors and barristers who accepted instructions on matters funded by the fund agreed to act at reduced rates. The payment of their fees was not dependant upon the success of the funded action and there was no provision for increasing their fees to standard rates if funded actions were successful.

The hope of the society was that the proceeds of successfully funded litigation would mean that the fund would become stable and self funding. That has not proved to be the case due to the difficulty of accurately predicting the cost, length and prospect of success of litigation. The Society proposes to amend the fund to be something much more modest. The fund will lend the amount of disbursements to solicitors and charges interest on those loans.

### **Court appointed pro bono schemes**

A major development in the provision of advocacy in the courts for those who cannot afford to pay has been that of court appointed referrals for legal assistance. Order 80 of the *Federal Court Rules* to which I have referred earlier was placed in the *Federal Court Rules* in 1998. Prior to the introduction of that rule an informal court referral system existed in that court. The schemes seem to be enthusiastically supported by barristers. As participants in the adversarial system of the administration of justice in the courts we can readily appreciate both the imbalance of the parties and the waste of limited court resources that can result from an unrepresented litigant.

I understand that at least in Western Australia the schemes were not initially as enthusiastically supported by solicitors but that with time more and more solicitors have volunteered to support the schemes.

The schemes were no doubt developed by the courts as a result of appearances before them of unrepresented litigants. They have no doubt been successful in ensuring representation for people who would otherwise have been unrepresented. However there are problems with the schemes. The courts are neither best placed nor appropriately placed to determine the merits of a matter before it has been heard.

Order 80 Rule 4(1) and (2) of the *Federal Court Rules* provides:

- "4 (1) The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.

- (2) For subrule (1), the Court or Judge may take into account;
- (a) the means of the litigant;
  - (a) the capacity of the litigant to obtain legal assistance outside the scheme;
  - (a) the nature and complexity of the proceeding; and
  - (a) any other matter that the Court, or Judge, considers appropriate."

Although the rule does not refer to the merits of case the merits are inevitably relevant to the decision. The difficulty is that the court must determine before a matter is heard whether it warrants referral to a legal practitioner. This necessarily involves some assessment of the merits of the unrepresented litigant's case before that case has been presented to the court. In some cases the Full Court of the Federal Court considers that a matter warrants referral for legal assistance when the single Judge whose decision is being appealed from made no such referral. Referrals under the scheme are sometimes made at very short notice. It is my view that it is undesirable for the Court to be required to form an assessment of the merits of a case before it has heard that case fully argued. It is also my view that the court is not in the best position to form a view as to those merits until it has heard the argument. It is time for the professional bodies such as the Bar Associations and the Law Societies to consider taking over that role from the Judges of the courts.

## **Conclusion**

There are a number of reasons why barristers do pro bono work. They do not do so expecting to be universally acclaimed. Those who expect such acclamation will inevitably be disappointed very quickly. We do so because it is the right thing to do to contribute to a community from our position of privilege in that community. At times the need to ensure that those without means are represented before courts and tribunals will require us to engage not only in advocacy before the courts and tribunals but to contribute to public debate. Professional associations also need to consider whether improvements can be made to the systems that exist for delivery of pro bono services.

## PLENARY THREE

### *Pro Bono Outreach: Matching Needs with Services*

The National Children's and Youth Law Centre is Australia's only national community legal centre specifically established to address legally related human rights issues for children and young people. The touchstone for the NCYLC is the United Nations Convention on the Rights of the Child, the 10<sup>th</sup> anniversary of Australia's ratification of which is taking place in December this year. Whilst casework forms just one aspect of the work of the centre, it has three main components for the centre:

- Operating a telephone advice service for children and young people nationally;
- Operating Australia's first interactive legal email advice service for children and young people – LawMail and Lawstuff;
- A limited public interest casework service which attempts to address particular human rights issues facing children and young people, through casework litigation which will have an impact and an affect for a large number of young people, beyond those who are the litigants. The issues addressed centre around issues of access to education, age based discrimination and duty of care issues.

In undertaking this work, as well as its extensive policy and law reform work, the NCYLC which, as a national centre is funded for only two positions from the Commonwealth, would not have survived without the generous pro bono support from the private legal profession.

We have been fortunate to have had assistance from many law firms in very creative and innovative ways, including:

- Public Interest casework – the traditional notion of pro bono, and in particular, in relation to a high profile media defamation case involving many students from a Western Sydney High School;
- IT support for the Lawstuff information website, together with research for updating the text on the website, and assistance in responding to legal email inquiries from the LawMail facility of the website;
- Sponsorship for various publications, including the last edition of *Rights Now*, the NCYLC quarterly journal;

- Sponsorship for special events, such as the NCYLC Children's Lawyer of the Year Awards.

Currently, we are also negotiating arrangements for the secondment of administration support for the centre – an areas of phenomenal need, so we can continue to provide our services.

Through our experience and partnerships with private law firms, we have identified three main areas relevant to the issue of matching needs with services:

1. Pro Bono support can be innovative, creative, unusual and going beyond the traditional notions of volunteering at legal advice sessions or legal representation for individual cases or public interest cases. It's quite amazing what you can come up with when you think outside the box.
2. However, unfortunately many private legal practitioners often stereotype legal needs for children and young people into crisis areas of juvenile justice, care and protection or family law. For young people to have true access to justice, the profession must recognise that their legal needs are much wider than these particular crisis areas.
3. As a result of this stereotyping, there are significant gaps in what legal services are available for children and young people across the nation – gaps which require a network of well resourced specialist children's and youth legal services in every State and Territory.

Human Rights law in relation to children and young people is particularly concentrated in various areas including:

- the right to access education;
- issues of procedural fairness in the education system;
- aged based discrimination;
- employment conditions for young people
- duty of care issues in relation to community services, education, juvenile detention, etc.

To truly secure the rights of the young people facing these issues, immediate responses are often required. In terms of accessing pro bono support on these matters, it is often impossible to access the immediate assistance that is needed to address the wrong that has been perpetrated on the young person. In addition, there are not large numbers of firms that have

the required level of expertise in these areas to be able to provide the immediate assistance required to address the situation.

However, there is a more significant gap that is not addressed by mere legal skill and expertise,, and a willingness to provide pro bono services. That is, the difficulty in identifying legal practitioners who have a particular specialty and skill in their style and manner, in working with clients who are children or young people.

The profession needs to recognise that children and young people have particular needs, particular vulnerabilities and particular disadvantages. Lawyers who represent clients who are children and young people need to be able to do so in a style appropriate to them. It needs to be recognised that the mere act of legal advocacy and representation for children is, in itself, an area of specialty and expertise.

Currently, the New South Wales Law Society is developing guidelines for practitioners in terms of appropriate legal representation practices for clients who are children ad young people. In addition, the NCYLC, with funding from the Victorian Law Foundation, is producing a handbook to legal practitioners on the issue of legal representation of children and young people.

The NCYLC strongly takes the view that in providing legal representation for children and young people, legal practitioners should display a commitment to providing direct representation to the client who is a child or young person, and not act from a “best interests” perspective, or take instructions from a “next friend or guardian ad litem. We submit that such a practice of direct representation most appropriately complies with Articles 12 and 13 of the United Nations Convention on the Rights of the Child, which provide:

*A child capable of forming his or her views, has the right to express those views, and have them taken into account in all matters affecting the child. The child has the right to be heard in administrative or judicial proceedings affecting him or her.*

*The child has the right to freedom of thought, conscience and religion.*

The challenge is to be able to identify and access firms and practitioners who have that understanding and expertise to provide direct representation services to children and young people – in rural, regional areas and remote areas, this is a scarce commodity. For many practitioners, legal representation of children is often confused with acting on the instructions

of parents, acting for the best interests of the child, or acting for a “next best friend” or “guardian ad litem”. From a human rights law perspective, legal representation on these bases is not sufficient. The need for children and young people is for legal representation on the basis of direct representation, which is understanding and sensitive to the particular needs and vulnerabilities of children and young people, and which has the degree of expertise in the specific areas of law involved. Yes there is a significant gap, which can’t be filled by the private profession. There is a gap in terms of the inequitable distribution of the availability of such legal representation services across Australia, particularly in rural and regional areas, whether provided by the private profession, Legal Aid Commissions or community legal centres.

To work towards addressing these gaps, the development of partnerships between specialist children’s and youth legal services and the private profession will provide a strong basis for appropriate legal service delivery to children and young people.

However, the first step in that process is to ensure that well resourced State based youth legal services are established in every State and Territory, and that the current inequity of specialist youth legal services is addressed by bringing all existing youth specialist legal services and positions upto a core minimum of three positions.

From there we can move to developing best practice partnership models of legal service delivery to children and young people, where specialist youth legal services are working closely with the private legal profession.

Children and young people do have special legal needs and special legal issues. However legal services are provided to them, the issue of specialty and expertise in working with children and young people, and their right to direct advocacy and representation, cannot be ignored.

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- <sup>i</sup> Lawyers admitted in both Australia and in the USA may be subject to particular local bar requirements. See also American Bar Association Model Rules of Professional Conduct, rule 6.1.
- <sup>ii</sup> This appears to have been more in the nature of "flagging" the issue for discussion rather than a statement of decided policy. See LIV News March 2000, *Victorian Pro Bono First*.
- <sup>iii</sup> See *Victorian Pro bono first*, *ibid.* p 1.
- <sup>iv</sup> See for example rule 10 of the Professional Conduct and Practice Rules 1999, Victorian Lawyers RPA Ltd. (Victorian Professional Conduct Rules).
- <sup>v</sup> There are some exceptions. See e.g. rule 10 (e) of the Victorian Professional Conduct Rules (*ibid.*).
- <sup>vi</sup> See e.g. Rules of Professional Conduct of the Victorian Bar Inc, clauses 86-90.
- <sup>vii</sup> See N Gration, *Recommending Pro Bono Work* (2000) 74-5 *LIJ* at p30.
- <sup>viii</sup> See eg ABIO Terms of Reference at [www.abio.org.au](http://www.abio.org.au).
- <sup>ix</sup> Report No. 89, *Managing Justice: A review of the civil justice system* (ALRC Sydney) 1999
- <sup>x</sup> Enacted in 1990 and amended in 1996
- <sup>xi</sup> See Department of Justice, Canada 'Policy on dispute resolution' 9 December 1997 at <<http://canada.justice.gc.ca/en/ps/drs/dr/dm/892.html>> (20 January 2000).
- <sup>xii</sup> National Alternative Dispute Resolution Advisory Council (NADRAC) discussion paper, "*Issues of Fairness and Justice in Alternative Dispute Resolution*": available at <http://law.gov.au/aghome/advisory/nadrac.htm>, provides a comprehensive discussion of general issues of fairness and justice in ADR and has particular relevance for those providing ADR related services to disadvantaged or minority groups.

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