

## THIRD NATIONAL ACCESS TO JUSTICE PRO BONO CONFERENCE

Brisbane 27 August 2010

**Plenary Session 1:** The widening justice gap in the United States and the Obama Administration response  
**Presenter:** Ambassador Jeffrey L Bleich  
**Chair:** The Hon Justice Margaret A McMurdo AC

Ambassador Bleich raised the following points:

1. There is a need to start delivering *pro bono* legal services differently.
2. The economic case for *pro bono* legal services should be advanced with law firms. Some of the benefits of provision of legal services on a *pro bono* basis include:
  - a. Exposure of young lawyers to training that they otherwise would not receive in their firms initially;
  - b. Raising the profile of the firm
  - c. Inexpensive form of advertising
  - d. Retention of lawyers for longer at their firms
  - e. Tends to impress judges by showing a commitment to public service; and
  - f. Leads directly to referrals.
3. As an example of these benefits, Ambassador spoke of his involvement on a *pro bono* basis in a case challenging San Francisco's "Matrix" program, which prohibited sleeping in public by homeless individuals.
4. Provision of *pro bono* legal services is a duty, rather than charity. Lawyers have the ability to hear the most important and sensitive secrets of their clients in confidence and to change their clients' lives. They also have the role to play in changing the law in their communities. These are the privileges of holding a practising certificate and therefore lawyers are charged with a duty to uphold the rights and secure the public's trust.
5. The legal assistance system in the US is not working as it only addresses a fraction of the need. There is substantial unmet need because:
  - a. Majority of the clients cannot afford the system.
  - b. The money value of many issues that are important to individuals is worth less than the cost of legal services.
  - c. Legal services are becoming more expensive.
  - d. Language barriers and other impediments exist that keep people from accessing justice.
  - e. The US justice system is only available to the wealthiest or a small portion of the poor who can gain access to legal aid.
  - f. These individuals are at a risk of losing their homes, families and livelihoods.
  - g. Although some clients have made poor choices, the bad results in their cases are often not due to the merits of their case but because they have no meaningful access to justice.
6. Access to justice in the US is not only an issue for the poor but also for the middle classes. The statistics clearly indicate that the problems extend to all but the wealthiest and are often

experienced by those involved in civil law matters such as family law matters, housing or credit disputes. In fact, 8 out of 10 individuals in California involved in a housing dispute are not represented by a lawyer.

7. Consequently, this is not justice. Despite the countless hours devoted by lawyers to *pro bono* legal services, the US has not been able to close the gap on access to justice. The US is at the crossroads.
8. In order to address the justice gap, it must first be acknowledged. In the US more than half the public cannot get access to lawyers and are forced to be unrepresented.
9. The cost of legal services is a serious concern. A salary survey recently conducted in California revealed that half the lawyers could not afford themselves. Yet, it is considered intolerable if a large number of Americans had to receive medical services from an unqualified doctor.

#### *Funding issues and some solutions*

10. The legal assistance providers are limited to federal government funding and are prevented from accepting private funding. One solution to the situation in the US is to increase the amount of private funding now that limitations have been lifted.
11. There are further limitations in rural areas and it appears that in these cases clients need something other than a fully trained lawyer, such as a paralegal.
12. The funding is well designed for criminal cases.
13. It is necessary to start changing the traditional ideas of right to counsel, particularly in civil cases where such right is not available as a matter of course, such as child custody cases. (This contrasts with the right to counsel in criminal matters where liberty is at stake.) There exists a need for a stronger mandate for legal services across the board. Furthermore, ensuring the right to counsel in civil matters is and remains an important issue.
14. It is important to consider alternative models of service delivery and allowing lawyers from other states to do legal work in other jurisdictions.

#### **Questions**

1. *Are there any mediation processes available for civil matters in the US?*

Most mediation services are privately funded. However, some mediations are funded by courts and are available for particularised area of federal law such as workplace law. Mediation services are often coordinated by the state bar association.

2. *What is the treatment of and access to justice by Native Americans in US at present?*

Ambassador Bleich reported that the US has examined what has worked in Australia and tried to see if any of these solutions would work in the US in relation to the indigenous populations. The government has considered programs to create real opportunity and education however there appears to be a lack of political will in this area.

3. *Does the public interest test case fund (such as currently in existence at the Commonwealth level in Australia) exist in the US to deal with public interest matters, such as environmental cases? In Australia, such funding is not available at a state level.*

In the US, funding for such cases is also not available at a state level. Instead, cost shifting occurs and each side bears its own cost and the winning party receives its fees back.

4. *How much opposition was experienced to remove legal services funding from the private sources?*

Ambassador Bleich reported that there was significant opposition from the politicians. Class actions have had a broad effect on this issue and there exists a concern that the courts have too much power.

5. *Can some of the legal work be performed by specialists or paralegals?*

Use of para-professionals is commonly done in other professions, such as nurse practitioners. However, there are certain matters which can only be done by holders of practising certificates.

6. *Will President Obama's response be inhibited?*

Ambassador Bleich noted that this is contentious politics. With the 24-hour media cycle, most extreme voices get the most attention. Most Americans have been reasonable in relation to what has been done. Money was spent in relation to important matters, such as health reform. Nevertheless, while it is messy and contentious, it is getting done.

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