2nd National Pro Bono Conference
Final session, Conference wrap up
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INTRODUCTION

Welcome to the concluding session of this Second National Pro Bono Conference, and thank you very much for your energetic and constructive participation in the Conference to this point—it is pleasing that virtually everyone has remained to the end.

I was the Conference facilitator for the First National Pro Bono Conference in Canberra in August 2000, and among other things provided the wrap-up in the final session—so I suppose it is sensible that I was asked to do this again. I won't attempt to summarise each of the preceding talks or workshops; rather I thought it would be more interesting, and of more lasting value, to comment on what I believe has changed in the three years since the last event.

FIRST NATIONAL PRO BONO CONFERENCE

The First National Pro Bono Conference was attended by about 500 practising lawyers—private practitioners (across the range: large firms, small firms, the Bar, legal aid, community legal centres) academics, judges and tribunal members, government officials, members of the general public, and representatives from professional associations and the business and philanthropic sectors.

The driving force was the then federal Attorney-General of Australia, the Hon Daryl Williams QC, a former President of both the Law Society of Western Australia and the Law Council of Australia, and the organisation was assisted by the Commonwealth Attorney-General's Department, with Prof Kathy Laster (now head of the Victorian Law Foundation) serving as principal consultant.

The format of that Conference involved the usual 'talking heads', but importantly there were also Workshops and a Lunch Roundtable, consciously designed to provide all delegates with an opportunity to participate actively and directly in fleshing out the matters of concerns and the areas requiring attention and action. (There was a discussion leader/recorder at each table, and the 40 or so individual reports were synthesised to produce a composite that summarised the main points, trends and concerns—which was subsequently published as an appendix to the report of the Task Force.)

For me, five of the most striking things about the First Conference were: (1) the sheer size (over 500 registrants) and level of interest; (2) the fact that people kept asking, 'Can this really be the *first* national pro bono conference?'; (3) the surmounting of the initial suspicion/cynicism about whether the Government was seeking to use pro bono as a backdoor attempt to get lawyers to make up for shortfalls in legal aid (the subject of a number of petitions that circulated among participants early on in the Conference); (4)

the commonly expressed sentiment after the Conference that ‘‘Gee, that was much more interesting and productive than I expected!’; and (5) a lingering challenge: to remedy the mismatch between capacity and delivery of pro bono legal services (more on this later).

National Pro Bono Task Force Established

In order to tap the optimism and undissipated energy of the First Conference, the Attorney-General announced at the end that he would establish a broad-based, 17 person National Task Force, with myself as Chair, the Task force was charged with exploring further the main ideas and issues and was to report no later than June 2001.

The challenge for the Task Force was to focus on pragmatic methods for enhancing access to the justice system for disadvantaged members of the community or those with modest means, through the delivery of more and better-targeted pro bono legal services. As with most other scarce resources, legal services are not evenly spread through the community: access to legal services is clearly more fraught in the outer metropolitan areas, in many parts of rural and regional Australia, in Indigenous communities, and among recent migrant communities.

Among other things, the Task Force needed to identify the organisations, institutions and individuals best placed to advance these priority activities, and the areas in which the federal government can assist with leadership, targeted funding, or the removal of structural impediments.

The Task Force Report (June 2001)

The Task Force report documented the enormous contribution already made by Australian lawyers in donating time, expertise and resources. According to ABS figures, in 1998-1999, solicitors spent approximately 1.8 million hours and barristers a further 500,000 hours doing pro bono work—services worth at least some hundreds of millions of dollars at the standard rates. However, even in combination with legal aid there is nevertheless a high degree of unmet legal need in the community.

The common view is that pro bono work is mainly the preserve of the large, well-resourced, commercial law firms located in the capital cities, which have the size, flexibility, and economies of scale to ‘leverage’ the legal and other resources necessary for sustain an active pro bono practice. However, the survey of small-to-medium sized firms in rural and regional New South Wales conducted on behalf of the Task Force found that most of the solicitors contacted were undertaking very high levels of pro bono work. Many of the pro bono clients were former *paying* clients who were not able to afford the full level of fees. For the country solicitors concerned—and no doubt the same situation would obtain in the outer metropolitan suburbs—pro bono work is not so much a professional lifestyle choice as an essential aspect of living and working in their communities.

The Task Force Report also contained Preamble, which spelled out the basic principles of pro bono practice in Australia. It is worth summarising here:

(1) **Pro bono practice is *not* a substitute for legal aid.** It is essential to distinguish lawyers’ professional/ethical obligation to do pro bono work from the fundamental government/community responsibility to provide adequate levels of legal aid, especially in such core areas as criminal law and family

law. However, there is also a recognition that even dramatically *increased* levels of legal aid funding would not completely relieve the demand for pro bono work, given the high level of unmet legal need in the community.

Further, pro bono schemes have a number of benefits that are not always possible through legal aid schemes, such as:

- choice/diversity;
- flexibility;
- motivation;
- ability to tap the specialist expertise of leading practitioners; and the

ability to tap the resources/infrastructure of major law firms, the Bar and the legal academy.

(2) **The design and provision of pro bono services should be driven by client needs.** The provision of pro bono services should not be driven by what lawyers are 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 equip lawyers with the necessary skills and expertise, and provide the necessary back-up support.

(3) **Pro bono clients should expect, and receive, the same high quality of service as all other clients.** Pro bono legal work always must involve legal services of the highest quality—not 'second rate justice', nor the sole preserve of young lawyers. Professional associations need to clarify the ethical framework for pro bono legal work—this entails recognition of the fact that pro bono practice may involve different circumstances, but must never mean lower standards of ethics or quality of service. Common problems that may inhibit or compromise the delivery of pro bono services, such as conflicts of interest, also need specific treatment.

(4) **Pro bono practice is a voluntary activity**, deriving from the legal profession's service ideal, and is a shared responsibility involving individual practitioners, law firms, peak professional bodies, courts, law foundations and others. There is strong opposition in Australia to any element of compulsion in the performance of pro bono legal work—including, it should be said, from those lawyers with the strongest record of actually providing such services.

There is somewhat less opposition, but certainly no clear groundswell of support, for any statement of 'aspirational targets', such as the ABA's Model Rule urging lawyers to perform at least 50 hours of pro bono work per year. The Task Force chose not to press for such targets, noting that this approach may be inconsistent with the essential voluntariness of pro bono work, the

accepted and acknowledged importance of this work, and the willingness with which it has been provided in the past by the Australian legal community.

(5) In the interests of a fair and efficient justice system, **there is an important role for government in encouraging and supporting—but not controlling—pro bono initiatives.** For example, governments might:

(a) assist in overcoming some of the structural barriers to pro bono work (eg, filing fees and other court-related costs and disbursements);

(b) provide resources to facilitate coordination and enhancement of pro bono services; and

(c) encourage pro bono practice by taking into account evidence of a record of such 'good professional citizenship' as a factor in awarding tenders for government legal work.

The Task Force also identified a list of specific (but inevitably related) needs, aims and projects, including among other things:

- the improvement of communication and information-sharing among pro bono providers;
- the active promotion of a strong pro bono culture in Australia, commencing at law school and continuing through all levels and styles of professional practice;
- the development of clear, consumer-oriented standards of professional practice to guide lawyers undertaking pro bono work;
- the creation of a 'best practice' management handbook and other guides and material to encourage and enhance pro bono practice;
- the removal of a variety of structural barriers to pro bono practice (eg, filing fees, transcript fees, translators and other court-related costs and disbursements);
- the negotiation of protocols regarding inter-professional cooperation in pro bono efforts (eg with doctors, accountants, actuaries, engineers);
- the commissioning of solid empirical research to underpin reform efforts, such as a client-centred 'needs and pathways' study; and
- the facilitation of partnership opportunities – across the different parts of the legal profession, as well as between lawyers and other community organisations, professions and business enterprises.

Addressing the 'mismatch'

The Task Force also spent considerable time addressing the key issue of the 'mismatch' between client needs on the one hand, and the supply (and accessibility) of pro bono legal services on the other. At the First Conference, it was widely remarked upon that major law firms reported that while they had a strong commitment to pro bono practice, they

were actually *unable to spend* their annual pro bono budgets because of insufficient or inappropriate referrals.

To some extent, this mismatch could be addressed at the local level by improvement and better coordination of the various referral schemes. The Task Force stressed that the problem goes much deeper than fine-tuning the mechanics of referral. At the heart of the mismatch is the fact that the areas of greatest need are in family law and criminal law, personal injury, migration and administrative matters (eg social security appeals). However, these are precisely the areas in which the large corporate law firms do not have in-house expertise—indeed, they generally have made a strategic commercial decision *not* to work in these areas of 'personal plight', most of which are associated with legal aid (to the extent it is available) and/or low fees.

Thus, the Task Force stated that an effective remedy for the mismatch must involve a more long-term and complex approach, that includes most of the matters referred to above:

- promoting a culture receptive to pro bono work;
- improving outreach services and community education;
- providing tools and training to willing lawyers;
- providing 'matchmaking' opportunities that will enable skills and resources to be sent from wherever they are located to wherever they are most needed;
- removing structural barriers; and
- sharing information about successful programs in Australia and overseas.

The establishment of a National Pro Bono Resource Centre

The Task Force was left with the issue of *who* would be responsible for all of this facilitation, creative development, coordination and quality control—as well as ensuring that valuable corporate memory was not lost, and sustaining the commitment, energy and continuity.

The centrepiece of the Recommended Action Plan, therefore, became the establishment of an Australian 'National Pro Bono Resource Centre' (NPBRC)—consciously and openly modelled on Esther Lardent's Pro Bono Institute at Georgetown University, in Washington DC. The Centre's mission was carefully designed: (a) not to replicate or stultify local initiatives, or (b) draw resources away from the frontline delivery of pro bono legal services—which, of course, is paramount.

Attorney-General Williams was successful in obtaining $1M seed funds (over four years) for the Centre, through the Budget process. Following a tender process, the NPBRC was awarded to a Sydney-based consortium that included PIAC, Victoria PILCH, the WA Law Society, and the UNSW Law School. The Centre was launched in August 2002, and its earlier successes have included: producing a Best Practice Handbook, which is available online at the Centre's website at <http://www.nationalprobono.org.au/probonomanual/index.htm>; some useful matchmaking and networking activities in support of pro bono activities nationally; some valuable research undertaken (and research grants won) on such practical and relevant

topics as effective models of legal service delivery, identifying legal needs and identifying and overcoming barriers to pro bono; as well as organising this 2nd National Pro Bono Conference.

THE SECOND NATIONAL CONFERENCE

The organisers decided, wisely I think, not to attempt another large, all-comers conference, but rather to consolidate and aim at a more targeted audience of pro bono coordinators and practitioners.

However, even at this somewhat smaller conference, one of the most significant differences from three years ago is the extent of the involvement and performance of the major law firms. By my count, there were only three major firms that played a key role at the first conference, and could report on substantial achievements in pro bono practice. Just three years later, and virtually all of the major firms are represented here, and can point to significant development of their pro bono practices over this period.

Candidly, some of the major law firms that have impressed me most during this conference are ones that I always have associated with poor performance in pro bono and community service, and I believe that reputation was widely held.

For example, when I was Dean of Sydney Law School about 10 years ago, the managing partner of a leading law firm told me that he was considering providing some funds to the Law School for building renovations or for a named professorial Chair, because:

> I suppose we have to do *something*, and this would be better than having to do the same amount of pro bono—with pro bono you get all those horrible people sitting in your reception area and they scare off the real clients!'

In the event, that firm decided that doing nothing actually was the best option of all—not surprising given this reflects its corporate culture at that time. I won't name the firm, but suffice to say that it has a new managing partner, and clearly a new ethos, since its lawyers have been amongst the most active and sincere participants in this conference, and have related creative thinking and impressive achievements in both pro bono practice and in general philanthropy. No doubt the drive and passion for pro bono may come from junior lawyers, but support from the top is also very crucial.

Another change in the conference structure was the increased involvement of overseas speakers. This year we had the great benefit of the presence of an absolute legend in the world of pro bono—the President of the US Pro Bono Institute, Esther Lardent—as well as excellent contributions from other speakers from the United States, Argentina, Canada, the UK and South Africa. I think this is a sign that we are mature and confident enough in our growth and development in this area to take on board the lessons from the experience of other countries (especially lawyers are often too bound by jurisdiction).

Another welcome development has been the effort to tackle 'the mismatch' identified in the first conference between capacity and delivery. It appears that in three years we have truly moved away from the old, passive 'supply side' economics of pro bono—that is, firms and lawyers saying 'here is what we are prepared to do, now send us some cases'.

Instead, we are moving towards a more ethical and rational approach, in which we are mapping client need, and then developing effective strategies to shift professional capacity and supporting resources and infrastructure towards clients and communities in the greatest need—such as victims of domestic violence; Indigenous peoples; people in rural, regional and remote Australia; and other disadvantaged or vulnerable persons. We did not hear once at this conference, as we did often three years ago, that major law firms are 'unable to spend their pro bono budgets'.

Another change in the mood from the first conference to the second was the much lower level of suspicion and cynicism about the motives of Government in promoting pro bono services. As noted above, the first conference was held in the shadow of cuts to (and restrictions on) federally funded legal aid. The Pro Bono Task Force Report entrenched as an underlying principle the notion that pro bono is not a substitute for a properly funded system of legal aid for disadvantaged persons, but rather is complementary. Even if the legal aid budget were magically restored to its high point, or even increased by 10 or more times, there are some very important reasons why we would still need pro bono, including:

- choice and diversity (in much the same way that community legal centres do not detract from the delivery of legal services by salaried legal aid lawyers);
- availability in conflict cases;
- flexibility;
- motivation;
- the educative/civilising effect, on lawyers and law students; and
- the ability to tap the resources, specialist expertise, and infrastructure of the major law firms, the Bar, government and corporate lawyers, and academics.

In other words, pro bono practice has separate, important justifications and benefits in itself–it is not merely 'Spakfilla' for an ailing legal aid system.

Moreover, governments can play a further supporting role in achieving equitable access to justice by using seed funds to pump-prime legal and community-based pro bono initiatives, and by removing (or at least lowering) some of the obstacles delivering increased and enhanced pro bono services—such as streamlining practice and procedure; minimising court fees; recognising good performance in pro bono as an important part of awarding tenders for the provision of legal services to government; and making clear that lawyers who act against the government on a pro bono basis will not (formally or informally) be penalised in the tender process or in other decision-making (such as the appointment to judicial or other office, or the award of honours).

This is very encouraging, and also highlights some important roles that the National Pro Bono Resource Centre over the next several years, at least, in:

(1) meeting the need for much more empirical research in Australia about lawyers, unmet client need, legal services, and access to justice—fulfilling the first recommendation of the Australian Law Reform Commission in its report *Managing Justice: a review of the federal civil justice system* (ALRC 89, 2000);

(2) facilitating the delivery of pro bono legal services by developing best practice manuals and precedents, to reassure new entrants and to avoid wasted time and energy in 'reinventing the wheel';

(3) engaging in 'matchmaking' efforts which link big city firms with community legal centres in both metropolitan and rural/regional/remote areas;

(4) providing a supporting infrastructure, including a clearinghouse for information;

(5) providing continuity and national coordination; and

(6) advocating for pro bono legal services, within the profession, with government and with the broader community.

On a less satisfying note, we still need to work hard at remedying the image of lawyers in Australian society. In the lead-up to the first pro bono conference, an effort was made to find 'heroes' in the profession to highlight. In the event, a number of lawyers were identified who had worked tirelessly, effectively and anonymously for the disadvantaged in society. However, this attracted no media interest whatsoever—not a single story.

If anything, the public image of the profession may have has gone backwards over the last several, despite the evidence of millions of hours of pro bono work. The heavy media coverage of the non-taxpaying barristers; the emergence and reporting of a public liability 'crisis' fuelled by extremely poor management of insurance companies but blamed almost entirely on lawyers; and even the polarisation in Australian society over the detention of illegal immigrants asserting refugee status, aided by pro bono lawyers—all contributed to the view that lawyers are more interested in their incomes than in their clients' rights, and that lawyers are not so much representing the unrepresented as defending the indefensible.

The various inquiries into access to justice in Australia over the past 20 years (such as the Sackville report in 1994; the ALRC's *Managing Justice* report in 2000; and others) all identified similar means to furthering access to justice for persons of modest means. These included: the use of 'no win, no fee' and contingency fee arrangements; increasing fee competition through the use of advertising; the strategic use of class actions and test case litigation; opening up of rules of standing; and increasing the time periods in Statute of Limitations. And, disappointingly, when the public liability 'crisis' began to bite, many of these strategies were the ones systematically rolled back by state and territory governments now focussed on preventing 'unnecessary litigation' rather than promoting 'access to justice', and finding it easy and popular to vilify lawyers in the process. In other words, lawyers increasingly provide free legal assistance despite an increasingly competitive market for legal services, and their image still suffers.

By way of contrast, when general practitioners effectively went on strike against the Medicare system, refusing to bulkbill because of the (admittedly) inadequate payment rates, and specialists refused to sign contracts in the public hospital system because of problems in assuring cost-effective medical indemnity cover, these issues were portrayed as presenting a political problem for government (to be solved with a huge injection of public funds). There was little or no denigration of the professional or social responsibility of doctors.

The answer, of course, is not for lawyers to sulk or withdraw. Rather, the profession needs to strengthen its commitment to ethical practice and the 'service ideal' that distinguishes it from business and commerce, and it needs to redouble its efforts to deliver access to justice to disadvantaged members of our community. Hopefully some due recognition will eventuate. But in any event, this is simply the right thing to do. My wish is that, at the third national pro bono conference sometime down the track, we will be able to report on increasingly success in this area, with the National Pro Bono Resource Centre playing an important facilitating role.