PLENARY 1: LAWYERS' SOCIAL RESPNSIBILITY IN PRACTICE: VOICES FROM AUSTRALIA AND ABROAD

PRO BONO - A CHALLENGE FOR THE COURTS

Ron Merkel[1]

Abstract: *Since 7 December 1998 judges of the Federal Court have referred more than 800 unrepresented litigants to legal practitioners for legal assistance under Order 80 of the Federal Court Rules 1979 (Cth). In each case the criterion for the referral was that it is "in the interests of the administration of justice" for the litigant to be granted legal assistance.*

There are a number of aspects of the Court's legal assistance scheme that might have ramifications for the development of pro bono representation in Australia. These aspects include:

- *the manner in which the Court's criterion for assistance has been applied in practice;*
- *the co-operation of the Bar, the Law Institute and legal practitioners in establishing and administering the scheme;*
- *the scheme considers the capacity of the litigant to obtain representation and is not a substitute for legal aid;*
- *the entitlement of legal practitioners to recover their costs if their client is successful in prosecuting or defending the proceeding;*
- *the ability of the courts to adapt their procedures to accommodate pro bono representation.*

Increasingly, in recent years superior courts around Australia have been confronted with the phenomenon of dealing with litigants in person. For example, over the last 5 years there has been an average of about 2000 cases each year in the Federal Court in which one of the parties was self-represented. Over the last three years that has meant that between 35-40% of the cases in the Court have involved self-represented litigants.

The challenge for the Court is to reconcile the tension between the right of all litigants to have access to the courts for the resolution of their legal disputes

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[1] A Judge of the Federal Court of Australia

with the requirement for the courts to devote their resources to resolving disputes fairly, efficiently and expeditiously.

The Federal Court achieved a breakthrough in respect of that challenge by the enactment of Order 80 of the Rules of the Federal Court as a Statutory Rule which has operated since 7 December 1998. Under Order 80 a Judge may refer a litigant to a legal practitioner on the Court's Pro Bono Panel for legal assistance "if it is in the interests of the administration of justice" to do so. In deciding whether there should be a referral a Judge may take into account the means of the litigant, the capacity of the litigant to obtain legal assistance outside the Court's scheme, the nature and complexity of the proceeding and any other matter that the Judge considers appropriate.

Since the introduction of the Rule there have been 820 referrals by Judges for legal assistance. Although the referrals have been predominantly in migration matters, they have ranged over many of the areas in which the Court exercises its jurisdiction.

The Court's experience since 1998 has revealed a number of aspects of its Legal Assistance Scheme that might have ramifications for the future development of pro bono representation in Australia. However, before considering those matters it might be useful to give some anecdotal examples of some of the Court's pro bono referrals.

I propose to start with a humorous example. Very early in the scheme when my Court was jam packed on a directions day a litigant in person, a sculptor, appeared to oppose a motion by a multinational corporation to strike out his statement of claim alleging copyright infringement. Although the sculptor had a go at airing his complaint it was not easy to discern what it was from his pleading. I asked him to tell me in his own words what had happened. He looked at me with a smile and said "Well Your Honour. If you'll excuse the language, sometimes shit happens!" I proceeded to say "We know that but, what happened to you?" It wasn't a bad exercise in advocacy as after the laughter subsided there wasn't a person in the Court, including myself, who couldn't wait to find out what his next words were. He said "Well Your Honour I made a beautiful sculpture of Queen Elizabeth and the Duke of Edinburgh in the nude – warts and all. It was on display in a park in Canberra but the irate citizens of the capital had a different idea about my sculpture and completely vandalised it. The next thing I find is a picture of my pristine sculpture on one of the defendant's giveaway CD's. I said to them that they have infringed my copyright and I wrote letters asking for royalties for four years. They fobbed me off so I'm suing them."

The hapless sculptor was given a pro bono referral and the matter settled not long thereafter on terms that I presume were satisfactory to him.

The second example occurred recently before a Full Court in a Migration case. The appellant, a litigant in person from Pakistan had lost his case

before a single judge and appealed to the Full Court, purportedly on the ground of jurisdictional error. Shortly prior to the hearing he wrote a letter to the Court saying he was unable to continue with his appeal as he did not understand it. That was understandable because his case involved difficult and contentious sections in the *Migration Act*. His letter concluded by saying that he was leaving his destiny in the hands of God. Well, that certainly was one of the more compelling and persuasive submissions that a litigant has ever made to a Full Court. The Full Court decided not to treat his letter as notice of discontinuance and referred his case for the pro bono assistance of senior and junior counsel. It will come back for hearing at the next Full Court sittings.

The final example concerns a litigant in person from Africa who was married to a woman from North Asia. After their separation in Australia he became concerned that she would remove the child to her homeland and it would be impossible for him to have any further access to his child. He obtained an order from the Family Court restraining his partner from leaving the country with their child. It appears that he received certain assurances that systems were in place to ensure that the order would prevent their departure. Two days later using their actual names and passports the mother and child departed from Melbourne Airport back to her homeland. The system had failed him and he brought a proceeding in the Federal Court against everybody he could think of, claiming he was the victim of a gross injustice. A single Judge dismissed his action as not disclosing a reasonable cause of

action. His case came on before an appellate court where he, like the hapless *Migration Act* litigant, claimed that he did not understand Australian law but felt he had been wronged. He received a referral from the Full Court for senior and junior counsel to assist him in his case, which settled not long thereafter on confidential terms. I can only presume that those terms were satisfactory to him.

Each of the cases to which I have referred is an example of some important principles at work in relation to the Court's legal assistance scheme. In each case the litigant had no capacity to obtain representation through his own resources or through Legal Aid. In each case representation of the highest calibre was able to be secured because of the co-operation between The Bar, The Law Institute, legal practitioners and the Court in establishing and administering the scheme. In each case there was an entitlement on the part of the legal practitioners involved to recover their costs if the client was successful. Finally, each case is an example of the ability of the Court to ensure that its procedures were adapted to accommodate pro bono representation "in the interests of the administration of justice".

The Court's legal assistance scheme grew out of a visit by me to Washington DC in 1998 for an International Conference celebrating the 50th Anniversary of the Declaration of Human Rights. While in Washington I met Judges of the United States Federal Court who explained to me how their legal assistance scheme works. I brought the ideas I received from the Judges back to

Australia and adapted those ideas to the circumstances applicable to the Federal Court. The steps we took, which have ensured the success of the Scheme, were as follows.

First, consultations in each of the States between members of the Court and the local Bar and Law Institute occurred with a view to establishing a co-operative scheme with a panel of barristers and solicitors who were prepared to offer their assistance under the scheme. There were two factors that were important in achieving that co-operation. The first was that the scheme was not a substitute for Legal Aid nor was it to apply in circumstances where the litigants might have been able, through their own resources or those of their families, to obtain legal representation. The concerns of the profession on both matters were understandable. The other factor was that referrals were only to be made after a decision of the Judge of the Court that the referral was "in the interests of the administration of justice". That enabled the profession to have confidence that the referral system would only be accessed when it was appropriate to do so.

The second step was to ensure that the referrals were governed by a Rule of Court. The Rule of Court, which is now embodied in Order 80, sets out the framework within which legal assistance is to be granted. That framework has a number of important facets:

- it sets out the principles governing the grant of legal assistance so there can be no doubt about how the scheme is to be administered;

- it provides for specialised Pro Bono panels in each of the main areas of the Court's jurisdiction;
- it requires the commitment to the case of a legal representative once she or he has accepted a referral. A practitioner is only to be released from that commitment with the agreement of the client or by leave granted by a Registrar of the Court to the practitioner to cease to provide legal assistance.

Finally the Rule, which has the force of Federal law, ensures that legal practitioners are entitled to recover fees and disbursements if another party to the litigation is required to pay the fees or disbursements under an order of the Court.

Put simply, the Rule of Court ensures transparency, fairness and certainty in relation to the administration of legal assistance under the scheme.

An important element of the scheme is to ensure that cases that have merit or require assistance get such assistance as is appropriate in all the circumstances. In some cases a referral is for representation through to the conclusion of the trial. However, in other cases, such as where the Court is simply unable to form any view on the merits, a referral may be made for Counsel to advise, and if thought appropriate, to draw a proper application for relief. If counsel is of the view that there are no merits and, as a result, it is not appropriate to draw an amended application then the referral is at an end

and the litigant must come back to the Court and do as best as he or she can. At least in such a case the administration of justice has been served by the litigant having had the opportunity to get legal assistance, albeit that it was for a limited purpose.

It is to be emphasised that legal assistance is not granted in order to provide all unrepresented litigants access to justice. Rather, the Court has had to recognise that litigants in person come with varying degrees of justice, or injustice, according to law on their side. In that context it is critical that the Court ensure that its pro bono scheme is not misapplied. Misapplication of pro bono assistance can arise in spite of the best intentions of those responsible for providing it.

A particular example is asylum seeker cases. Plainly, there is an understandable groundswell of sympathy in the legal profession for the plight of asylum seekers. Many barristers and solicitors offer to appear for unrepresented asylum seekers in the courts in order to challenge decisions of the Refugee Review Tribunal. However, there is a real, but not well understood, problem in that area. The Tribunal conducts merits review. Review in the courts has been strictly limited to, putting it simply, errors of law or jurisdictional errors that affect the outcome of the case. Most cases decided adversely to asylum seekers in the Tribunal are decided on credibility issues – issues of a forensic kind that solicitors and barristers are well equipped to deal with. Yet generally their role comes into play only after the

case has been lost at the Tribunal level, making the task on judicial review extremely difficult. Thus, so many well intentioned pro bono cases have proved to be fruitless because the effective representation arrived too late. I notice that even now PILCH and the Victorian Bar's Legal Assistance Scheme, generally speaking, does not assist at the merits review stage. It's a bit like saying we'll not worry about the jury trial but will appear on the appeal.

What might be learnt from the Court's experience?

First, the success of any pro bono scheme depends on ensuring that support is only given to the cases that merit that support. By merit I do not mean that the case or defence will succeed. Rather, I mean that the case is one in which the due and fair administration of justice warrants representation. In order to ensure that pro bono access to the courts is not misapplied it is important that each agency's criteria for representation are carefully considered, specified, administered consistently and are transparent.

Second, it is critical that the co-operation of the legal profession is secured and that the practitioners involved in giving assistance are confident about the fair administration and integrity of the pro bono scheme in which they are participating.

Third, endeavours should be made to ensure that successful outcomes can result in costs orders in favour of the practitioners. Such incentives may not be essential, but they are certainly helpful.

Fourth, pro bono agencies should be working with the courts to ensure the pro bono scheme is a co-operative venture. While all litigants must be treated equally there can be no doubt that pro bono representation in appropriate cases is of great assistance to the courts – indeed I would say it can be critical to their task of administering justice whenever there is an unrepresented litigant. Thus, there is every reason for the courts to be active participants in supporting the pro bono agencies. In that regard officials of our court have been working with PILCH in presenting migration seminars to practitioners and also on expanding our panels to include more junior practitioners in migration cases.

Finally, pro bono schemes should supplement existing legal aid services, and not be a substitute for those services. Put bluntly, I do not accept that governments are entitled to abdicate their responsibility for ensuring fair and equitable access to justice on the basis that others should pick up that tab.

I appreciate that the Court's experience might be very different to the experience many have had in the field. However, I hope our experience might be of some assistance in transforming access to justice.