

Delivery Version - 15.11.08

‘Working together’: 2008 National Access to Justice and Pro Bono Conference Sydney, Australia, 13-15 November 2008¹, hosted by the Law Council of Australia and the National Pro Bono Resource Centre.

“ACCESS TO JUSTICE – THE STATE OF THINGS IN ENGLAND & WALES”²

President, Colleagues.

I will do my best to tell you something of access to justice in England & Wales.

In summary we have travelled a great distance, yet we still have so far to go.

By **justice** I mean the law. By **access to justice** I mean law that is actually available to each citizen. Law that in fact, and not just in theory, protects each citizen. And by each citizen, I do not mean only those citizens with financial means.

The importance of access to justice in this sense cannot be overstated. Without it, some of the work of our Parliaments, and our governments, does not achieve what was intended. Democracy does not function as it should. The rule of law itself is compromised.

These are fundamental things. For any law making body, access to justice - access to the law it is making - has to be a first priority. This is why access to justice is not in the category of a service that the state may or may not make available to its citizens, in large portion or small. Rather it is part of the means by which the work of a Parliament reaches the citizen and works for the citizen.

The challenges are huge – not least at the present time for the world and our respective countries. The call for access to justice in areas of debt and employment will be acute, and we know, do we not, how the legal problems then cluster, and extend to housing and family law issues and beyond

¹ Plenary by-line: “The world of justice – policy, perception and practice; How the stakeholders in the justice system work to achieve access here and abroad, are we [Australia] failing where others have succeeded, or can we show the global village a thing or two?”

² I am very grateful to the following for their comment, advice and encouragement in the preparation of this address: Michael Napier CBE, QC (Attorney General’s Pro Bono Envoy); Bob Musgrove (CEO, Civil Justice Council); Rebecca Hilsenrath (CEO, LawWorks), Rebecca Wilkie (Director, Bar Pro Bono Unit), Chris Marshall (Chairman, A4ID); Toby Brown (my legal assistant).

Any practical treatment of access to justice has to embrace a range of subjects. These include the complexity of the law, the health of the judiciary and of the legal profession, and the role of the voluntary sector. And, necessarily and obviously, public funding and pro bono work.

Let me focus on **public funding**.

I start with some examples. In England & Wales there is no legal aid for representation in most cases of unfair dismissal from a job. In practice many people cannot find solicitors ready to take family cases on legal aid. An ill-thought-out exclusion for what are “business” cases rules out legal aid for the poor family running a corner shop business and threatened by their landlord.

Last month Lord Bingham retired as the Senior Law Lord. Two weeks later he presented the Bar’s Pro Bono Award for 2008. It was thought provoking to look across some of the shortlist of entries. All deserved our respect and admiration. But the help each of those shortlisted had given pro bono told us something about the gaps in our legal system. One barrister was left to represent pro bono at inquests the families of UK soldiers killed in service. Another supported pro bono those with no means but in urgent need of immigration advice. A QC represented pro bono a grandparent in family proceedings requiring a 15 day High Court hearing. Another QC appeared pro bono in test cases on the implications of social security law for children. In these and other examples, public funding or legal aid was not available – either as a matter of policy, or in practice.

I know that in any assessment of legal aid in the UK, it is important to keep in mind that some countries have none and not just that we do not have enough. But we have seen so many decisions driven either by a priority of saving money, or by an assumption that the numbers helped, rather than the depth or quality of help, is what matters. The point is that the Courts provide access to the laws that Parliament is making. We see those laws themselves becoming more and more complex; with the consequence that more and more citizens need help to understand them and, ultimately, to enjoy them as Parliament intended.

Conditional fee agreements are now widely permitted, but only some cases – and only some deserving cases – are suitable for them, or in practice attract them. And where, as in employment or criminal injury compensation, there is limited cost-shifting, a CFA will diminish the financial result in the hands of the claimant. We are often talking about claimants for whom so often every \$ or £ counts in a way that in this room we can imagine but have probably never experienced.

Let me turn then to **pro bono work**.

In England & Wales as in Australia we can take pride in our profession when we speak of legal work *pro bono publico* - professional legal work without charge and in the public interest. Pro bono work has been in the legal profession for centuries. Yet in a real sense

we are only just beginning. The shift is from important examples by exceptional individuals, to mainstream activity by an exceptional profession.

We can go back a long way. 400 years have passed since the Lord Chief Justice of the day spoke to the Sergeants-at-Law of their duty to defend without reward “the poor and oppressed”. Ad hoc examples of pro bono work by members of the profession have occurred across the centuries.

60 or more years ago, three advice centres were established in London, which survive today with names held in great affection – Toynbee Hall, Mary Ward and University House. These may be among the earliest examples of **safe, trusted points of** entry to the system. 30 years ago saw the creation of an advice bureau to support those appearing unrepresented in the main court building in England, the Royal Courts of Justice. Today it deploys pro bono lawyers from 55 law firms, is complemented by a Personal Support Unit, and has a direct referral relationship to the in-depth pro bono resources of the profession – barristers, solicitors and legal executives.

The RCJ Advice Bureau is unique in a number of ways, but at the same time it is part of a national network of advice bureaux. That network is joined now by a network of Law Centres and of independent advice agencies. This, alongside the law firms, is the front line; the first point of access to pro bono help. But we have realised more recently that sometimes points of access need to be fashioned around the community they serve rather than the service they offer if those who need help are to be encouraged to obtain it. The Pro Bono initiative at the London Muslim Centre, including access through its Women’s Link, is a perhaps a good example. The Wai Yin centre focussed on the Chinese community in Manchester is another.

The 10 years from 1996 to 2006 might be seen as the decade of **coordination** for the UK’s pro bono effort. Of course there had been earlier examples. The Free Representation Unit – or FRU as we all call it, with affection and pride - had organised employment tribunal representation in the South East since the 1970s. Some Bar Circuits later set up schemes in other parts of England & Wales to deal with a similar type of pro bono work. A City panel existed by the 1990s to help with death row appeals from jurisdictions for which the Privy Council was still the final court of appeal.

But in 1996 the Bar Pro Bono Unit was formed, by Lord Goldsmith QC (who was later to become Attorney General) as a national clearing house for the pro bono work of the Bar, in every subject area and at every level of seniority. LawWorks followed shortly afterwards, and was in due course to become the national clearing house for the pro bono work of the solicitors profession. Then came the Pro Bono Forum of the Institute of Legal Executives, and more recently, on the international side, both Advocates for International Development (A4ID) and the International Lawyers Project (ILP).

A standing National Pro Bono Coordinating Committee chaired by the Attorney General was formed. An International Committee has followed. The Attorney General’s Pro Bono Envoy, Michael Napier (who sends his greetings to this Conference), leads their work on

a day to day basis. A national coordination website, probonoUK.net, has been created. The entire profession, through the professional bodies, has subscribed to a Pro Bono Protocol and a Statement of Principles for International Pro Bono Work, each setting basic standards and methods. There are sub committees focussed on law schools and on law in schools. In-house lawyers have increasingly become part of this coordinated picture.

After the decade of coordination we have more recently entered what might be called a decade of **collaboration**. At least I believe we have and I hope we have. The first Joint National Pro Bono Conference in 2007 started in the planning as a LawWorks conference but became a collaboration between LawWorks, the Bar Pro Bono Unit, ILEX and the Advice Services Alliance. Its organising committee is now chaired by a member of the Government Legal Service, making her pro bono contribution in this way. National Pro Bono Week, in its 7th year, is now built around themes and key messages agreed and delivered in a spirit of collaboration. A database of international pro bono projects has been introduced, and more joint working should result.

I have mentioned entry points, coordination and collaboration. There is then the importance of **strategy** – of strategic thinking and action. LawWorks and the Bar Pro Bono Unit have, for example, come to realise that regional development needs a sustained, sequential programme, and will not happen with just a general “push”. The careful and appropriate engagement of the judiciary, beyond simply welcoming their encouragement, is another area.

A significant example of a strategic approach being taken came in October this year. Legislation was brought into force allowing the Courts to make an order equivalent to a costs order against the losing party when a pro bono case was one, even though no actual costs had been incurred. The sum ordered to be paid must be paid to a designated charity, The Access to Justice Foundation. That charity will in turn apply this new, additional money to help add to the resourcing of the infrastructure that enables pro bono assistance to be made available to others. With the help of the Civil Justice Council, the creation of the Foundation has been accompanied by the formation of Regional Legal Support Trusts. These give the Foundation a picture of the regional and local unmet need so that some of that can be met from the new money available through the Foundation. They also carry out regional and local fundraising activity and, in time, will help develop regional pro bono activity in a strategic way.

As can come if a strategic approach is taken, the Access to Justice Foundation has large potential for bringing other new resources into the system. Created as the destination for pro bono costs orders, it is now canvassed as the natural destination of choice for monies standing long unclaimed on law firms client accounts. The Civil Justice Council recently recommended it as a suitable destination for damages awarded but unclaimed under “opt out” class litigation. The new financial resources available through these and other routes could be very material indeed. In early discussion about pro bono costs orders some had said the money should go to a place chosen by the lawyers in the particular case. The

welcome greater potential I have just described is handsome reward for resisting that idea in favour of a strategic approach.

An initiative introduced this year will take a strategic approach to the involvement of lawyers in school governance, using their legal skills rather than their knowledge of the law, especially at the schools that face the greatest educational and social challenges.

This latter is an illustration of the broader reach in the contribution made once there is a trusted entry point, coordination, collaboration and strategy. To give other illustrations, mediation – both mediator and mediation advocate - is available pro bono. Highly specialised commercial and competition lawyers have found calls for their skills to help the poorest developing countries manage engagements with developed nations over free trade, with multinationals over commodities, with vulture funds over assigned loans. Advocates have delivered advocacy training across the developing world, helping local legal professions to capacity build. One city has twinned its legal community with that of a region in Africa in a successful model that it is hoped others may emulate. African Prisons Project and International Law Book Facility show other approaches. Pro bono work by lawyers has been combined with that of other professionals, especially through ProHelp. Streetlaw and Public Legal Education or PLE have brought knowledge of rights and responsibilities into schools, youth clubs and community centres - a PLE demonstration of work of the National Centre for Citizenship and the Law opened National Pro Bono Week 2008 on Monday this week in the courtroom of our Lord Chief Justice.

Some of these broader efforts have, beneficial, implications beyond access to justice. They go to the broader subjects of citizenship, engagement, multiculturalism and social cohesion. It is not an overstatement to say that the pro bono initiative that is known as ProBono in the London Muslim Centre is playing a small but significant part in bringing the Muslim and non Muslim community together in London's near East End (an area where the Muslim ethnic minority is in the majority). The readiness of the immediate past Lord Chief Justice, Lord Phillips, to come into the London Muslim Centre and Mosque, at the request of the pro bono initiative there, and speak on "Equality before the Law" has reinforced this. Of course, equality before the law requires the means to access the law.

The combination of trusted entry point, coordination, collaboration, strategy and reach have taken pro bono work into an altogether different league. I am not sure we have realised it yet, but what has happened is that pro bono is rightly taking its proper place as an integral part of the justice system rather than simply as a collection, however generous, of acts of charity.

One can offer statistics that are encouraging. As I speak, National Pro Bono Week 2008 will just have completed 70 events across 20 cities. There are 2000 pre-volunteered members of the Bar on the Bar Pro Bono Unit's books, and many more willing to act besides. LawWorks has enabled more than 100,000 pieces of legal advice. Advocates for International Development has matched UK lawyers to over 200 projects across two dozen countries in the last 2 years. One of the sponsored walks, shared with Australia,

saw 2000 people walk to raise A\$700,000. That money is going a long way to help the front line of advice agencies. But also the conversation among 2000 lawyers, judges, court staff, advice agency workers and law students will pay unique dividends. And their collective presence speaks eloquently the messages “it matters” and “we care”.

Some of the steps I have described or illustrated were not easy. The survival of some of the oldest of the safe, trusted, points of entry serving the poorest in the great but sometimes harsh City that is London, has had episodes of serious challenge and difficulty. It is hard to believe now that there was real difficulty to persuade some of the point of there being a Pro Bono Unit, and to persuade others of the value of the Pro Bono Protocol. Today there are those who are not yet convinced about the Access to Justice Foundation. More generally there are still lawyers who assume pro bono work is just for the youngsters, or for those in some areas of law only. We still see initiatives embarked on that are not sustainable. Too often still the focus is not on seeing a person with a deserving case through to the end of that case and rather than simply offered help at the beginning.

The profession’s pro bono work is key to the health of the legal profession. The health of the legal profession is key to the health of the future judiciary. More and more it is pro bono work that brings the profession together; connecting senior and junior; specialist and generalist; legal executive, solicitor and barrister. It is a rare but true source of respect for the profession. It attracts talent to the profession, and keeps that talent in the profession, and in the firms and chambers that encourage and support it. It is part of the key to diversity in the profession, and to retaining diversity so that it is present at all levels of the profession. It keeps the practice of law in touch. I want to suggest this is about having a profession to be proud of.

For those who want an endorsement of the business case take advice from Goldman Sachs. Goldmans committed \$100 million in March this year towards assisting 10,000 women from developing countries with their access to entrepreneurial education. The Chairman and CEO of Goldmans was not shy in explaining why. He said “being on the side of the angels matters. What people think about us in public places matters”.

But let me now have the courage to suggest that our profession can do much more. I support, without qualification, the call for further financial resources. But there are things we can do for which further resources are not a precondition.

My **first suggestion** can take the form of a question. Why – forgive my being direct, but I do so from a position of respect – why are some lawyers not doing anything pro bono? This is not a question of charity; it is about being a lawyer. In the past there have been barriers of time and organisation to our volunteering. But it is now possible: the vehicles are there, the infrastructure is there. It is utterly practical for pro bono work to be “part of being a lawyer”. If the whole profession is involved the demands on each individual member of the profession are not too great.

Who would not do a short case a year, or an evening advice session – face to face, by internet or by phone – once a month, or a longer case once in every few years? Or mentor a voluntary agency legal advisor? And if not, why not? I am not advocating compulsion, just that we, each of us, ask ourselves what it means to be a lawyer? Whatever your individual answer to that question, pro bono work should willingly be part of it. And I hope we shall increasingly hear not “my firm does it”, but “I do it”.

My second suggestion is that we now need to avoid separate initiatives and schemes where possible. I do understand the pride that a firm, a pro bono organisation or even an individual professional body will have in an initiative that they have thought of or that bears their name. And sometimes competitive instincts, excitement, or pride in one’s own legal stable, tempt a firm to want its own initiative rather than to look for the opportunity to praise and support and join and extend the initiatives in which others are already involved. I echo and endorse the utterly appropriate call yesterday by John Corker for “respect and acknowledgment of the work of others”.

Imagine if you were the person in need. Your chances of help are higher if a good idea has been shared and undertaken with others. Your chances of getting to that help are better if there is one coordinated referral scheme, in which many have joined, rather than several schemes which carve up access to the profession between them. How can we expect clients or lawyers to manage if a request has to be taken to and examined by lawyer after lawyer, or scheme after scheme, until someone is prepared to help? Surely we can organise things so that there is one place to approach for help, and one place to approach to volunteer, one place to examine a request for help, and examine it once?

My **third suggestion** is related. A concerted effort is needed to ensure that the safe, trusted points of entry to the system know precisely how to get further help to a person where that is needed. This does not mean giving the person a list. While there is a list then it should be for the use of the front line agency, not the person seeking help. We need to encourage more and more front line agencies to see their role and responsibility as including knowing and identifying the, single, place from which further help can in fact be obtained. Of course if we can continue to focus on offering a single coordinated referral point – a Bar Pro Bono Unit, a LawWorks, a PILCH - that is universally known to all front line agencies and itself handles deployment of pre-volunteered lawyers we will have made an advance of real proportions.

My **fourth and final suggestion** is that we need to move on from proper coordination of pro bono work to proper **coordination BETWEEN legal aid and pro bono work.**

We are a long way from that type of coordination at present, but why are we?

I suspect the reason is that it is a difficult place to go. It requires a dialogue with Government. It carries the fear that it will end up being a dialogue about pro bono substituting for legal aid. In fact the dialogue offers the best way of guarding against the fear being realised.

On any view, the legal profession needs to make sure it is heard in the public funding debate. To do so it needs to be heard from a place of knowledge, and not from a place of self-interest, and as a voice that is respected. It needs to decouple its voice from its trade union voice – however merited – that speaks to rates of remuneration.

It is the profession's very involvement in pro bono work that gives the opportunity and entitlement to be heard in this way. With great respect to Norman Raeburn, Chairperson National Legal Aid, who spoke at yesterday's opening session it is the profession not National Legal Aid that knows most about the unmet need, about the front line. It is the profession that is there where Legal Aid is absent because it has chosen not to fund.

The Government's interest is in securing access to justice – access to the laws Parliament is making. It is therefore in the Government's interest to accord respect to the profession in this dialogue; a profession that comes from a place of knowledge and with a pro bono contribution to make. Attacking the profession in order to control the legal aid budget solves nothing, because legal aid will never be enough.

In truth, for the profession and for Government alike, pro bono work has reached the point at which it offers a different entry point to the discussion of public funding, and the vital discussion of how public funding **and** pro bono work can **together** be **coordinated** to provide better access to justice.

This is about the intelligent use of public funds and pro bono work alike. If we cannot increase the amount of public funding at least we can try and better organise its use. Legal aid – public funding - is key to the survival of entire legal specialisms, such as housing law, social security law, immigration law, and of course criminal law. Intelligent use of public funds is also key to the survival of many trusted points of entry to the justice system.

What might we see as practical results?

First, we should see public funds focussed strategically, with priorities that include investment in areas of law that cannot survive without public funding, and contracts that are workable for not for profit agencies.

Second, we should see a focus on pro bono as added value throughout the system. The agency that offers a combination of funded provision and pro bono provision should attract the public funding authorities. This might be the publicly funded law centre that offers additional clinics with the assistance of pro bono volunteers from law firms. It might be the law firm that offers a combination of publicly funded and pro bono services (as with the Law for All practice in England). It might be the advocate who is remunerated from public funds for advocacy but who provides advice pro bono.

The **third** thing we should see is the opportunity to revisit existing ideas. With the type of coordination to which I refer we might not have seen the ambition of a nationwide Community Legal Service in the UK get stuck as it did – almost inevitably so - at the

stage of attempting to map unmet need. The idea of a contingent legal aid fund – involving the allocation of some of the proceeds in a successful publicly funded case towards a fund available to support other publicly funded cases – could attract fresh consideration but this time jointly between the profession and government.

This therefore is I suggest the dialogue that, together, the legal professional bodies, government, the coordinating pro bono bodies, and the judiciary, need to have, together. With hard work, and mutual respect, a true strategy could emerge. And help us move on from a world in which the reason some legal need is unmet is because Government decides in comparative isolation what it will purchase, presenting the profession and the charity sector with a given position to which it is left to add a pro bono contribution as best it can. And help us move away from a world in which Government and profession and charity sector are left to measure by number of people helped, or number of money value of hours given, rather than by true inroads into unmet legal need, including in the areas that are most difficult.

As in any challenge in this field, the continuous sharing of ideas, including between one country and another, will play a key role. It has before. I well recall the interest in the UK when a delegation led by our Civil Justice Council and its CEO Bob Musgrove (who also sends his best wishes) reported back on your PILCHs. Our first Joint National Pro Bono Conference in the UK was enhanced by the experience John Corker from your National Pro Bono Resource Centre so generously and willingly contributed. I have mentioned the UK initiative that is headed by The Access to Justice Foundation – although this has been described as a “world first”, its existence, and its potential, owe much to ideas gathered from around the world, including from Australia.

We do not have an equivalent of this present Conference in UK – a conference that is not just about pro bono but about access to justice as a whole - and I look forward to the day that we do. The more so when the title is, as it is for this Conference, “Working Together”. With all the sincerity in the world, I thank you for allowing me to come and learn from this Conference, and in my own way to try and contribute to it.

Robin Knowles CBE, QC³

³ Chairman of the Bar Pro Bono Unit of England & Wales; Trustee of LawWorks (the Solicitors Pro Bono Group of England & Wales); Member of the Advisory Council of Advocates for International Development (A4ID); Member of the Attorney General’s National Pro Bono Coordinating Committee (and International Committee); Trustee of the Royal Courts of Justice Advice Bureau; Chairman of Pro Bono in the London Muslim Centre; Chairman of University House; Director of ProbonoUK.net; Chairman of the Working Party on the Access to Justice Foundation.
Immediate past Chairman of the Commercial Bar Association of England & Wales; Queen’s Counsel, Recorder and Deputy High Court Judge; Bencher of the Hon. Soc. of the Middle Temple.