For the Public Good: The First National Pro Bono Conference
4-5 August 2000 • Canberra

Defining Pro Bono - Challenging Definitions

Andrea Durbach•

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[1].

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

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• Director, Public Interest Advocacy Centre, Sydney and Co-ordinator of the Public Interest Law Clearing House (NSW)

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

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.

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.[2]

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. 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

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

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.[3]

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 [4]

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[3] 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)

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

Often policies and schemes which declare themselves axes to justice, bear little correlation to 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[5], 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"[6]

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[7]:

• "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[8], 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

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

6 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

7 ibid. at p 4

8 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.

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 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."