

PILCH & PRO BONO: THE IMPORTANCE OF THE PUBLIC-PRIVATE PARTNERSHIP

For the PILCH AGM

At 120 Collins Street (Phillips Fox)

On 24 November 2004 at 6pm

INTRODUCTION

There is a joke that a QC once told me about doing some free work for somebody. He said that someone once asked him whether he would ever represent U2 in court should they ask? He replied rather wittily: 'only if I can do it pro "bono"'.

Ladies and Gentlemen, it is a pleasure to be here this evening at the annual PILCH Annual General Meeting. Ten successful years have now passed since the first AGM. So much good work has been done in that time to improve access to justice. The lawyers who so generously provide assistance to individuals, community organisations and not-for-profit centres through PILCH continue to do so either for free or at a reduced rate. That is what is generally understood by the term 'pro bono' here in Australia.

I note that the derivation of the term is latin, '*pro bono publico*': meaning 'for the public good'. It also does not mean 'free of charge', though in many cases this is just what happens. It is in fact the display of that quality the Romans would have called 'virtue'. It is taking seriously the *raison d'être* of our profession - that all people should have access to justice, and that means having a lawyer in court when they need it, regardless of sex, wealth or race. It may be viewed as an extension of the cab rank rule, albeit here, the lawyer concerned is giving the ride for free, or at a heavily discounted rate.

Definitions of *pro bono* commonly incorporate three situations: firstly, where direct legal advice and representation is sought; second, where there is involvement in law reform work and community education activities; and third, in situations where lawyers work without charge for charitable and community organisations.¹ PILCH's activities cover all three of these scenarios, and as such, this organisation is helping to improve access to justice for all.

¹ Sir Anthony Mason AC KBE, 'PILCH: Access to Justice and the Rule of Law', Keynote Speech delivered at the 10th Anniversary Dinner at Parliament House in Melbourne, 9 September 2004.

OBSTACLES TO PUBLIC ACCESS TO JUSTICE

But what is meant by this term 'access to justice' which one so often hears in connection with *pro bono*? How should this phrase be defined? According to the NSW Law & Justice Foundation in its 'Access to Justice and Legal Needs Program' report, it interprets both 'legal needs' and 'access to justice' more broadly than just formal representation and courts. This interpretation is reflected in the program goals, which are to appraise the ability of disadvantaged people to:

- 'obtain legal assistance (including information, basic legal advice, initial legal assistance and legal representation)
- participate effectively in the legal system (including access to courts, tribunals, and formal alternative dispute resolution mechanisms)
- obtain assistance from non-legal advocacy and support (including non-legal early intervention and preventative mechanisms, non-legal forms of redress and community-based justice)

- participate effectively in law reform processes'.²

PILCH effectively deals in all of these points.

Centres such as PILCH may therefore be viewed as just one of several different ways in which access to justice is obtained in our society by disadvantaged individuals or organisations. Other methods include the provision of legal aid centres and also a scattering of community legal centres, mostly funded by government, throughout the State.

The question is, however, are all who need access to justice (in the context of legal representation) obtaining it?

It is fundamental to our democracy and to our notion of the rule of law that all who require it should have access to justice.³ But there are many reasons why it is becoming increasingly difficult to obtain legal representation.

² Law & Justice Foundation of NSW, 'Access to Justice and Legal Needs Program: Identifying legal needs, pathways and barriers for disadvantaged people in NSW' (2001) at <http://www.lawfoundation.net.au/access/> on 23 November, 2004.

³ Sir Anthony Mason AC KBE, 'PILCH: Access to Justice and the Rule of Law', Keynote Speech delivered at the 10th Anniversary Dinner at Parliament House in Melbourne, 9 September 2004.

Rising court costs are one. For many people, even middle Australians, court costs are simply prohibitive and many are barred from accessing it by ordinary means (i.e. by paying for it themselves). People and organisations must also be able to afford the time it takes to seek just resolution of a dispute; and time, of course, is also money.

Legal aid is also diminishing. It used to be that legal aid was available for those needing to bring or defend an action in the legal system. People often faced a means test and an assessment of the likelihood of their case succeeding before legal aid was granted. More recently however, around about the time PILCH was established, cuts to legal aid funding occurred and subsequent public concerns about access to justice raised.

These cuts to legal aid coupled with the rising costs of litigation still have not deterred many (who either cannot or will not obtain legal representation) from taking their case to court themselves. These self-represented litigants, as they are known, more often than not have little experience of court processes. The inexperienced ones inevitably take longer to work out how to present correctly, with the court often taking time out to aid them in the interests of promoting

fairness and justice. This results in much wasting of the court's time. As well, the inability of self-represented litigants to clearly articulate the real issues in their case could possibly result in injustice, particularly where the opposing side has managed to obtain legal representation. At the present time, it would appear that *pro bono* can only go some way to meeting the need of those who will otherwise represent themselves.

The abovementioned factors are obstacles to accessing justice. Obstacles to the provision of *pro bono* include changing private lawyers' and law firms' attitudes to such work. Possible solutions to this problem could include the provision of professional guidelines and targets for *pro bono* work (they already do this in the US), for example as issued by the various law institutes around Australia. Secondly, as there appears to be widespread concern that doing *pro bono* work against the government may prejudice a firm's prospects of securing public sector work, some lawyers are calling upon the governments to make it clear that their chances of obtaining this work are not so inhibited if they do take on *pro bono* against a government department. Whether these concerns are genuinely preventing lawyers from providing *pro bono* where they otherwise would is unclear.

TIMES HAVE CHANGED: Comparing Australia to the US and Canada

So how does Australia's progress in the *pro bono* sector compare to other countries in the time since PILCH was established?

Australia

Firstly Australia: On the national scale, *pro bono* has become a part of the legal landscape. Such was not the case 10 years ago; back then it was often difficult to distract lawyers, most of whom work in private practice, from their regular billing activities.

Arguably, however, at the forefront of much *pro bono* activity in recent years is the notable increased participation by national law firms. Whereas a decade ago, donating one's time may not have been supported by the law firm's culture, now many Melbourne law firms have explicit *pro bono* policies and are becoming adept at implementing them. Indeed, for a growing number of firms, taking a *pro bono* case is no longer just a random act of kindness, but a well thought-out policy decision based on the firm's goals and

interests. Lawyers are encouraged to do some *pro bono* work. Supporting their efforts has become important to the firm and its outlook.

Indeed, although law firms are mostly unable to link *pro bono* work directly to their profit bottom line, law firms are beginning to realize the returns of having their solicitors engaged with organisations like PILCH, or providing their services directly.

But law firms are quickly beginning to realize the benefits of *pro bono*. These include:

Recruitment and Retention — having a strong *pro bono* program attracts bright lawyers and is good for team-building and morale. *Pro bono* work can spark 'innovation and excitement', instilling enthusiasm for the practice of the law and boost lawyers' self-esteem and the respect with which they are held in by the wider community.

Training and Experience — *Pro bono* work often provides articled clerks and newly qualified legal practitioners with opportunities to meet with clients and run their own case independently, under the

supervision of a more experienced lawyer at a firm. The training can be invaluable, as well as providing younger lawyers with the satisfaction of working on matters for social benefit.

Stress Life Management – *pro bono* work can also increase the sense of worth one has about one's profession. Helping others for little or no fee can help lawyers to get away from ordinary 'faceless' work, meet clients and through them see the benefit that their largely unremunerated efforts have on others.

As well, in Australia there is a call for *pro bono* to become part of the practice of public sector lawyers.⁴ In the main, it appears that whilst government lawyers are presently providing in a sense *pro bono* services, it is largely a result of individual pursuit rather than as part of structured, departmental policy. Departments may soon be instituting change along the lines employed by private practices to ensure that more government lawyers take on *pro bono*; we await further developments.

The US Experience

⁴ National Pro Bono Resource Centre, 'Information Paper: Government Lawyers and Pro Bono', October 2004.

In the United States, the Model Rules of Professional Conduct call upon all lawyers to undertake *pro bono* work. This is not yet the case in Australia. Ten years ago in America, the motivating cause for attorneys to take on such cases was a moral and ethical obligation. Now, that has changed: the business case for *pro bono* is being increasingly emphasized in that country.

For example, it appears that there is an interesting link between *pro bono* activities of American law firms and a firm's profitability. According to one study, compared to their competitors, where US law firms had strong *pro bono* programs, they generally seemed more resistant to economic slumps; their clients appeared more loyal and patient during the tough times.⁵ As well, every law firm that made *American Lawyer* magazine's top 50 'Most Profitable Law Firms' list in 2003 had robust *pro bono* policies in place.⁶ Lastly, it seems that US firms are seeing *pro bono* as a 'win-win' situation for their clients for the simple reason that it offers their lawyers the chance to get more 'hands-on' experience. All this adds up to additional expertise, improved reputation, recruiting advantages and client connections. Perhaps no *direct* link to a

⁵ Mélanie Raymond, 'Pro bono Rising', at www.cba.org on 22 November 2004.

⁶ *Ibid.*

client's bottom line profitability – but the link, arguably, is certainly there.

One wonders whether the majority of Australian law firms make the connection? As discussed already, it would appear that many are beginning to realize it.

As with US government lawyers: many departments have *pro bono* policies in place. According to the US Department of Justice Policy Statement, the government has set a goal of a minimum of 50 hours of *pro bono* legal and volunteer work per employee each year.⁷ Perhaps we might see similar goal-oriented policies in place in our own departments soon.

The Canadian Experience

As noted in a report by the National Pro Bono Resource Centre, Canadian government lawyers are generally limited in their *pro bono* work given professional indemnity insurance requirements.⁸

⁷ Office of the Attorney General, Department of Justice Policy Statement on Pro Bono Legal and Volunteer Services at 1, available via http://www.usdoj.gov/jmd/ethics/docs/probonopol_pol.htm; as quoted in National Pro Bono Resource Centre, 'Information Paper: Government Lawyers and Pro Bono', October 2004.

⁸ *Ibid.*

In some Canadian states, notably British Columbia and Ontario, moves have been made by law associations and insurance organisations to exempt government lawyers from these requirements (and from paying contingent insurance premiums) – subject to the restriction that the *pro bono* services performed are ‘approved’ ones.⁹

Private law firms in Canada are, as in Australia and the US, increasingly ensuring that *pro bono* is being kept on the agenda. They are doing so in similar ways; instituting firm policies and setting up firm-wide committees.

FUTURE DIRECTIONS: A PUBLIC-PRIVATE PARTNERSHIP

The most visible changes in *pro bono* appear to be the way in which firms are now actively managing *pro bono* files. Nevertheless, as important and valuable as *pro bono* programs are, they can be in no way a substitute for government funding. Government commitments to legal aid have waned over the past few years and court expenses are on the rise. The need is growing and the funding to meet it somehow needs to be made available.

⁹ *Ibid.*

Thus, it should be clear that *pro bono* by itself cannot and does not replace the need for legal aid funding. In concert with legal aid, however, it is a very valuable way of improving access to justice. As Chief Justice McLachlin of the Supreme Court of Canada has commented:

*Lawyers need to think of legal aid as an essential public service like health care or education and work with others to improve coordination of pro bono services. All players must work to improve public access to information about the law and legal system.*¹⁰

Thus I suggest *pro bono* can be valued most where it does not stand alone.

As the law and society itself becomes more complex, obstacles to public access to justice can be expected to continue to grow. Increased demand can be met only through a concerted effort between governments for the funding of legal aid and through private law firms providing *pro bono*. Therefore, a highly

¹⁰ Chief Justice B McLachlin, 'Preserving Public Confidence in the Legal Profession and the Courts', to the Faculty of Law, University of Manitoba, Canada, February 1, 2002.

constructive relationship between relevant government departments and *pro bono* organisations such as PILCH must be promoted and maintained where appropriate. Increased co-ordination should also see more lawyers in the private sector offered the opportunity to provide *pro bono*.

Happily, this need for increased co-ordination seems to be understood by the national government, which established the National Pro Bono Task Force to examine the key issues affecting *pro bono* work in Australia. Arising from the Task Force's recommendations, the Government has provided seed funding to establish the National Pro Bono Resource Centre. The Centre envisages itself as a sort of support for local providers such as PILCH Victoria and has the active contribution of PILCH members. This sort of initiative must continue with its emphasis on public-private partnership.

Nonetheless, despite all this focus on improving access to justice, I would like to point out that one should remember that the goodwill and satisfaction that comes from giving without receiving should not be jeopardised. In other words, access to justice must be coupled with quality of service. Lawyers should be encouraged to

give freely of their time without being overly pressured to do so. Taking this kind of stance to *pro bono* should maintain the very high level of service which those receiving *pro bono* have come to expect.

Among your guests this evening you have practitioners and barristers who have met this challenge – not only who have given freely of their time but have done so with distinction, dedication and care. May I congratulate you all for your commitment to *pro bono* work. Your generosity reminds us all that we belong to a noble profession, of the reason for the very existence of our profession – access to justice. It is a privilege to be here at your AGM in the 10th anniversary year of PILCH – may it live many decades longer.