REMARKS OF THE HON. MARILYN WARREN AC
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ON THE OCCASION OF

THE VICTORIAN BAR TENTH ANNIVERSARY PRO BONO CELEBRATION AND AWARDS CEREMONY

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'PROPPING UP THE SYSTEM'

Tonight, I would like to talk about the pro bono work performed by the Victorian Bar. I do not diminish the magnificent and generous contribution made by the remainder of the legal community but this evening I focus on the Bar. I will also discuss the symbiotic relationship between pro bono work and legal aid funding. I will, further, speak about the unique role of the legal profession in our democracy and the obligation of governments to support the justice system.

The Bar's Contribution

Pro-bono legal representation is carried out, not as a piece of legal dilettantism, but as part of the every-day grind of the courts. Pro bono commitment reflects the fact that the law cannot deliver

justice to large sections of the community without supplementation.[1]

Most of the free work goes unrecognised. While law firms are encouraged to perform pro bono work as an incentive or condition to winning government legal work, for barristers it is different. Were it not for the commitment to the highest ideals of the Bar displayed by those who provide pro bono work, it would not happen at all. To demonstrate, let me take you through a brief survey of what the Bar is currently doing in the area of pro bono services.

The pro bono activities of the Victorian Bar are primarily channelled through two schemes: the Victorian Bar Legal Assistance Scheme or "VBLAS" and the Victorian Bar Duty Barristers' Scheme.

The VBLAS scheme is administered by PILCH and overseen by the Victorian Bar's Pro Bono Committee. The scheme has been running since 1995. Its aims to provide legal assistance to those in financial need whether criminal or civil. Barristers are registered as participants in the program. Currently these number around 400. The VBLAS scheme provides a range of legal services, which might include preliminary advice on prospects, preparation of court

[1] The Hon Murray Gleeson A.C., '*National Access to Justice and Pro Bono Conference'* Melbourne, 11 August 2006, 4.

documents, or even, representation in court as counsel. In 2008-2009, the scheme received 279 referrals. The financial value of the referrals accepted by members of the Bar was estimated at $1.1 million[2].

In contrast, the Duty Barristers' Scheme is a relatively new program. The scheme was founded in June 2007 with a pilot program in the Melbourne Magistrates Court. Its great success led to the establishment of a permanent program in July 2008. Since then it has been extended to the Dandenong Magistrates Court, the commercial section of the County Court and into the Supreme Court of Victoria. Essentially, it provides duty barristers who rotate through the Magistrate's Court five days a week providing advice and representation. More than 332 barristers have volunteered to participate in the scheme ranging from the most junior to the most senior members of the Bar.

The Duty Scheme's history at the Supreme Court began on an ad hoc basis in April 2008. It was established on a more formal basis in December of that year. Since then, Shane Draper, the Victorian Supreme Court's Unrepresented Litigants Co-ordinator has worked closely with the Scheme's Committee as well as its Co-ordinator, Peta Hansen, to request the assistance of barristers in urgent

[2] PILCH, Annual Report 2008-09, page 7.

cases. Mr. Draper tells me that the scheme has proven invaluable to his efforts to assist unrepresented parties.

To date barristers involved with the scheme have appeared over a period of more than 500 days in the Melbourne Magistrates Court, over 100 days in the Dandenong Magistrates Court, over 100 days in the Supreme Court, over 40 days in the County Court, and over 30 days in other courts. The financial value of this commitment is estimated at over $1.6 million[3]. Of course that figure relates to barrister time only and does not include the saving to the justice system. Judge-time and court delays are better managed because of the Bar's pro bono support.

THE BARRISTERS' STORIES

You might ask yourself: 'What does this all mean in practice?' 'What is the human story behind the statistics?'

On Monday 12 November 2007 at 9.30am three Victorian barristers walked across to the Melbourne Magistrates Court to announce their appearance and commenced the operations of the Duty Barristers Scheme. They were Amelia Macknay, Elizabeth Ruddle and Amanda Wynne. They literally hit the ground running and

[3] Will Alstergren, Chair, Duty Barristers' Scheme Committee, Memorandum '*Victorian Duty Barristers Scheme'*, (28 April 2010), p 8.

were all fully engaged for the day. They represented the Bar with distinction.

The Scheme has since that first day represented many litigants in criminal and civil matters. Duty Barristers have conducted pleas, bail applications, contests and advised witnesses. They have also appeared in civil matters ranging from simple debt disputes to more complicated matters. The Scheme has worked closely with Victorian Legal Aid and the court's coordinators.

A day in the life of a duty barrister in the Melbourne Magistrates' Court is gruelling and varied. One of its participants described an average day as commencing with advising two witnesses in a serious WorkSafe prosecution involving a fatality, assisting a complainant in a sexual assault matter with advice on legal professional privilege, before acting as counsel for a self-represented accused who wished to seek leave of the court to change an existing guilty plea to a plea of not guilty.

There have been many cases in which the Duty Barristers Scheme has been asked to act, with little notice. In a Supreme Court criminal trial a witness, in custody, required urgent advice as to the possibility of him purging himself. Within half an hour of receiving the telephone call from the Court, the Scheme arranged for a silk,

Les Glick SC, and a junior counsel to appear in the Supreme Court, to interview the witness in the cells and appear later than afternoon before the judge on the witness' behalf.

In another criminal trial in the Supreme Court two accused had been found guilty of assault and rape. The victim sought compensation pursuant to section 85B of the *Sentencing Act 1991*. As this had become effectively, a civil claim, Victorian Legal Aid was unable to further represent the accused. Senior counsel appeared on behalf of the victim. The judge identified the possible application of sections 8 and 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* and required a notice to be given to the Attorney-General. Appearances were then made by the Solicitor-General and then other senior counsel sought to intervene on behalf of the Victorian Equal Opportunity and Human Rights Commission. The Scheme was contacted and it was able to provide counsel to represent both accused. Eventually, Legal aid was able to instruct and the matter was able to proceed to judgment, see *Kortel v Mirik & Mirik*[4].

In another example, in a Supreme Court commercial case there were three unrepresented litigants seeking to take action against a

[4] [2008] VSC 103 (4 April 2008).

major bank in a four week trial. Again at very short notice the Scheme was contacted and two junior counsel and a senior counsel appeared on the morning of the trial. Later over the next two days mediation was conducted with another member of senior counsel acting as mediator on a pro bono basis in an attempt to settle the matter.

Another example was a civil case. On the morning of the hearing litigants had lost their barristers and were about to start a five week trial. A silk and junior represented the other side. Two duty barristers were able to attend on the first day of the hearing, have the matter stood down and then started the trial commencing the next day, including opening the case and calling the first witness. The trial proceeded for a period of three weeks before it settled.

In the Court of Appeal of the Supreme Court Duty Barristers have appeared on a regular basis in both civil and criminal appeals.

In a Criminal Appeal involving an appeal against sentence and conviction the Scheme was asked to provide duty barristers. Victorian Legal Aid was prepared to fund and brief counsel only for the appeal against sentence. The appellant had significant difficulty articulating his grounds of appeal on conviction and preparing submissions. The Court of Appeal requested assistance from the

Scheme. Three Duty Barristers prepared the Amended Notice of Appeal on the conviction in a very short period and also filed and served detailed submissions. Shaun Brown, Sarah Keating and Will Alstergren then prepared for the Appeal and Nick Papas SC agreed to appear as leader.

In civil appeals the Scheme has provided many appearances since its inception. One very demanding appearance was a complicated multiple appeal from a decision of a trial judge, a decision of an additional trial judge dealing with contempt proceedings and a decision of an associate judge on quantum. The appeal required appearances on preliminary questions including fresh evidence. The appeal itself was heard over a three day period. The appellants were successful in having judgment against one of the three appellants set aside and achieved a retrial on the question of quantum for the other two appellants.

The Scheme has also provided duty barristers to appear in mediations conducted in the Trial Division and Court of Appeal of the Supreme Court by Associate Judges. Many of these matters have settled as a result of the unrepresented litigant receiving advice and the ability to have someone articulate their case for them.

Lessons to be learned

Two things are apparent from these anecdotes. Firstly, and obviously, it is clear that effective legal assistance is integral to the just adjudication of the rights of parties in a legal dispute, whether civil or criminal; trial or appeal. One might ask what the result in each of these cases would have been if all these parties had not had the benefit of competent and timely advice. Justice would have been denied to the citizen. What is often overlooked is that the proper resourcing of legal parties is integral to the proper resourcing of the court. As Justice Weinberg noted recently, cases conducted by litigants in person can be very protracted. Thus valuable court time is wasted, at the expense of other prospective litigants who are denied timely resolution of their disputes.

Legal representation allows issues to be identified and dealt with effectively. Good advocacy reduces the amount of time required by a judge to decide an issue in dispute. It also relieves the burden on judges to assist those who are self-represented to put their case adequately, receive a fair hearing and, critically, natural justice. Whilst, not all those appearing before the courts wish to be represented, for those who do, and cannot afford it, the pro bono work undertaken by the Bar provides an important impetus to the best application of limited judicial resources and the efficient use of the courts. Therefore, in a very significant way, those members of

the Bar actively assist the court every time they appear in a pro bono capacity. For that, I extend the deep thanks of the Supreme Court, indeed all courts and my fellow judges and magistrates. Without the pro bono work of the Bar, and the profession, the wheels of justice would slow down. Governments speak about court delays, they would be exacerbated without the generosity and commitment of pro bono work.

THE IMPORTANCE OF LEGAL AID

The systemic efficiency benefits of professional legal assistance are most obvious at the trial stage. A recent newspaper headline read 'Lawyers fleeing Legal Aid in droves'. The heading followed a Senate committee inquiry into access to justice. If criminal barristers with the necessary experience are fleeing 'in droves' it is self-evident that responsibility for these matters will fall to less experienced, junior counsel, or counsel who are not appropriate. When this happens the judge's task of ensuring a fair trial becomes increasingly onerous. We know from the findings of the Victorian Law Reform Commission report *Jury Directions* that where inexperienced counsel are briefed in criminal trials problems arise, trial time blows out and the risk of error increases. This leads to the running up of extra costs of trials and appeals. A former President of the Law Council of Australia observed that every dollar

of Commonwealth legal aid funding spent saved up to $2.25 within the justice system.

The second thing to be noticed from the pro bono stories I told is that effective pro bono assistance only operates within the context of, and as an adjunct to, effective legal aid funding. Providing legal aid for an appeal against sentence, whilst denying any assistance in an appeal against conviction to the same party, does not increase faith in the 'justness' of our legal system. Furthermore, as soon as legal aid is restricted, demands for pro bono assistance increase commensurately. In February 2008, limits were placed on publicly funded legal assistance in family law matters. In the 2008-2009 year, the VBLAS scheme received a 200 per cent rise in referrals in family law matters.

THE OBLIGATIONS OF GOVERNMENT

The obligation to provide a just legal system is a primary obligation of the state. It is a function of government to maintain the courts so 'citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole', see *Attorney-General v Times Newspapers Ltd*.[5]

[5] [1974] AC 273 at 307.

Increasingly, and disappointingly, this obligation has been shifted to the legal profession. The community cannot allow the creation of a system in which extensive, even effective, legal representation is primarily conferred as a matter of professional grace, rather than as a necessary element of civic rights.

At present, legal aid in Victoria remains under-funded. Since 1996/1997, Commonwealth legal funding has decreased, in real terms, by 12 per cent. Whilst the Commonwealth government announced an additional $13 million boost to legal assistance services on 7 May 2009, there is a long-standing structural problem not amenable to one-off budget announcements. Although the federal legal aid budget for 2010-2011 has been announced at $190.8 million Victoria's position needs resolution. As Danny Barlow, former President of the Law Institute of Victoria has pointed out, not only does Victoria receive 'over 15 percent less per head of population than any other state or territory' of Commonwealth Legal Aid funding, that funding increased by only ten percent from 1999-2007, whilst funding nationally increased by 45 per cent.

Former Victorian Bar Chairman, John Digby QC observed that the number of barristers working on criminal cases funded by Legal Aid had dropped by 26 per cent since 2005 and blamed the decrease

on inadequate funding. This, he said, had strained available resources and put increased pressure on the lawyers still involved in the scheme.

Recently, the Victorian government announced an increase in state legal aid funding of about $24 million. The increase represents a beginning. More needs to be done otherwise the cost-switching I have described earlier onto the court system will not be reduced. Courts will carry the burden of ensuring fair trials in the face of inadequate legal representation at the ultimate expense of the community.

Announcing his government's funding increase, the Victorian Attorney-General called upon the federal government to similarly increase Commonwealth funding. There is an opportunity for much better national collaboration and co-operation. Legal aid and adequate legal representation lie at the heart of our democracy. The State should not say "we have done our part and now it is up to the Federal Government". Nor should the Federal Government say "it's a state problem". If state and federal governments can resolve, with much zeal, to establish a national profession then similarly both sectors should work towards an effective national co-operative for legal aid. This should be a primary goal. One key

performance indicator would be the discontinuance of barrister and lawyer protest rallies outside the Victorian County Court.[6]

Yet, the discussion should not be geared simplistically towards criticising Attorneys-General. One might readily have some sympathy for the tough advocacy task they face. When going into Cabinet and Expenditure Review Committee meetings and arguing for funding for legal aid, Attorneys-General are doubtlessly met with the remark 'more money for lawyers! You have to be joking.'

The proper funding of legal aid is not about some undeserved pay rise for lawyers. It is about recognition of the true cost of justice. If your washing machine needs to be fixed you need a competent technician or plumber. If you face a criminal charge you need a competent lawyer. More often than not, the technician or plumber is paid more than the competent criminal lawyer so whilst your machine is fixed your liberty might be risked.

The community understands that skilled service of any kind comes at a price. The legal profession should support Attorneys-General in educating governments and the community that legal representation warrants a skilled service; that the service is essential to our democracy; and it comes at a cost.

[6] On 28 April 2010 a rally was held over underfunding of legal aid. See *Australian Financial Review*, 30 April 2010, 'Rudd slammed on legal aid', R. Nickless, p.41.

Any decisions taken to increase legal aid funding at the state and federal levels should be taken as part of an adequate consultative process with the legal community, especially those engaged in legal aid and pro bono work, to ensure that the finite resources which have been made available are applied to maximum effect.

For the Bar this might require some give and take. So, for example, specialist accreditation of criminal trial and appellate barristers. Another prospect may be abolition or review of the Appeal Costs Fund.

THE ROLE OF THE LEGAL PROFESSION AND THE NATIONAL REFORMS

The key to the symbiotic relationship between pro bono work and legal aid is that where legal aid falls down the legal profession steps in. This altruistic reaction is reflective of the distinctive role of the legal profession in supporting our democratic society and implementing the rule of law. It is this inherent characteristic that distinguishes the legal profession from all other professions and the trades. It is for this reason that lawyers are officers of the court owing a paramount duty to it.

The federal and state Attorneys-General have announced extensive changes to the profession. All barristers and lawyers should be aware of them. The reforms are connected to the pro bono and legal aid discussion because they all these topics lead to how the rule of law is achieved.

The proposed national legal profession reforms would compromise and threaten the independence of the legal profession and its democratic role. Bringing the legal profession under the control of the Executive arm of government, through the governing vehicle of the Standing Committee of Attorneys-General, risks the independence of the legal profession and its role in implementing the rule of law. The question of national legal profession reform is much more than a method of costs saving and efficiency. It is fundamentally about the rule of law. The proposed National Legal Services Board must have majority control by the legal profession and the judiciary. Whilst Executive government representation is acceptable, even welcome, it must be confined to a minority on the Board. If the Board is constituted as presently proposed there is a prospect of the Supreme Courts not recognising the national admission under the scheme. It is the courts who determine and control who are officers of the court.

It is the distinctive characteristic of duty to the court and sworn commitment to do justice on admission to practice that has driven the great pro bono traditions of the Victorian Bar. Let us recall and think of Victoria's contribution to land rights and criminal justice in the Northern Territory, to Native Title and human rights. It has been the Victorian Bar who have dominated the bar table on these occasions of challenging advocacy in Victorian and Australian legal history.

Pro bono is a commitment that is on one hand convenient to government as it fills the legal aid gap and props up the justice system. On the other hand the independence of the legal profession and its upholding of the rule of law is sometimes inconvenient to governments and dismissed with the attitude that lawyers are so well paid with all the other work they do it will not hurt them to give something back.

The commitment of the Victorian Bar to pro bono work runs deep. But, that commitment is a finite resource. I fear governments exploit it at their peril. The new national scheme proposed for 1 July 2010 is awaited. Without an effective partnership between the state and federal governments to provide legal assistance to those who, without means, must negotiate the law and the courts, and without an effective national co-operative for legal aid at the

state and federal levels, the state obligation to provide society with a fair and just legal system will not be met. The burden will remain with the profession putting justice at risk. A time will come when the profession will say ‘enough’. I just hope the time has not begun already.