Pro bono - New strategy for public interest litigation?

The 'free market' of legal services fails many consumers. To what extent is the private profession obliged to compensate for this failure?

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Some preliminary questions

There has been intense focus in the last few years on 'public interest law'. This focus is not only in Australia, nor even only in common law jurisdictions, but extends across the whole range of legal and political systems.

Inevitably, much of the focus has been on the use of the court system. There is implicit in much of the debate the assumption that 'access to justice' means access to litigation lawyers and to the impartial ear of the judge.

That, of course, is one important element of the debate but we need to take a step back from the advocacy for public interest litigation, and first obtain an objective answer to a number of fundamental questions. While there is obvious injustice abounding in our society, we should not readily conclude that the solution is the provision of more legal services, even if provided on a pro bono (often assumed to mean 'free') basis. Some of these questions follow.

What is 'public interest law'?

Not every case, not even every case of acting for the poor, has a public interest element to it. There are many false distinctions drawn between: human rights and the public interest, public and private interests, commercial and private interests, and between the interests of big business and the individual. This is more than a matter of terminology; without care we lose sight of the *competing* interests which make up the public good.

Why does the market not now provide the services apparently demanded?

Many of the causes can be attributed to traditional market failure factors: incomplete information; the presence of public goods not provided by the private market; externalities not costed by the private market. Many, but not all, of the solutions can also be found in the traditional responses to market failures. Much of the problem lies in deeper distributional inequities, and in social organisation requiring not just legal but social reform.

What are the appropriate responses to the failure to provide justice to all?

The response should not simply be that lawyers provide further legal resources. A broader perspective must be obtained. There must be radical reform of the legal system. There must be reform of each element of that system– the *rules* which govern it, the *institutions* which comprise it, the people who provide the *legal services*, and the people or groups with claims, that is, the *parties*.[1]

What is the motivation for lawyers to do pro bono work?

Given the unlikelihood of radical legal or social reform (even if such reform would cure the problem), is the current trend to pro bono work simply a fad affordable in a time of recession, when there is excess capacity? Is it part of the 'new ethics', likely to disappear in the turn of the economic cycle? Perhaps it is a response to bad publicity about the profession or a desire to obtain a clear training ground for our young lawyers? Or is there some more fundamental obligation associated with lawyers' professional standing?

How should lawyers organise to provide legal services, and what special issues arise in their provision?

In this paper I suggest that:

- a proper response to the injustices demonstrated in our society is *not* to provide more litigation services;
- models other than the adversarial system need to be developed. In particular, there should be greater judicial activism in public interest cases;
- we need to understand why lawyers should provide pro bono litigation and other legal services;
- lawyers should be advocating a clarification and reform of the right to legal services, especially but not only in criminal law cases; and
- there must be more innovative and active measures by law firms to provide legal services to the poor.

The cost-benefit of litigation

I start with some counter-intuitive propositions: society needs *fewer* not *more* legal services; the legal services now being provided should be *more* expensive not *less*.

As lawyers, it is easy to assume that the proper response to injustice and lack of access to justice should be to provide more legal services in the form of pro bono assistance. This response is inadequate and wrong. The very lack of success in lawyers fixing the world's prob-

lems should cause us to pause in doubt.

Although legal services are formally available to all, the poor cannot afford them. In the words of Cappelletti, there is no 'effective equality of arms'.[2] The provision of further, even 'free', legal services does not meet this need, for, of course, the services are not free at all. There is a social cost in the provision of legal services. The high costs of litigation should be remembered; because they are external to the parties these costs are not captured by the market. Legal services, especially litigation services, are not an end in themselves – the proper end of law is justice. Yet many cases we see being run seem to be more profitable for the professional advisers than the parties. As I suggest below, greater emphasis ought be placed on law reform and preventive measures. Greater use of the court system can be counter-productive in obtaining social justice.* Society's resources might more effectively be utilised in other endeavours.

It is obvious that the cost of justice is not lowered by increasing the supply of legal services – there is an excess supply of lawyers now. The problem is much deeper. More fundamental reforms to the way in which we do justice, such as market practices and professional liability rules, have to occur. Serious consideration should be given to a true 'user pays' system. As distasteful as this suggestion may be to many, the merit of the 'user pays' system is the attempt to make public the true costs of justice and build them into individuals' and society's decisions.

By hiding the costs or by not imposing on the users the real costs, the form of justice delivery is seriously distorted. We have one mode to determine all cases – the full glories of the British adversarial system, governed by the rules of evidence, rights of cross-examination and of appeal. A true 'user pays' system would, I assert, lead to a multiplicity of differentiated modes of doing justice: local courts, mediation, arbitration and others. Many cases can be adequately dealt with outside the court system as presently constituted. Those who want the full-blown adversarial system should pay for it. Currently, there is no incentive for either the consumers or suppliers of legal services to create these new models.

Nor does a legal solution tackle the wider social issues of poverty and inequality. Again, the demand for legal services should not necessarily be met with increased supply. Indeed the legal fixing of the individual's problem may mask the need for more fundamental reform of the system. By creating incentives to stay within the system we are hindering more fundamental reforms. For example, some studies suggest that legal aid schemes support existing state institutions and thus have a price in that they preserve 'the right of solicitors to work without interference and with high profit at their usual line of business'.[3]

The presence of externalities (costs and benefits not caught by a market price) prevent public interest issues being litigated and are a sign of true market failure. For example environmental matters, which require more resources than one consumer has, create no incentives for that individual to spend money to rectify the problem: by definition, a market solution cannot be found.

But we should draw a clear distinction between those cases not brought because of market failures which are matters of *private* interest, and those matters of true public interest. Changes are occurring to allow public interest matters to be effectively litigated – class actions; contingency fees; special interest advocacy groups to organise and fund otherwise disparate groups. The Public Interest Law Clearing House is the latest example of this reaction to market failure. Any solution to the general problem of access to justice, however, must tackle the broader issues of societal and legal reform.

The parties' capacity

These failures of the market may, however, be largely resolved without recourse to the concept of pro bono services. Marc Galanter has stated that the fundamental problem of justice is found at the party level:

> ... lack of capability poses the most fundamental barrier to access and correspondingly, upgrading of party capacity holds the greatest promise for promoting access to legality. Party capability includes a range of personal capacities which can be summed up in the term 'competence': ability to perceive grievance, information about availability of remedies, psychic readiness to utilise them, ability to manage claims competently, seek and utilise appropriate help, etc.[4]

Measures to overcome these problems are worthwhile and needed. But greater attention ought also be paid to some fundamental reforms to the way in which we do justice.

Judges' intervention

There is a growing realisation that the adversarial system of justice is not delivering the goods. The old 'trial by ambush' method is out of favour, particularly where there are third party interests involved. There has been a great change in curial procedure and attitude in recent times. Judges are becoming more interventionist. Sir John Donaldson MR said in *Naylor v Preston Area Health Authority* [1987] 1 WLR 958 at 967:

> ... we have moved far and fast from the procedure whereby tactical considerations which did not have any relation to the achievement of justice were allowed to carry any weight. This is as it should be ... nowadays the general rule is that, whilst a party is entitled to privacy in seeking out the 'cards' for his hand, once he has put his hand together, the litigation is to be conducted with all the cards face up on the table. Furthermore, most of the cards have to be put down well before the hearing. This is ... the product of a growing appreciation that the public interest demands that justice be provided as swiftly and as economically as possible.

Criticism of, and a moving away from, the adversarial system is most obviously seen in the NSW Supreme Court Commercial Division. Bryson J in *Lombard Nash International Pty Ltd v Berentsen* (1990) 8 ACLC 1213 at 1216 speaks of 'a deliberate turning away after much experience from an earlier regime of trial by ambush'. This was in the context of a liquidator's examination – the classic case where a third party's interest (the liquidator's on behalf of the general body of creditors) intervenes in the ordinary commercial dealings of the company. If it is appropriate in that regime for the judge to be more interventionist, is it appropriate in public interest cases? The issues have been framed in these terms by Cappelletti:

> Does judicial activism conflict with the ideals of an impartial judge and the parties right to a fair hearing? Is the adversary system an essential aspect of 'natural justice'?[5]

To each question he gives a qualified 'no'. He identifies a worldwide trend to more interventionist judges even in non-civil law countries. This has important implications for public interest litigation:

> This trend can be justified as increasing the efficiency of judicial administration – making it the judge's task to assure a swift and orderly progress of the litigation. Another strong justification, however, emerges everywhere, though most loudly in socialist and developing nations – the social justification. A conception of procedure as a merely private affair of the parties – or, possibly worse, of their advocates – can be, and indeed frequently is, in conflict with the guarantee of a real, not merely a formal, equality of the parties.[6]

*On this point see also the article by Gig Moon on p.24 – Ed.

Lawyers' professional obligations

Promoting market-based pricing of legal services says nothing of the need for public interest law services; the 'user-pays' system ignores the question of distribution of wealth. The mistake made by free-market economists is to see the market as a panacea for all society's ills. It is not – indeed it may expose those ills and result in calls for radical reform. What the free market solution hardly ever achieves is an equation between an efficient solution and an *optimal distribution*. It is therefore important that lawyers be involved in providing pro bono service in this area.

But their involvement should not be in the expectation that this will solve any problems. For the reasons stated above, there is a danger that this step masks the need for more fundamental reform. Nevertheless while deep social and economic inequalities exist, remedial devices must be provided by the legal profession.

Lawyers must recover a true understanding of what it means to be a professional. There has regrettably been a great divorce in this country between 'black letter' law and jurisprudence. There must be a reconciliation between the two.

The starting point in advocating pro bono service is a presumption of equality of access to society's goods. Thus, Rawls argues the classical liberal case for fair equality of opportunity and access to society's primary goods upon which legitimate expectations are based.[7] Raz argues that personal autonomy requires adequate choice – there must be both the options and the capacity to exercise them.[8] Our starting point should be that of Murphy J in *McInnis v R* (1979) 143 CLR 575 at 583, namely, equality of justice:

> Every accused person has the right to a fair trial, a right which is not in the slightest diminished by the strength of the prosecution's evidence and includes the right to counsel in all serious cases. This right should not depend on whether an accused can afford counsel. Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice.

But, as Cappelletti says, there must be 'effective equality and a process in which even the economically weaker party has a real, rather than merely illusory, opportunity to be heard'.[9] The principle should apply to civil as well as criminal matters – for many people the devastation caused by the failure to secure private rights can be as bad or worse than a criminal conviction.

The recent High Court decision of *Dietrich v R* (1992) 67 ALJR 1 has, unfortunately, failed to adopt fully these sentiments in the case of criminal trials. Urgent attention must be given to changing current government policy on legal aid and the court's attitude to the right of individual defendants to have appropriate legal representation. Individual lawyers and law firms cannot hope to provide the shortfall in legal services. The governments of Australia must face up to their responsibilities in this area.[10]

In this respect the American experience is illuminating. One of the debates in that jurisdiction is the question of whether pro bono work should be compulsory and, if so, whether there are constitutional limits on the imposition of such service. The due process and equal protection clauses of the US Constitution have been interpreted recently to imply effective equality. In a period when constitutional reform is on the agenda in Australia, attention should be given to this issue, and the whole question of enshrinement of a constitutional right to representation should be debated.

A further reason for the provision of pro bono legal services is a recognition that the nature of law is that of a debate. The legal system is a forum within which wider ideals such as political democracy and social and economic equality are debated. Being involved in the process is just as important as getting a result in a 'one-off' case. Lawyers must give the disenfranchised a 'voice'. In the ancient words of King Lemuel: 'Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy.'[11] Failure to give the poor a voice may lead to other alternatives, such as exit from the system; it will not engender loyalty and social stability.[12] This does not necessarily lead to the conclusion that the forum of the 'voice' is in court: that is likely to be a very poor forum. There is a very large role for lawyers to be involved in advocacy outside the court – to use their professional standing and political influence to advocate reform.

The poor will always be with us. It is part of a lawyer's professional and ethical responsibility to provide these services. There has been a healthy return to the traditional view of ethics as based on personal character and community values rather than rule-following, and we should develop our character in the context of the communities in which we live. These communities include the community of the law. As Dworkin states:

> We must ask in what circumstances someone with the proper sense of his own independence and equal worth can take pride in a community as being his community, and two conditions, at least, seem necessary to this. He can take pride in its present attractiveness – in the richness of its culture, the justice of its institutions, the imagination of its education – only if his life is one that in some way draws on and contributes to these public virtues. He can identify himself with the future of the community and accept present deprivation as sacrifice rather than tyranny, only if he has some power to help determine the shape of that future, and only if the promised prosperity will provide at least equal benefit to the smaller, more immediate communities for which he feels special responsibilities, for example, his family, his descendants, and, if the society is one that has made this important to him, his race'.[13]

Ultimately the real justification for lawyers undertaking public interest cases is that it is the right thing to do. As Brundage states:

> Like physicians, who likewise began in this period [after 1250] to identify themselves as professionals, rather than simply as practitioners, medieval lawyers regarded it as one mark of their superiority to other craftsmen that they furnished their specialised skills to economically and socially disadvantaged persons without compensation. Providing the benefits of expert skill and knowledge for those to whom a profit economy would deny them was from the beginning an integral characteristic of professional status.[14]

The state does not make a good job of looking after the poor. The state's commitment is subject to a multitude of considerations, allowing such matters to become a political and economic plaything – witness the episode whereby the Legal Aid Commission of New South Wales resolved to stop granting legal aid in civil matters due to a pending budget deficit. The provision of legal services should not be subject to such considerations. That is, it should not be in the domain of the state, for once surrendered to the state it becomes enmeshed in the very system which ensures it is subject to the whims of political powerplay and economic cycles.

I make this point strongly for two reasons. First, as lawyers we should be deeply suspicious of government. It is one of the roles of the lawyer always to stand against government or power in whatever manifestation. Although recognising a justifiable role for (indeed an obligation on) government to help meet the need for legal services, we as lawyers should never allow government to dominate the field.

Second, I emphasise the need to recover a true understanding of our professional standing. The current attacks

on lawyers aim to destroy their status as professionals. Failure to live up to our obligations (but instead insisting on our rights) will hasten the decline of lawyers to the status of mere technicians.

Pro bono guidelines

We need to take control of the provision of pro bono services.

There are no doubt many matters already undertaken by lawyers which fall within the traditional definition of pro bono work. Increasingly, however, many firms (particularly the large commercial firms) concentrate on 'economic' matters. There is a risk that lawyers forget their true professional obligation to help the poor, as they become more and more divorced from the real world.

There are a number of fundamentals to pro bono work. It is fundamental that each matter is treated in the usual manner. Pro bono is not an excuse for second rate or amateur work. Lawyers are not handing out favours – it is a matter of obligation. The law firm's full resources should be available to the pro bono client as they are to any other client. There is no such thing as a 'second rate client'.

The undertaking of pro bono work should not disadvantage the career path or reward of a partner or solicitor. Each matter is credited at full billable time and recognised for what it is: a contribution to the growth, development and culture of the firm as a caring and responsible legal community.

Pro bono work must not be undertaken only by a subset of the partners and solicitors. It is a matter for both litigators and non-litigators, partners and solicitors.

Conclusion

Lawyers must think in a truly lateral and innovative manner. New organisations and institutions must be put into place in order to combat the failure of the market. The innovative commercial minds who designed the new financing techniques in the last two decades need to turn their minds to this problem. Instead of All Money Turnover Subordinated Debt, with an acronym disguising the true nature of the transaction, let them boast of a new way to fund legal services to the poor. No individual lawyer or firm of lawyers can beat the market. There must be a multi-disciplinary approach. It is best to prevent the problem arising than have to meet the problem, in court, once the problem has arisen.

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NESB perspectives

Wrongly characterised as sectional interests, the concerns of Australia's migrants are of national import.

QUANG LUU

In Australia in the 1990s one in five Australians is born overseas, and many of them are from non-English speaking backgrounds. For 800,000 people in Sydney alone, English was not or is not their first language. That is the reality of Australia – whether we like it or not. The Special Broadcasting Service (SBS), whether television or radio, is in a very fortunate position to look at that particular angle of Australia of today, to celebrate that diversity. SBS brings access and equity to those who, by reason of language barriers or ethnicity, may not be able to enjoy full access to society.

I would like to make two points. The first is the question of shaping public interest and how the community can participate. The 'marketing impact' of an issue is very important to that issue being accepted. Organisations like the Australian Conservation Foundation and the Australian Consumers Association are skilled and effective in getting their issues known and debated in mainstream Australia. People of non-English speaking or overseas backgrounds are far behind in getting the issues known.

For example, if you look around Australian streets and in workplaces there are many people born overseas who have skills which will never be recognised here. Ethnic organisations have tended to market that kind of issue as an ethnic, sectional interest, rather than as a concern for Australia as a whole. I think that is wrong tactically,