president's column

PRO BONO PUBLICO

At the invitation of the Law Council of Australia I travelled to Canberra this month to deliver a speech at the Commonwealth Attorney General's national Pro bono conference. On my first visit to the capital as President of the Law Society it struck me, that in spite of the small number of legal practitioners in the Northern Territory, our jurisdiction commands an enormous amount of respect in the national arena. Of the 37 papers, four were given by Territory lawyers.

Attendance at the conference also gave me the opportunity to meet with the Commonwealth Attorney-General to raise concerns about the loss of our Family Court registrar and the failure of the Government to base a Federal Magistrate in the Northern Territory. We also discussed the establishment of diversionary programs as a result of the mandatory sentencing deal between the Prime Minister and our Chief Minister Mr Burke. Mr Williams also indicated a desire to come to the Territory to address the profession. I have wasted no time in extending an invitation to him to attend our annual Law Society dinner to be held on 30 September at Cornucopia.

In Canberra my brief was to present a paper giving a criminal perspective on pro bono. An edited version of that speech appears below.

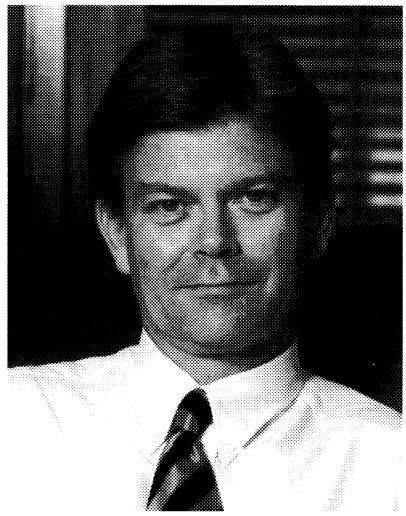
I have never been concerned by the widely held view in the community that criminal lawyers often stand between a case solving arrest and a well deserved conviction. I have been before too many juries made up of members of the community who appear to well understand the importance of individual liberty and the meaning of that venerable phrase "beyond reasonable doubt" to conclude that such casual and uninformed views significantly intrude into the decision making process at trial.

My concern is that politicians, or at least too many of them, believe that the rights of the individual and the fundamental freedoms to which the modern democratic state aspires, are so important that criminal lawyers, who are often at the forefront of upholding them, should have the honour of doing so for free, or at least at a considerably reduced fee. As Oscar Wilde observed there are times when charity can create a multitude of sins and no more so if it is used to fill the gaping crevasse carved out by the inadequate provision of legal services over the terms of successive governments in this country.

Do not misunderstand me. I am aware that the term *pro bono publico* suffers from an incorrect usage if it is applied to legal work performed free or for a reduced fee. That information I gleaned with some surprise from Butterworths Australian Legal Dictionary. It is just that some governments in this country seem to prefer the incorrect usage when assessing the value of pro bono work not to the community but to themselves. The other mistaken view of the term is in my opinion held by sections of the legal profession who perceive pro bono work as a valuable marketing tool and therefore an important adjunct to the modern corporate practice.

The portrayal of the law and particularly the criminal law is overlaid by the cliched icon of the set of scales balanced evenly and judiciously in favour of Neither side of the legal equation. Nothing could be further from the truth. One side is heavily weighted down by the accurately described "infinite resources of the Crown" while the other seeks succour from the ever dwindling budget of a legal aid organisation or depends on the accused suffering a devastating financial reverse even if he or she should establish an absence of guilt.

The legal community is not to be held responsible for the provision of legal services. It is our responsibility to ensure that when adequate and appropriate legal services are provided we do not squander such resources. Training, experience and the commitment to professional responsibility are the tools best suited to avoid that outcome. If the respective governments of this country wish to rely on the legal community to



Jon Tippett, President

fix a legal system that has been thrown out of kilter because one side of the bar table has all the capital then they should give the legal profession the power and the budget to redress the imbalance. Criminal lawyers do not have a responsibility to ensure that the community has access to adequate legal services in the same way that it is not the responsibility of the engineering profession to ensure that the community has access to bituminised roads or the medical profession has the responsibility to ensure that the community has access to medical services.

Equally I am not advocating a reduction in the funds available to prosecuting authorities or police services in order to redress the imbalance. The community is entitled to expect that law breakers and particularly offenders engaged in sophisticated illegal activities are detected, apprehended and dealt with. What I am saying is that the notion of pro bono work being a significant factor in such an environment if it were ever contemplated is a naive and dangerous one.

The point is well made in an American decision referred to by Justice Kirby then President of the New South Wales Court of Appeal in the case of *Director of Public Prosecutions for the Commonwealth v Saxon* (1990) 28 NSWLR 263. Justice Kirby observed that solicitors and barristers are not in the charitable business and that it is unreasonable to expect them to act

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without fee for more than a relatively short period of time (p.273).

In the criminal law the jurisdiction in which much of the important pro bono work is carried out is the Court of Criminal Appeal. At this level in many of the more difficult, nay hopeless cases, the legal aid services have had to set off the possible success of the proceedings as against the money available to provide aid in more deserving cases. The appellant usually therefore has no choice but to represent him or herself. There are many reasons why Courts of Criminal Appeal are reluctant to hear a perhaps lengthy and difficult appeal presented by the litigant in person not the least of which is that it is often a frustrating and messy business. For the criminal advocate that can mean a telephone call from the President of the Bar Association or a representative of the Court accompanied by a request that he or she appear on behalf of the appellant.

It is very much like the offer you can't refuse unless you have some kind of cast iron excuse like being part heard in the High Court. Sometimes the difficulties encountered by the advocate during the hearing of these appeals are enough to cause he or she to swear off accepting such a brief ever again. There is the necessity to deal with the Court's unhappiness about the state of the papers. Then comes the trenchant criticism from the bench of the failure of the grounds of appeal to clearly articulate the nature of the case. Of course the brief was only recently delivered and the advocate had no part in the preparation of the appeal books. The Court then informs the advocate that the appeal appears to be entirely hopeless. A point not lost on the advocate upon the first perusal of the papers. By morning tea the magnanimity of appearing in pro bono work has lost a lot of its shine.

When you examine the definition of pro bono publico as determined by the Law Council of Australia and come across the words "the clients case raises a wider issue of public interest" think big in terms of the otherwise billable hours needed to satisfy the requirements of the action. In the instance of larger firms the corporate entity can often digest the cost without immediate concerns related to paying staff or quarterly tax instalments. To the small practice or single practitioner the matter of time required to do the work can amount to a severe impost upon the operating capacity of the legal enterprise and the practitioner's social life. Many of you would have read the book or seen the film "Civil Action" in which a small American legal office takes on a polluting corporate giant represented by a canny and wealthy legal firm. David does not kill Goliath. Rather the small firm is ruined by the action. Greed has a part to play. There is no getting away from Hollywood moral schmaltz. I thought John Travolta was a lot better in "Pulp Fiction". However you are drawn to admire the lawyers who put it all on the line for their clients. It's just that not many legal practitioners supporting families or otherwise who can afford to or should be asked to make such a sacrifice, although we are one of the few professions the community has come to expect will do so. That in itself is a professional badge of honour, though care must be taken lest it be abused by bean counters.

The legal community is yet to set in place a sophisticated support mechanism in part involving financial resources and in part involving direct assistance that can be accessed by such practitioners should the action be criminal or quasi criminal in nature. The legal aid services, or at least some of them, do have a discretion to approve funding in the area of matters of public importance but that discretion can only be exercised within the organisations' guidelines and cannot be expected to meet the funding of cases that clearly fall within the ambit of pro bono work by definition alone.

Organisations such as the Plaintiff Lawyers Association have set up support structures based on the sharing of information and experience. The consequences of some civil actions may have the most profound impact upon the public interest but if the proceeding is successful the plaintiff in the vast majority of instances will recover costs and the lawyers will be compensated. The criminal jurisdiction offers no monetary prize to lawyers who undertake a complicated action in support of the rights of an individual that may, as in Dietrich, have significant and ongoing ramifications for the community at large. Those who act on behalf of asylum seekers or refugees in the area of immigration law will be only too familiar with what I am talking about. Lawyers in significant numbers have shown that they are prepared to take on a case when there is nothing in it for them. That is not a resource to be tapped into by governments but something to be encouraged by a better system of recognition for the work carried out and support offered by the legal profession during the running of the case.

Law Societies such as my own have a far greater role to play in this area in the future. I do not offer a specific model appropriate for that to be done at this stage but I do see the need for some sort of structure to be put in place. I have in mind a facility to support fellow practitioners who choose to carry out pro bono work that can be accessed by them if they require it. It might help for example in setting up contacts for advice or to assist in enquiries through the offices of other Law Societies.

A practical example is the Northern Territory legal community's recent experience in providing for the legal representation of the many people charged with offences arising out of the Jabiluka protest. A relatively sophisticated arrangement was established so that protesters could be referred to a lawyer and provided with representation and advice. Email was the key with personnel delegated by various community legal services to coordinate the operation. A protocol was set up to provide lawyers with the most recent authorities and defences available to the charges preferred. I struck a bit of a snag as a volunteer when a group referred to me wished to overturn the entire legal system as we presently understand it. The value of my advice in those circumstances was a little limited. However they did have a lawyer. I left the rest up to them.

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Charity however often deals with symptoms instead of causes. The criminal justice system has to deal with both. If lawyers are to continue to advance their services on a pro bono basis it is the obligation of governments to be prepared to act in an effort to fix the causes. That is not presently being done certainly in the context of indigenous Australians. Courts are understaffed, legal resources are constantly being undercut or reprioritised and the criminal justice system is left to be the garbage bin of numerous areas of social disadvantage.

I have often reflected upon the fact that for a profession of rampant egotists we lawyers are so easily prepared to hide the value of the pro bono work daily carried out under such a modest bush. I agree with the Attorney General for the Commonwealth, it is about time we started yelling, "Hey you mob look what I just did!".

For relatively small organisations such as the Law Society Northern Territory there are crucial financial and personal considerations to be accounted for before a support scheme for legal practitioners prepared to undertake pro bono work could be developed and implemented. But the profession must ask itself, does it want such a scheme to be implemented? Hitherto the decision to undertake pro bono work has been the individual practitioner's or firm's prerogative. The legal profession as a whole has a proud tradition of encouraging its members to make themselves available for such work. Indeed the practice of criminal law was once almost entirely carried out on a pro bono basis. Unfortunately it didn't do much for equality before the law. Ned Kelly would probably have had a few words to say about the efficacy of that system.

Pro bono work usually requires a fair degree of legal skill. It is not an area of work to cut one's jurisprudential teeth upon. The very recent decision of the House of Lords in *Arthur JS Hall and Co v Simons* [2000] UKHL 38 removing a barrister's immunity from suit for negligence in court is a portent of things to come. It underscores the need for the profession to offer skilled pro bono services not just work that gives the doer a warm inner glow and the receiver the product of an amateur.

The legal profession should be careful to apply the definition of *pro bono publico* to describe such work in the strictest of terms. Outside the definition lies the responsibility of government to provide adequate and appropriate legal services. The legal profession should be slow to accept an obligation to perform any function that in effect sets it up as a whipping boy for the lack of effective government policy. In the area of the criminal law practitioners have generally seen the provision of pro bono services as a necessity rather than a prerogative. That should not be so.

I congratulate Daryl Williams, the Commonwealth Attorney-General for having the foresight and initiative to host a gathering such as this. For those in the legal profession committed to pro bono work it provides much needed encouragement to continue to find ways to serve the community and improve the effectiveness and dignity of our system of justice.

Maria Ceresa, Executive Officer

FERAE NATURAE

The decision by Justice O'Loughlin to permit a live broadcast of the ruling in the case of Gunner and Cubillo ruling says a lot about changes in the way justice is delivered to the public — and the background to how it went down is reported in this issue of *Balance*. But it brings to mind the fact that it was the Northern Territory that pioneered the televising of court decisions. On the 20th anniversary of the Chamberlain case, we shouldn't forget Dinnie Barritt's groundbreaking decision to broadcast his coronial decision on the Azaria case.

The fabulous thing about Dinnie's decision to broadcast was that he realised the importance of what he was about to say, and the importance of speaking directly to the public from the bench. While it took the Morling inquiry, perhaps, to vindicate his views, the real value of the episode was in bringing an explication of the justice system directly to the public.

O'Loughlin's decision to agree to the broadcast of his summary was a powerful extension of Barritt's brave move. It allowed the timely and accurate dissemination of the gist of an almost 700 page legal judgement to the person in the street. Many, perhaps, initially interpreted the judge's consent to broadcast as a sign that he would come down in favour of the plaintiffs. But neither was that to be, nor should it have been a motivation. Justice O'Loughlin's decision to broadcast was impeccable because of the public interest involved, not because of the result.

It was a result that involved considerable emotion. But it acknowledged, unequivocally, the existence and validity of the Stolen Generation. In so doing, his honour's decision delineated limits to the adversarial system of justice. What can we do to resolve historical issues where records no longer exist?

I am constantly inspired by the influence — far beyond the mere 400 local practitioners — of the NT profession. How the issue of the Stolen Generation is resolved is uncertain, but it seems to me that the local profession, in all its variety, is perfectly placed to be key players in reaching a solution.