

NATIONAL ACCESS TO JUSTICE AND
PRO BONO CONFERENCE

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I am delighted to open this Inaugural Access to Justice and National Pro Bono Conference. Issues of legal costs, legal aid and pro bono resources go to the heart of the perennial problem of access to justice.

Access to justice has a much wider meaning than access to litigation. Even the incomplete form of justice that is measured in terms of legal rights and obligations is not delivered solely, or even mainly, through courts or other dispute resolution processes. To think of justice exclusively in an adversarial legal context would be a serious error.

Even in the narrow context of justice as defined by legal rights and obligations, litigation and other dispute resolution services form only a minor part of the legal profession's involvement and responsibility. Most citizens never become parties to civil litigation; and for those that do their case is a once-in-a lifetime experience. Most people who need legal advice and assistance are not involved in any kind of dispute, and promoting disputes may be of no practical help to them. Even when

disputes arise, most of them never give rise to litigation because, if the law is working effectively, it provides reasonably clear guidance, if necessary through professional advice, without the need to resort to conflict. Of the relatively small proportion of disputes that result in court proceedings, most are settled without need for any judicial decision. This is possible because the parties and their lawyers are able to form a common view about what the outcome of a judicial decision is likely to be. There are only about 1000 judges and magistrates in the whole of Australia. They have the capacity to resolve, by decision, only a fraction of the cases that are brought to courts. The civil justice system works only because most cases are settled. The criminal justice system would collapse if all, or even most, people charged with offences contested the charges.

Provided laws themselves are fair and just in their content, then the information about those laws, and assistance in giving practical effect to that information, provided where necessary through skilled professional advice, that promotes justice. Bringing to people an understanding of the law, and helping them to develop their capacity to take advantage of that understanding, is what is essential. People who know their rights, and their potential liabilities, can use that knowledge, within the limits of their individual capacities, to seek to fulfil their individual and collective aspirations. People who can afford private legal services are usually best served when their lawyers are keeping them out of court. Providers of legal aid, and public or private pro bono legal work, perform public service of immeasurable benefit in the same way,

often avoiding the need for conflict, and conflict resolution, which is sometimes regarded as the manifestation of a concept of justice that is inherently adversarial.

Whatever form legal services may take, whether they are provided to fee-paying citizens or governments, or through systems of legal aid, or without fee, lawyers have a responsibility to provide competent, disinterested advice. That may involve actively discouraging people from pursuing cases that have no reasonable prospects of success. It is unprofessional conduct to encourage the pursuit of hopeless litigation. Where it is appropriate to advise a client to litigate, the services provided should advance the interests of the client, not those of the service provider. Disadvantaged people are just as entitled to skilled, disinterested representation as are wealthy individuals, large corporations, or governments.

One of the topics to be considered at this Conference is "unmet legal need". For most Australians, their most pressing legal need is not, and is never likely to be, advocacy in the High Court. Their need is for practical, reasonably affordable, advice and assistance in the conduct of their ordinary affairs. In the case of family separation, for example, equality of access to information about resulting legal obligations may be an elementary aspect of justice. Regrettably, there are many areas in which injustice results from nothing more complicated than lack of knowledge.

Conflict, especially when it becomes so serious as to result in litigation, attracts notice. Unmet needs in that area might include unmet demands that are insatiable.

We often refer to the "civil justice system", but to describe it as a system may be misleading. In most court cases, to think that the judge, the parties and their lawyers are all working towards a common objective would be naive. Provided their objections are not unlawful, litigants are entitled to pursue their individual interests. Judges have a certain capacity to control the pace and direction, and hence the expense, of litigation, but it is far from complete. To describe certain kinds of litigation as more or less worthy than others would normally reflect a personal and contestable value judgment.

Litigation is conflict. How do you assess a community's need for conflict? How can there be a limit to such a need. If litigation were free, some people would devote their lives to it. If litigation were cheap, it would be much more popular. But would our society be more just?

The human and financial resources that are channelled into the various forms of legal aid and pro bono assistance that now exist, and that are reflected in the concerns of this Conference, are responses to particular forms of need that have been identified and selected, probably without any grand design. That is probably inevitable I cannot imagine what kind of grand design would work; or who would be an acceptable designer. Those activities, however, reflected a conviction, widely held

within the legal professions, and also shared by many in government, that the labour-intensive and costly methods by which the law pursues its imperfect attempts to deliver justice cannot reach larger sections of the community without supplementation.

In large part, they are sustained by a recognition, indeed an insistence, that the legal profession is a profession and not only a business; that its members have a duty to temper their pursuit of individual self-interest; and that they have a collective obligation to do their best to make legal services available to needy people.

Collectively, this is a matter of duty, not generosity. Naturally, however, within the profession there are those who take on more than their fair share of their profession's responsibility, and their individual generosity is to be admired.

I have great admiration for those lawyers who take up this challenge. They are more complete professionals for it. I also admire those within government, and others outside the legal profession, who are active in this area. The Annual Report of the National Pro Bono Resource Centre is an impressive record of the work that is being done to expand access to legal advice and assistance. The Law Council of Australia and the various Law Societies and Bar Associations are to be congratulated on their responsiveness to this area of public need, as are all the lawyers who devote a generous part of their time to this important work.

I would like to make particular reference to what I think is a good example of that responsiveness. For a number of years, on its annual visit to Perth, the High Court has been confronted with a problem resulting from substantial numbers of self-represented litigants in asylum cases, most of whom have been in detention centres, and who do not speak English. Dealing fairly with their applications by the ordinary process of oral argument that was adopted in those years would have been very difficult. At the request of the Court, the Western Australian Bar Association provided pro bono representation for those applicants.

The way in which lawyers respond to the community's need for access to justice, in all its forms, is a measure of their right to be seen as members of a profession which acknowledges responsibilities that transcend the individual interests of its members. I wish you success in your Conference.