LAUNCH OF THE VICTORIAN BAR LEGAL ASSISTANCE SCHEME - MELBOURNE - 16 FEBRUARY 2001

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I am delighted to have the opportunity to participate in this announcement of a new phase of the Victorian Bar's Legal Assistance Scheme. What is involved is a revitalisation of the scheme, through the establishment of a formal relationship with the Public Interest Law Clearing House, which will manage the scheme on behalf of the Bar Council, and some alteration of the scheme in certain other respects in the interests of increased effectiveness.

The Victorian Bar, like other Australian bars, has a long history of provision of legal services either without fee, or at reduced fees, in needy and meritorious cases. This *pro bono* work of members of the Bar, in its turn, is one of a number of methods by which various institutions associated with the legal profession provide a much-needed form of legal assistance. Government funds for legal aid are limited, and the need for legal services has always had to be met, to a significant extent, by the provision of voluntary services by members of the profession. In his opening address at the First National *Pro Bono*

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Conference held in Canberra in August last year, the Commonwealth Attorney-General said:

> "Having been a lawyer for over 30 years and having portfolio responsibility for the provision of legal assistance services funded by the Commonwealth, I have some idea of the massive contribution of voluntary services that lawyers make in the public interest. And I have seen the difference that contribution makes first hand. Yet it has always seemed to me that this contribution goes largely unrecognised by the general public and the profession itself".

At that national conference, detailed information concerning the extent of services was examined. It is important that such material should be known to the public.

In the past, information about work done by barristers without fee, or at substantially reduced fees, has largely remained confidential. But there are some famous cases which, at least within the profession, were known to have been undertaken by counsel on that basis. Perhaps the best known recent example was the case of *Mabo* which was conducted by the late Ron Castan QC and those assisting him, over a period of several years, without fee.

In the early 90's David Habersberger QC, when Chairman of the Victorian Bar, recognised the need to establish a more formal scheme

for dealing, on an organised footing, with the large number of requests for legal assistance that were being received from various quarters, including courts and community organisations, as well as the general public.

The scheme established by the Bar Council was operating alongside another scheme, managed by the Public Interest Law Clearing House. The arrangements under which the Public Interest Law Clearing House will now participate in the management of the Bar scheme will provide an important opportunity for rationalisation.

I warmly congratulate the Victorian Bar, and the Public Interest Law Clearing House on this initiative, and on their continuing contribution to the important and difficult task of making access to justice not only a catch-phrase but a practical reality for many people.

It is, I think, important not only that the public should be aware of the nature and extent of the voluntary services provided by members of the profession, and of the facilities that are available in that regard, but also of the significance this work has for the courts in the administration of justice.

Although the difference between the common law adversarial system and what is sometimes called the inquisitorial system, of justice, is sometimes oversimplified, and exaggerated, and the modern trend towards some convergence between the two systems is often

overlooked, there are particular features of the common law system which make the availability of legal aid or unpaid legal services, in cases of genuine merit and need, vital.

Criminal and civil cases in the common law system are conducted in the form of a contest between opposing parties. A criminal trial is usually fought as a contest between the government and a citizen. A civil case is conducted as a contest between two citizens, personal or corporate, or between a citizen and the government. In both civil and criminal cases, it is the parties and their lawyers who decide the issues to be tried, and the evidence and arguments to be put before the court.

At a criminal trial, the guilt or innocence of the accused will be decided by a judge, or by a jury instructed by a judge, who will have taken no part in the investigation of the crime, or in the decision to prosecute the accused, or in the framing of the charge, or in the selection of the evidence to be led. The investigating and prosecuting authorities, on the one hand, and the judiciary, on the other, are institutionally and functionally separate. This separation lies at the heart of the difference between the adversarial system and the inquisitorial system.

In a civil case, the outcome will be determined by a judge who has taken no part in framing the issues, or choosing the witnesses, or selecting the arguments to be advanced on either side.

Our system has two primary objectives. One is to maintain the independence and impartiality of the judge. This is of special importance when one of the parties to the contest is the government; but it is always important that the judge should be, and should obviously be, independent of the parties and their witnesses. The second objective of the system is related to the theory that in ordinary cases a just outcome is most likely to result from a decision made after listening to powerful arguments advanced on either side. The theory underlying the second objective is contestable. But the importance of the first objective is, I believe, beyond serious question.

A moment's reflection will make it apparent that a system like that can only hope to achieve a reasonable degree of justice if the parties to the contest are ably represented. It is very difficult for a court to ensure that the adversarial system works fairly in a case when a litigant is unrepresented. And the efficient conduct of the overall business of the courts depends to a large extent upon the assistance they receive from professional legal representatives of the parties. Cases conducted without adequate legal representation place heavy and disproportionate demands upon the limited resources available to the courts.

Whether the operation of the system is considered at the level of arriving at a just outcome in an individual case, or at the broader level of an efficient and fair allocation of time and resources, the result is the same. Our method of administering justice depends upon the assumption that most litigants will be professionally represented.

Some litigants, of course, choose to be unrepresented. There is nothing much that can be done about that. And the assistance that can be made available to litigants who want to be represented, but cannot afford it, whether by way of government funded legal aid, or by way of *pro bono* services of the kind provided by the Victorian Bar, has to be rationed. Even so, it is vital that the optimum use of available voluntary services be made. This can only be done by a well-managed and efficient scheme, conducted so as to provide the maximum benefit to the public, and taking the maximum advantage of the willingness of practitioners to co-operate. This work is vital for the proper administration of justice.

The sense of individual and collective professional responsibility which motivates all those associated with the scheme must be applauded. I congratulate them all, and wish them success.