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"Pro bono work, legal aid and access to justice: some matters of history"

The Hon Susan Kiefel AC
Chief Justice of Australia[1]

The phrase '*pro bono publico*' means 'for the public good'. In connection with the courts and the legal profession, it reflects the conception of the provision of philanthropic legal services as a means of ensuring access to justice for disadvantaged members of society. A similar concern explains legal aid, which in Australia refers to government schemes which employ lawyers for the provision of legal services to such persons.

Consistently with an access to justice movement experienced in Western societies in the 1970s, it may be said that in Australia there were two events which marked a 'watershed' in the history of attempts in Australia to increase equality before the law. The first was the establishment of the Australian Legal Aid Office in July 1973; the second was the publication in 1975 by the Commissioner for Law and Poverty, Ronald Sackville, of the discussion paper 'Legal Aid in Australia'.[2] These events 'represented the beginning of acceptance in this country of the view

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[1] My thanks to Rebecca Lucas, Legal Research Officer at the High Court of Australia for her research.

[2] Commission of Inquiry into Poverty, *Legal Aid in Australia* (1975).

that equality of all before the law is a goal of democratic societies'.[3] Much was to come later, particularly with respect to the provision by the legal profession of pro bono assistance, but it is important to recognise that this goal is one of long standing, as history shows.

Early history of access to justice

Contemporary practices of legal aid and pro bono work are modern solutions to an ancient problem. The Roman poet Ovid once observed '*Curia pauperibus clausa est*' ('[t]he courts are [or the Senate is] closed to the poor').[4] It has been argued that an early form of legal aid is discernible in the clientele system of Ancient Rome, whereby impoverished plebians attached themselves to wealthy men of influence ('*patronus*').[5] In return for certain aid and political support, the patron assisted with difficulties encountered by plebians, including legal ones.[6] In Ancient Greece, the '*synergos*' acted as both advocate and character witness on behalf of the principal when they believed in the principal and their case.[7] Payment to the '*synergos*' was prohibited and their advocacy was seen as a civic duty.[8]

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3 Commonwealth Legal Aid Commission, *Legal Aid and Legal Need* (1980) 1.

4 Ovid, III *Amores* viii line 55.

5 Mauro Cappelletti, 'Legal Aid: Modern Themes and Variations Part One: The Emergence of a Modern Time' (1972) 24(2) *Stanford Law Review* 347, 349.

6 Wiley Online, *The Encyclopedia of Ancient History* (online) '*Legis Actio*'.

7 Anton-Hermann Chroust, 'Legal Profession in Ancient Athens' (1954) 29(3) *Notre Dame Law Review* 339, 351-2.

8 Rowena Maguire, Gail Shearer and Rachel Field, 'Reconsidering Pro Bono: A Comparative Analysis of Protocols in Australia, the United States, the United Kingdom and Singapore' (2014) 37(3) *UNSW Law Journal* 1164, 1166.

In medieval times, legal aid was a form of '*charitas*', provided by the Church and Christian men as pious work. The Christian Church teaches that one must:

> 8 Speak up for those who cannot speak for themselves,
> for the rights of all who are destitute.
>
> 9 Speak up and judge fairly;
> defend the rights of the poor and needy.[9]

The piety of the Church produced two organised forms of assistance. One was an official created by canon law who was paid by the Church to represent the poor in ecclesiastical courts (the '*advocatus pauperum deputatus et stipendiatus*').[10] The other form of assistance that emerged was the command that magistrates forgive the court fees of poor litigants and sometimes assign a private lawyer to assist gratuitously. In France, kings and lords charged their jurists to appoint counsel to cases.[11]

In England, most discussions of equality begin in 1215 with King John signing the *Magna Carta* which contained the pledge: 'To no one will we sell, to no one will we refuse or delay, right or justice'. But the story starts earlier under the reign of Henry I (1100 - 1135) when the necessary security for damages and reimbursement of expenses was mitigated for poor plaintiffs by a provision which allowed those who had not 'sufficient present security' to 'pledge their faith' to make satisfaction.[12] By the time of

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[9] Proverbs 31:8-9.

[10] Commission of Inquiry into Poverty, *Legal Aid in Australia* (1975) 4.

[11] Mauro Cappelletti, 'Legal Aid: Modern Themes and Variations Part One: The Emergence of a Modern Theme' (1972) 24(2) *Stanford Law Review* 347, 349.

[12] Selden Society, *The Publications of the Selden Society* (1893) vol 7, 14.

Henry III (1216 - 1272) it had become accepted that 'the poor should have their writs for nothing'.[13] During the reign of Edward I (1272 - 1307) a plaintiff who on account of their poverty was unable to proffer the 'pledges' required for prosecution, was permitted to sue 'upon the pledge of [their] promise only'.[14]

In 1495, a statute was passed,[15] providing that every poor person was to pay nothing for the issue of writs and that the justices were to assign to such a person counsel who were to take nothing for their services. This statute is usually regarded as the foundation of the proceedings described as being *in forma pauperis*. Yet as a judge was to observe in 1841,[16] in fact it merely confirmed the practices of the preceding common law. The courts had developed the procedure *in forma pauperis* as a means by which the poor, whose cases were regarded as having legal merit, were represented by counsel consenting to act without fee and were able to have court fees dispensed with. The statute applied to the courts of the common law, but the practice was also followed by the Court of Chancery, although it was there extended to include paupers who were defendants.[17]

In England and Scotland, this form of proceeding continued into the 20th century. Indeed, the judgment of the House of Lords in 1932 in the

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13 Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 1952) 195.

14 Francis Morgan Nichols, *Britton: The French Text Carefully Revised with an English Translation, Introduction and Notes* (Clarendon Press, 1865) 299.

15 11 Henry VII, c 12 (1495) ('An Acte to admytt such psons as are poore to sue in formi paupi').

16 Tindall CJ in *Brant v Wardle* (1841) 3 Man & G 534; 133 ER 1254, 1257.

17 G Goldsmith, *The Doctrine and Practice of Equity; Or, A Concise Outline of Proceedings in the High Court of Chancery* (Saunders & Benning, 1838) 210; A W Renton (ed), *Encyclopaedia of the Laws of England* (1898) 441 'in forma pauperis'.

landmark case of *Donoghue v Stevenson*[18] records the appellant as being a pauper and the orders made disclose that she sued '*in forma pauperis*'.[19]

Access to justice in Australia

Turning then to the position in Australia, *in forma pauperis* proceedings were instituted in the colonies although the extent to which they were undertaken is not entirely clear.[20] In a judgment of the Supreme Court of New South Wales in 1826,[21] some doubt was expressed as to whether the form of proceeding had yet been established. Chief Justice Forbes however said that if the applicant was too poor to pay for the court process, they 'shall have it gratis'. There are examples of *in forma pauperis* proceedings later in that colony and other colonial courts.[22] The procedure was regulated by legislation and rules of court in the early 20th century. Even today such proceedings remain on the statute books in some jurisdictions.[23]

There were other kinds of legal assistance which historically were provided in Australia. Under the dock brief system, legal representation was provided to an accused by a barrister appointed by the court. This occurred when the accused first came before the court by being placed in the dock,

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18 [1932] AC 562.

19 *Donoghue v Stevenson* [1932] AC 562, 623.

20 Commission of Inquiry into Poverty, *Legal Aid in Australia* (1975) 115.

21 *In the estate of Pugh* [1826] NSWSupC 36.

22 See, for example, *Eagan v Thurlow* [1846] NSWSupC 14 (2 February 1846); *Doe dem. McKillop v Lascelles* [1843] TASSupC 44 (3 December 1843); *Polack v Schumacher* (1869) 3 SALR 76 (26 April 1869). See generally, R M Stonham, 'In Forma Pauperis' (1941) 15 *Australian Law Journal* 379.

23 See, for example, *Crown Proceedings Act 1958* (Vic), s 12.

hence the name 'dock brief'.[24] In New South Wales, this system commenced in 1938.[25] In a newspaper at this time it was reported that 'a prisoner in custody could call on any barrister to defend [them] for a fee of £1/3/6'.[26] The response of the legal profession to the innovation was said to be 'gratifying'.

The dock brief practice seems to have been abandoned as more formal referral mechanisms were put in place. In 2022, former Chief Justice Murray Gleeson recalled that the first criminal trial he conducted after being at the Bar only a few weeks resulted from the referral procedure put in place by the New South Wales Bar Association to replace the dock briefs.[27]

At the Commonwealth level the first legislative provision for legal aid was enacted very shortly after Australia became a Federation. The *Judiciary Act 1903* (Cth) provided that any person who was committed for trial for an indictable offence against the laws of the Commonwealth could apply to a judge of the Supreme Court of a State for the appointment of counsel for their defence.[28] If the judge was satisfied that the person was without adequate means to provide for a defence, and it was desirable in the interests of justice that counsel should be appointed, the judge could certify this to the Attorney-General who could then make appropriate arrangements. The High Court's *Rules of Court*, made in 1910, provided for legal aid in 'proceedings by or against paupers' to the extent that they could

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24 LexisNexis, *Encyclopaedic Australian Legal Dictionary* (online) 'dock brief'.

25 J M Bennett (ed), *A History of the New South Wales Bar* (Law Book Co, 1969) 176-7.

26 'Dock Defence', *Canberra Times* (3 August 1938) 1.

27 Interview with Murray Gleeson AC GBS KC (Rosalind Dixon, Mason Conversation, University of New South Wales, 3 August 2022).

28 *Judiciary Act 1903* (Cth), s 69(3).

sue or defend without payment of court costs on proof they were not worth a certain amount.[29] Additionally, towards the end of World War II, some provision was made for legal services to members of the Forces, discharged members and their dependents.[30]

By the mid 1970s, when I came to the Bar in Queensland, barristers (and solicitors) were able to and did either charge no fee when a litigant was impecunious or would take the matter on a 'speculative' basis - an early version of 'no-win, no-pay'. Whether this was done would usually depend on the barrister's assessment of the prospects of success in the matter.

The 1970s also saw the start of a wider access to justice discourse, which I have earlier mentioned, which was conducted overseas and in Australia. The 1972 federal election was run by Gough Whitlam on a program of equality, committing to a 'drive for equality of opportunities'.[31] Next month it will be 50 years since Whitlam's Labour Government announced the establishment of the Australian Legal Aid Office ('ALAO'). At the same time, the formal establishment of both the Aboriginal Legal Service and the Australian Legal Aid Review Committee was announced, the latter body being tasked with examining all aspects of legal aid in Australia.

The role of the ALAO was then seen to be to provide a service of legal advice and assistance, including assistance in litigation, in co-operation with community organisations, referral services, existing legal

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[29] *Rules of Court* (1910) ord IIA rule 1.

[30] *Re-establishment and Employment Act 1945* (Cth), s 105(4).

[31] Gough Whitlam (Speech, Blacktown, NSW, 13 November 1972).

aid schemes and the private legal profession.[32] A number of ALAO offices were opened throughout the country and operations commenced in the States in April and May 1974. By 30 June 1975, ALAO's officers were interviewing some 10,000 clients a month.[33]

While the ALAO was finding its feet, Ronald Sackville was working on his report 'Legal Aid in Australia', which came to be known as the 'Sackville Report'. It helped shape the discussion around legal aid throughout the late 1970s and early 1980s. The Sackville Report is recognised for its significant contribution to the understanding of the need for legal aid programs. It advocated for an understanding of legal aid as not only having a role in providing access to legal resources but 'a vital role to play in removing inequalities within traditional legal processes and identifying areas in need of reform'.[34]

In 1976, a National Legal Aid Scheme resulted from a meeting of the Standing Council of Attorneys-General. The arrangements between the Commonwealth, the States and the private legal profession were regarded as something of a compromise.[35] From its establishment until the early 1990s, the mixed model system operating under the National Legal System has been described as adopting a 'mutual interest approach'. It was an approach predicated on high levels of reciprocity, agreement and

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32 Attorney-General's Directive of 6 September 1973, quoted in J P Harkins, 'Federal Legal Aid in Australia' (Paper, International Colloquium on Legal Aid and Delivery of Legal Services, 1976) 7 [3.5].

33 National Legal Aid Advisory Committee, *Legal Aid for the Australian Community* (1990) 27.

34 Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, October 1975) 3.

35 Don Fleming, 'Some reflections on 30 years of a National Aid Scheme' (Speech, National Access to Justice and Pro Bono Conference 2006, 11-12 August 2006).

co-operation between government and private actors.[36] The National Legal Aid Advisory Committee described it as a 'partnership which ha[d] evolved between Federal, State and Territory governments, legal aid commissions, community legal centres and the private legal profession'.[37]

Recent history

But, by the 1990s, 'the foundations of the mutual interest approach were crumbling'.[38] Up to 1997, the legal aid commissions of each State and Territory were responsible for determining their own budget priorities and expenditure. The Commonwealth participated in this arrangement through the Commonwealth Attorney-General's representation on the board of the commissions. In 1996, the Commonwealth withdrew from this arrangement and, from 1997, the commissions were restricted to allocating Commonwealth funding to matters arising under Commonwealth laws. Commonwealth funding for legal aid then declined. 1996 also saw the ALAO close.

In the 1990s, programs for the provision of pro bono services by the profession began to develop. That rise is inextricably linked with the changes that occurred to the provision of legal aid and Commonwealth funding. The website of the Australian Pro Bono Centre lists as some of the key events in this period: the Law Society of New South Wales developing

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[36] See, for example, Don Fleming, *The Purchaser-Supplier Approach in Legal Aid* (March 2004) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la6-rr03_aj6/p2.html>.

[37] National Legal Aid Advisory Committee, *Legal Aid for the Australian Community* (AGPS, 1990) 109.

[38] Don Fleming, 'Some reflections on 30 years of a National Aid Scheme' (Speech, National Access to Justice and Pro Bono Conference 2006, 11-12 August 2006).

its first pro bono policy; the Public Interest Law Clearing House (PILCH) (now Justice Connect) being established in New South Wales, followed later by the establishment of PILCH Victoria; the New South Wales Bar Legal Assistance Referral Scheme being established, as well as a Pro Bono Secretariat (Volunteers) in Victoria; and a New South Wales law firm appointing, for the first time, a pro bono co-ordinator. In 2000, the First National Pro Bono Conference was held.

Time does not permit a survey of all that has happened in relation to the provision of pro bono work since then. Today, law firms, barristers, inhouse lawyers and teams are signatories to the National Pro Bono Target which is administered and promoted by the Australian Pro Bono Centre. They agree to use their best efforts to provide a certain number of hours of pro bono legal services per lawyer per year and they report annually to the Centre on their performance. For the 2022 financial year, the Centre recorded that the equivalent of 359 lawyers working full-time for one year, had been reported, or an average of 37 pro bono hours per lawyer.

Conclusion

In 2003, Ronald Sackville delivered an address in which he remarked that:

> The expression 'access to justice' is ubiquitous in legal and political discourse. Its attractiveness as a catchphrase owes much to the powerful linguistic messages it conveys. These messages

include both an *ideal* and an implicit *promise* that the ideal is attainable.[39]

The pursuit of access to justice has a long history. I have at the outset identified two watershed moments in its modern Australian history: the establishment of the ALAO and the Sackville Report. They occurred in a period which, in Australia, marked an awakening of interest in effective access to justice. But they identify neither the beginning nor the end of the access to justice story. The expression 'access to justice' is firmly entrenched in socio-political and legal discourse.

The implicit *promise* that Ronald Sackville observed is that the law and our legal system are capable of achieving the goal of access to justice. Views about how access to justice may best be achieved may have changed over time, but there can be no doubt that this goal continues to be worth pursuing.

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[39] Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2(1) *New Zealand Journal of Public and International Law* 85, 86 (emphasis added).