Honouring Pro Bono Lawyering

The Victorian Bar
Pro Bono Committee

Reception in honour of the *pro bono* commitments of members of the Victorian Bar

Melbourne, Victoria
2 April 2009.

The Hon. Michael Kirby AC CMB

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SAVED FROM A MISCARRIAGE OF JUSTICE

One of the worst misfortunes that can befall a person in judicial office is to be an instrument of the miscarriage of justice. I know, because it happened to me. It is something I have to live with.

In 2006, a bundle of appeal books landed on the desk of my chambers in Canberra. They concerned an appeal by Andrew Mallard. Special leave having been granted, Mr. Mallard was challenging orders of the Court of Appeal of Western Australia. Those orders had rejected his petition for the exercise of the royal prerogative of mercy, in respect of his conviction of murder more than a decade earlier.

Very thorough submissions were filed on Mr. Mallard's behalf by *pro bono* Counsel, Mr. Malcolm McCusker AO QC and Dr. James Edelman, members of the Western Australian Bar. As I read the papers, aspects of the case seemed

*Justice of the High Court of Australia (1996-2009)

familiar. And then my attention was drawn to the fact that a decade earlier, Mr. Mallard had sought, and failed to obtain, special leave to appeal from an earlier panel in the High Court. That application had followed his original conviction, and the dismissal of an appeal to the Full Court of the Supreme Court of Western Australia, sitting as a Court of Criminal Appeal.

Discreetly, the record and the submissions did not disclose the names of the Justices who had participated in the earlier refusal of special leave. However, one can look this up in the occasional schedule of special leave dispositions, published in the *Commonwealth Law Reports*. I hastened to do this. It revealed that the Bench, constituted for the earlier hearing, had comprised Justices Toohey, McHugh and myself.

Justice Toohey was a very fine jurist and by no means formalistic in criminal appeals to the High Court. Justice McHugh, from his years in legal practice, was well experienced in the mistakes that can sometimes occur in criminal trials. I myself, as President of the New South Wales Court of Appeal, had participated for a decade in the Court of Criminal Appeal of that State. As a Bench, the three Justices were by no means hostile to criminal applications. I had the Registrar draw to the notice of both parties in the later appeal, my earlier involvement, lest they would prefer that I did not participate. Neither side raised any objection.

As I read the thorough submissions prepared on behalf of Mr. Mallard, I felt a growing concern that the result of his original trial had evidenced a serious wrong to him and that, not only was a miscarriage of justice demonstrated but that, quite possibly, he was actually innocent of the murder of which he had been convicted. I then called for the earlier special leave books and the transcript of the argument in 1997. These disclosed that the principal ground of objection to the conviction was quite different from that advanced a decade later. Originally, the principal point argued had been that the Full Court had

erred in confirming the decision of the trial judge to exclude evidence that Mr. Mallard had submitted to a polygraph (lie detector) test which had suggested that his protestations of innocence were truthful. This was always a difficult argument to advance, given much authority in Australia and evidence indicating the defective character of the technology of polygraphs.

In the second application, and the appeal then pending to the High Court, the arguments advanced for Mr. Mallard were quite different. In part they addressed the alleged failure of the prosecution to disclose to the then representatives of Mr. Mallard, evidence that might tend to show his innocence. But most importantly, by a painstaking scrutiny of the evidence at the trial, *pro bono* counsel indicated the high unlikelihood (bordering on impossibility) that the participation of Mr. Mallard in the homicide could be reconciled with objective evidence concerning his proved whereabouts on the day of the homicide. That evidence involved proof of his presence in a police watchhouse earlier in the afternoon and in a taxi, later in the afternoon, in a part of Perth distant from the scene of the killing. Putting the factual ingredients of the evidence together, an extremely strong case of miscarriage of justice was built up.

In the end, the Justices of the High Court unanimously allowed Mr. Mallard's appeal and set aside his conviction[1]. Later other evidence suggested that the homicide might have been linked to a different prisoner who had since died. An enquiry by the Hon. John Dunford QC found Mr. Mallard to have been wrongly convicted. In the result, he had been imprisoned for more than a decade for a crime he had not committed. Although monetary compensation is being paid, nothing could restore the prolonged loss of liberty which Mr. Mallard had undergone.

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1 *Mallard v. The Queen* (2005) 224 CLR 125

Judges and lawyers have to accommodate themselves to the high responsibilities they carry in contested litigation. Human justice is necessarily imperfect. Mistakes occur. By hard work and serious-mindedness, we endeavour to reduce the incidence of error. The mistakes of lawyers are serious enough. But the ultimate responsibility for error rests on the shoulders of the judges whose orders determine the outcomes and, as in Mr. Mallard's case, affect individual liberty.

But for the outstanding work of Mr. McCusker and Dr. Edelman, and the excellent brief prepared for them by Clayton Utz, solicitors, in Perth, Mr. Mallard would still be serving his sentence for a murder he did not commit. I leave it to you to imagine my feelings about the disposition of the appeal. Could I, by more careful reading of the first application, have prevented Mr. Mallard's loss of liberty for more than ten years? If I had enjoyed more assistance earlier, could the wrong done to Mr. Mallard have been prevented? Most troublingly, what of the other cases where such *pro bono* assistance was not forthcoming, where wrongs have been done, by mistake, in civil and criminal litigation and never discovered? How can we improve our system of justice to prevent such wrongs in the first place, rather than relying on later, exceptional, proceedings to undo error?

I will always be grateful to the advocates and lawyers who gave relief against the mistake of the first determination of Mr. Mallard's case before me. But the error of that determination proves not only the importance of vigilance and good legal representation. It demonstrates the need for systemic improvement to the system in which judges and lawyers must ever be alert.

SOME VICTORIAN CASES

Often, in the High Court, one would not know, as a judge, whether parties were represented by *pro bono* lawyers or by advocates on a paying brief. The names of the lawyers on the face of the appeal book will not necessarily disclose this. Sometimes, however, the circumstances of the case, and

apparent impecuniosity of parties will suggest that lawyers are appearing without fee, or for a lesser fee, on the basis that, doing so, will enhance the prospects of ensuring the attainment of justice.

In *Roach v. Electoral Commissioner*[2], it seemed pretty plain that Ms. Roach had secured legal representation from members of the Victorian Bar, acting *pro bono*. The solicitors on the record were Allens, Arthur Robinson of Melbourne. Counsel for Ms. Roach were Mr. Ron Merkel QC, Ms. Fiona Forsyth and Dr. Kris Walker. Ms. Roach was an Aboriginal prisoner in a Victorian prison, who challenged provisions of federal law that purported to disqualify her from voting in the then pending federal election of November 2007. She brought her challenge as a test case, not only on her own behalf, but for other prisoners who were deprived of the civic privilege (and duty) to vote. Her contention was that she was imprisoned as punishment for the crime of which she had been convicted, but that it was no part of the law's purpose to add to her punishment by depriving her of basic civil rights, such as the right to vote.

In the end, a majority of the High Court (Chief Justice Gleeson, Justices Gummow Crennan and myself; Justices Hayne and Heydon dissenting) upheld Mr. Roach's challenge in part. The majority concluded that a 2006 federal statute, depriving all federal prisoners of the right to vote, was unconstitutional. In effect, the decision of the Court restored the position that had obtained before the amending Act. Prisoners serving sentences of three years or less were thus entitled to vote. Although this did not assure the right to vote to Ms. Roach (whose sentence was for greater than three years) part of the principle for which her *pro bono* lawyers had contended, was upheld.

Without such legal representation, it is next to impossible to believe that this important principle of our Constitution would have been determined. Finding a prisoner with the will and the means to challenge the federal law would have

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[2] *Roach v. Electoral Commissioner* (2007) 233 CLR 162.

been next to impossible. What was required was an act of principle on the part of legal practitioners, on behalf of a stigmatised and unpopular minority, prisoners. It is such minorities that are sometimes disadvantaged in an electoral democracy. This is where courts become important to uphold basic rights and the principle of civic equality. I pay tribute to the *pro bono* lawyers for Ms. Roach. When, earlier today, I visited the Public Interest Law Clearing House (PILCH) in Melbourne, I spoke with some of the lawyers who had worked on the *Roach* case. Ms. Roach has now been released from prison. She is continuing post-graduate studies. The work of PILCH in big and small cases, helps to make the rule of law a reality for such people such as Ms. Roach.

There are many other cases that come before the High Court with the aid of *pro bono* lawyers. In 2008, the proceedings in *MZXOT v. Minister for Immigration*[3] raised an important constitutional question as to whether, in defence of its constitutional function, the High Court had an implied power to remit proceedings in its original jurisdiction to federal or state courts, beyond the provision for such remittal appearing in federal law.

In the end, the constitutional question did not have to be determined. But its importance was undoubted. I pay tribute to Debbie Mortimer SC, L.G. De Ferrari and C.P. Young, *pro bono* counsel in that case. They were instructed by Victorian Legal Aid. Many of the refugee cases that have reached the High Court (probably most) have been litigated with the aid of *pro bono* lawyers. I acknowledge and thank them, in every State and Territory, for their advocacy and hard work.

Supporting a refugee applicant, with a viable legal argument, is a precious professional service. In most cases, the matter would never get near a court without such assistance. Otherwise, it would generally have to be dealt with

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[3] (2008) 233 CLR 601

on the papers by a panel of two High Court justices, unaided by earlier expert legal scrutiny and advocacy. The refugee decisions of the last decade have not only been important for the individual justice of the cases involved. They have also been significant for clarifying the refugee and administrative law applicable in Australian courts. I express thanks for the assistance of the many legal practitioners who have accepted briefs in cases of this kind. The Victorian Bar has been foremost in representing indigent refugee applicants. I thank all those who have done so.

SYSTEMIC WEAKNESSES

A survey of *pro bono* work, amongst Victorian barristers, conducted in 2008, indicates that, of the 150 respondents to the survey (about 9% of the Victorian Bar), 126 had performed *pro bono* duties in the preceding year. This was an increase on past returns. The mean hours devoted to such service has been between 50 and 70 hours, considerably more than the 35 hour target fixed for individual *pro bono* work of Australian barristers. Most of the work has been performed following referrals of cases by PILCH. Of those who have undertaken such briefs, 92% have declared that they have done so to assist marginalised and disadvantaged groups and because of a sense of professional duty. It is this sense that distinguishes a profession, such as the Bar, from other occupations.

In 2008, an additional service was introduced by the Victorian Bar, being the Duty Barrister Scheme. This has responded to hundreds of applications and a high proportion of them (about 50%) have been accepted as deserving of investigation.

The catastrophic bush fires in Victoria in 2009 led to a spontaneous offer by approximately 250 members of the Victorian Bar, indicating to the Bar and to PILCH, their willingness to provide *pro bono* legal services to the needy. The establishment of thirteen support centres and a Forum of *pro bono* organisations, has enhanced the efficiency of the delivery of legal services to

those in need. I pay tribute to the Victorian Bar Legal Assistance Scheme (VBLAS), supported by PILCH, and the Human Rights Law Resource Centre, which affords *pro bono* legal assistance both to local and national endeavours, and also to international activities affecting scrutiny of Australia's delivery of legal services to the needy.

I know that these outlets do not exhaust the contributions by members of the Victorian Bar. As a patron on Reprieve Australia, an organisation supporting repeal of capital punishment laws and assistance to those on death row, I know that Victorian barristers have been foremost in offering services and funds to help prisoners facing the death penalty in countries as far apart as Indonesia and the United States. I pay tribute to the members of the Victorian Bar who have taken up this initiative.

Of course, *pro bono* assistance is no substitute for proper facilities of legal aid. The decision of the High Court in *Dietrich v. The Queen*[4] assures indigent prisoners facing trial in Australia for serious criminal offences of an entitlement to be provided legal representation, to avoid a stay of the criminal proceedings. However, that principle has not yet been extended to prisoners seeking to appeal against their convictions.

As the case of Andrew Mallard demonstrates, mistakes can be made at trial that need to be corrected on appeal. There is, in my view, a further potential injustice involving the access of prisoners to the High Court, to present orally their special leave applications, where they are in custody. In some Australian jurisdictions, prisoners are not afforded the chance to attend court or to provide oral submissions by video link, as could be done with technological assistance[5]. This defect was noted by the Human Rights Committee of the

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4 (1992) 177 CLR 292.

5 *Muir v. The Queen* (2004) 78 ALJR 780.

United Nations[6]. The introduction of rules requiring such applications to be considered on the papers palliates, but does not remove, the potential inequality in the treatment of such prisoners.

We should all learn from the decision in *Roach*. Prisoners are human beings and, generally, citizens too. We do not now have legal notions of "corruption of the blood" or loss of civil rights, simply because of imprisonment[7]. Fortunately, legal representatives throughout Australia have been prepared to take test cases to the High Court and other courts. The law knows no finer hour than when it defends the rights of the marginalised and the unpopular[8].

ON BEING A JOINER

When I was a young legal practitioner, indeed before, I was always a joiner. I joined civil society organisations at university. I was elected to head student societies. As a young solicitor, I offered *pro bono* assistance to students in trouble. Many towering figures of the legal profession today were rescued from petty crimes, such as fare evasion, by my early forensic triumphs. Wild horses would not drag from me their names. But *pro bono* work entered my blood.

After my student days, I joined the New South Wales Council for Civil Liberties. As a solicitor and later at the Bar, I represented Vietnam protestors, applicants for conscientious objection from national service in the Vietnam War and Aboriginal interests. Together with Gordon Samuels QC (later my colleague in the New South Wales Court of Appeal) and Malcolm Hardwick (later a QC), I went to Walgett, in outback New South Wales, to uphold the right of Aboriginals to enter the upstairs section of the local cinema. Astonishing as it may seem today, that right was denied to them in the 1960s. With Jim Staples, I took part in an inquest that challenged the police use of firearms. Verbals

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[6] Dudco & Australia, United Nations, Human Rights Committee, Geneva, 2007 arising out of a refusal of special leave in the absence of the applicant/prisoner.

[7] Cf. *Dugan v. Daily Mirror Ltd.* (1978) 142 CLR 583.

[8] Cf. *Falbo v. United States* 320 US 549 at 561 (1944) per Murphy J.

and confessions to police came under our withering scrutiny. It was definitely no less energetic because it was *pro bono*. I gathered up and remembered the wrongs done to my clients, such as Mr. Corbishley[9]. Later, as President of the Court of Appeal, I was able to establish principles (such as due warning of a risk of increase of sentence to permit application for withdrawal of an appeal) where *pro bono* cases had taught me lessons about injustice.

Many of those who joined with me in those days in *pro bono* work for the Council for Civil Liberties in New South Wales went on to judicial appointment. In fact, it was a dangerous professional risk: *pro bono* civil liberties cases often led to judicial preferment. It was no bad thing to leaven judicial appointments in Australia with counsel who had shown their values by their professional work, not for money but for principle and for justice. Values matter in the law and on the Bench. I would not have been appointed to my various judicial offices, now concluded, if I had not been noticed in my earliest days of *pro bono* legal work for the needy.

TAKING LEAVE

There is one further reason that brings me to this occasion in Melbourne. I hope I may mention it? In the past, the tradition on the retirement of a Justice of the High Court (other than Chief Justice) has generally been that he or she simply disappears with a minimum of fuss. I see the merits of that tradition. For those who prefer it, it will always be available.

From my earliest years as a barrister, when I would come to Melbourne (generally in industrial cases), I became acquainted with the special ethos and traditions of the Victorian Bar. Here, there was the same wealth of ability as in my home Bar, in New South Wales. But there was a special characteristic. It was focus and unswerving professionalism, stregthened with courtesy.

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9 *Ex parte Corbishley: Re Locke* [1967] 2 NSWR 547 (CA).

Courtesy was not always present in the judiciary of my own State. I liked what I saw in Victoria because it accorded with my own inclinations and temperament. I applaud this particular feature of your tradition. I have endeavoured, in my own legal and judicial service, to emulate it.

One aspect of courtesy (at least as I conceive it) is to take leave when one departs. Particularly when one departs from the company of friends. So I use this occasion, and the presence of so many members of the Victorian Bar, to take your leave. I thank you for your assistance to me during my judicial years. I praise you for the strong commitment to indigenous Australians and other vulnerable minorities. I applaud the work done by PILCH and VBLAS. I honour those who have given *pro bono* assistance to persons in need. And I express the hope that judicial retirement will not mean a complete severance of the link I have come to treasure, with a Bar I have learned to respect and to appreciate.

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