WORKSHOP SESSION 1B: HUMAN RIGHTS AND PRO BONO LEGAL SERVICES

HUMAN RIGHTS AND PRO BONO LEGAL SERVICES—CONTEXT AND ISSUES

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In introducing our distinguished panel of speakers, Debbie Mortimer (Victorian Bar), Vincent Saldanha (National Director of the Legal Resources Centre, South Africa) and Cathy Scalzo (Senior Associate, Allens Arthur Robinson, Melbourne), I would like to make some comments for your consideration during this session on the important area of human rights and the provision of pro bono legal services which may help "set the scene", as well as identifying some challenges and questions.

The importance of the topic has been recognised very recently; the area of human rights formed one of the themes for papers presented at the recent High Court Centenary Conference in Canberra (8-9 October 2003). This recognition is part of a heightened awareness of and interest in the intersection of human rights and the role of pro bono legal services.

Sources of human rights in the Australian legal system

In Australia, of course, it is well known and understood that we do not have a Bill of Rights either in the Australian Constitution or in a separate constitutional document, or a Charter of Rights and Freedoms such as exists in some other countries with similar historical origins (for example, Canada).

Whilst it is beyond the scope of these introductory comments to define human rights, at the very least they include internationally recognised fundamental freedoms which arise for individuals as human beings[1], although those commonly extend in some legal systems to include particular rights which may be attached to a person having a particular status (for example, as a worker, as a consumer or as a tenant).

[1] International covenants exist with respect to many aspects of human rights in addition to civil and political rights; see, for example, the **International Covenant on Economic, Social and Cultural Rights**.

Note: This is a revised and extended version of the introductory comments made at the Conference on 20 October 2003.

In Australia, despite the absence of statutory or constitutional definition of and provision for human rights as such, there are a number of sources by which human rights are able to be defined, utilised and enforced.

Whilst Cathy Scalzo will deal with these matters in detail, the first potential source of human rights is the Constitution itself. But that document has the fundamental purpose of establishing the federation of the Australian States as the Commonwealth of Australia and the political structures associated with that federation. Furthermore, given its historical context and origins, the Australian Constitution has very limited specific references to matters which are encompassed by the concept of human rights, at least in a direct sense. By way of example, there is a limited recognition of human rights in respect of freedom of religion in the Constitution (section 117).

More commonly, protection of human rights at the constitutional level has arisen through the limitations on the Commonwealth legislative power of the Commonwealth Parliament set out in the Constitution, and the interpretation of those powers by the High Court of Australia, over the years. It is clear that human rights are capable of protection through the Constitution. For example, in cases concerning the validity of the legislation banning the Communist Party of Australia and the scope and extent of the defence power (with the associated regulation of some human rights) [2], the separation of powers between the executive, the legislature and the judiciary[3] (for example, in relation to immigration and detention matters) and rights in connection with political comment in a representative democracy[4], the judgments of the High Court all have consequences for establishment or protection of human rights. But in respect of our present constitutional arrangements, the impact for human rights arises only in the limited sense that the necessary role for the High Court of Australia in determining the Constitutional validity of legislation by reference to the Constitutional power will in some cases have implications and consequences for the definition and enforcement of particular human rights. The subject matter of the issue before the Court will, in this class of case, usually be the constitutional validity of legislation, with potential implications for an aspect of the field of human rights, not a determination or enforcement of human rights as such.

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[2] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
[3] *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1.
[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Secondly, the common law does, in some limited ways, provide for what would now be regarded as human rights: for example, the tort of false imprisonment (which does in a limited context control attempts to inhibit a person's freedom of movement).[5]

However, as a general rule there is no positive creation or establishment of a right as such by the common law. The example of the tort of false imprisonment is more an example of the general common law approach that, subject to legislation and the rules of the common law itself, any conduct is lawful, unless the law recognises that some wrong would be committed in particular circumstances and therefore provides some form of remedy to the wronged party. In addition, of course, these common law rights are not generally protected by statute and can be overridden at any time by valid legislative change. Furthermore, the common law did not attempt to limit or control many forms of conduct which would now be regarded as a breach of recognised human rights (e.g. discrimination on the ground of race in the provision of accommodation).

Thirdly, legislation of the Commonwealth and of the States and Territories can and does provide for establishment (or recognition) and enforcement of rights within the field of human rights. For example, discrimination in employment and in other areas is prohibited in all the States and Territories in Australia; Commonwealth legislation also prohibits such conduct in respect of sex, race and disability and Commonwealth legislation is proposed to provide in a similar fashion in respect of discrimination based on age. Much of this legislation relies for its Constitutional validity (and operation) in part on the external affairs power in the Constitution and international conventions adopted by Australia[6]. However, these rights are not protected by the Constitution of the Commonwealth and therefore may be amended or abolished by Parliament at any time (acknowledging, of course, that State laws also are of long-standing in this area).

It goes without saying that these various sources of law in the Australian context are not islands to themselves and each may influence the other. (Again, Cathy Scalzo will deal with this aspect in detail). A well-known example of the connection in terms of possible developments in the common law is provided by Justice Brennan in the High Court of Australia in *Mabo -v- Queensland (No 2)* [7]

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[5] The tort has been recognised by the High Court of Australia, see eg, *The Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379.

[6] See, for example, s.9(1) of the **Sex Discrimination Act** 1984 (Cth), referring to the Convention on the Elimination of All Forms of Discrimination Against Women.

[7] (1992) 175 CLR 1 at 42 per Brennan J.

> *"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."*

The extent to which the common law is or should be influenced by international law is a matter of some contention, especially where specific international treaty obligations have not been enacted in domestic law by Commonwealth legislation, but the observations of Brennan J do draw our attention to the reality that the common law can be seen as evolutionary, responding and adapting over time to changed needs and circumstances - and that international law is, at least potentially, an environmental factor relevant to changes in the common law.

The provision of pro bono legal services and human rights

So what, then, of the provision of pro bono legal assistance and human rights? There is a multiplicity of ways in which pro bono legal assistance can be of great importance in defining and enforcing human rights.

In a recent article titled "From Cause to Solution: Lessons from the Provision of Legal Services to the Homeless in the United States", Phil Lynch observed that:

> *"Finally, responding to homelessness in a human rights framework can be a powerful strategy. Human rights norms impose obligations on governments to respect, protect and fulfil fundamental rights, including the right to adequate housing, the right to health, the right to education, the right to social security and the right to liberty and security of person. The National Law Centre on Homelessness and Poverty"* [in the United States] *"uses human rights norms as an effective tool by which to measure and, to some extent, enforce the realisation of these rights."* [8]

This summation of an aspect of developments in the United States of America highlights the relevance and significance of pro bono legal services to the recognition and provision of human rights.

But, in a practical day-to-day sense, how do pro bono legal services and human rights issues interact?

Casework

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[8] *PILCH Matters* (October 2003), Public Interest Law Clearing House, Inc. (Victoria).

Often an individual or a disadvantaged group will be seeking to redress a perceived wrong in breach of the rights of that person or of the group (or members of the group). Common examples, of course, include issues in relation to detention of persons seeking refugee status, the recognition of entitlements of prisoners in respect of conduct towards them by prison authorities, ensuring that social security provisions are properly applied and the whole array of enforcement of anti-discrimination laws.

It is in areas such as these that the provision of legal services on a pro bono basis can be critical.[9] Unless services are provided on a pro bono basis, and given legal aid constraints, the persons affected might not have any effective mechanism to have their entitlements under the law recognised and enforced and they may suffer the consequences of breaches of the relevant legal provisions. This is particularly true where the alleged breach, or non-provision of an entitlement, is by an organ of the State exercising authority in the particular circumstances.

Casework matters, such as those I have been referring to, fall into two broad categories:

- first, those where it is claimed that there has been a failure by a public authority to provide a benefit in accordance with a statutory obligation, where there is no particular implication for the existence of rights or the enforcement of rights generally; the issue concerns whether a particular person has been properly dealt with according to the law;

- secondly, the class of cases which are in the nature of determining the existence and/or scope of particular rights, where the potential application of the principles involved extends beyond the circumstances of the individual or group involved in the particular case and may have precedent value elsewhere for the benefit of others. In this class of case, for example, are included cases in which challenges to the validity of detention occur in the sense that the claim being pursued is that the legislation requiring the detention is, itself, constitutionally invalid.

In each of these areas, the availability of pro bono legal services is of considerable importance in ensuring that a law is applied in accordance with its terms or to ensure that a person is not disadvantaged by the application of an invalid law.

But provision of pro bono legal services is not without an array of challenges. One of the challenges for those involved in provision of pro bono legal services is co-ordinating the often

[9] Legal aid schemes and community legal centres are of course frequently and very extensively involved in provision of assistance for clients, and in other ways, within the broad human rights fold.

disparate efforts to deal with similar circumstances, so as to put the available services to the most appropriate use. Another challenge is to determine allocation of limited available resources to the assistance of needy individuals who have meritorious claims - but which may have no substantial relevance or impact more broadly - compared to the cases which will have a "precedent" value. In practice, these issues tend to be resolved in an ad hoc way by responding to the needs of individuals.

Another dimension of these challenges is the ability for those who are suffering deprivations of their rights to even have knowledge of the rights that they have and knowledge of the means by which they may have access to those who might be able to assist.

This short-list is not intended to be exhaustive of the difficulties in the casework aspect of provision of pro bono legal services in this area.

Policy development

Casework is not the only area of potential impact of pro bono services. Another, and perhaps more controversial issue, is whether pro bono legal services should be provided where the issue is not so much the correct application of the existing law but participation in efforts to identify deficiencies in the current legal position and to pursue proposals for reform. There is, here, a distinction between on the one hand analysis and proposal for reform and legal mechanisms to achieve reform, by way of contrast, on the other hand, to advocacy for particular changes in order to achieve particular outcomes.

Despite the potential for different views on this significant question and the role of pro bono legal services in such matters, there is little doubt that pro bono legal services can be used to provide the analytical support for submissions to ensure that debates about legislative reform which can affect human rights are conducted on a proper understanding of what the current legal position is, as well as identifying the consequences, costs and benefits of particular proposed legal changes.

The future

There are undoubtedly many challenges and issues facing lawyers involved in the provision of pro bono legal services in the human rights area.

The papers which will be presented by Cathy Scalzo, Debbie Mortimer and Vincent Saldanha, and the discussion which will follow, will assist in identifying specific areas of need for provision

of pro bono legal services in the area of human rights in Australia and, by reference to experience in other jurisdictions such as South Africa, consider how those rights might be able to be pursued and enforced.