

7 Constraints on pro bono service delivery

7.1 Introduction

In the course of the general activities of the Centre and in gathering information for this Report, the following issues have been raised as factors which possibly reduce or constrain the ability of private profession lawyers to deliver pro bono legal services. Knowledge of these constraints is an important part of the landscape and the Centre and other agencies have produced resources and undertaken research and activities to address some of them.

7.2 Government responsibility to provide legal services

Governments bear the ultimate responsibility for vulnerable Australians who need access to legal advice and representation. Pro bono exists alongside the services funded by government and, in the overall scheme, provides only a small proportion of the legal services delivered to low income and socially disadvantaged people.

Pro bono is a limited resource and in areas of legal need where pro bono help is difficult to obtain - such as criminal law and family law – pro bono services are not likely to increase dramatically as many private lawyers take the view these areas should be covered by government funded legal services.

CLCs have commented on the sometimes inappropriate incursion of pro bono into areas which are properly the responsibility of government. They suggest that a stronger commitment by government to funding legal aid and CLCs would result in less cynicism in the profession and elsewhere, and encourage greater commitment to pro bono – that is, government investment in legal aid is very likely to leverage a significant contribution from the profession²⁹¹. And there is evidence to suggest that if the function and/or nature of CLCs changed significantly (for example, if the government introduced competitive tendering for CLCs or if there were changes to CLC activities, funding, clients and philosophy), a proportion of private lawyers would consider no longer volunteering at CLCs²⁹².

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291 National Association of Community Legal Centres, *Doing Justice: Acting together to make a difference*, at 15.

292 R Melville, *My Time is Not a Gift to Government: An Exploratory Study of NSW Community Legal Centre Volunteers* (University of Wollongong, 2002) at 45.

7.3 Mismatch of skills

A commonly identified barrier to pro bono is the mismatch between the skills and knowledge of pro bono lawyers and the expertise and services typically required by pro bono clients. Most lawyers have a range of generalist and generic skills that can be put to use in the interests of disadvantaged clients. However, where there is a mismatch of specific skills and/or unfamiliarity with or reluctance to address particular areas of law, training becomes necessary.

Few commercial law firms have expertise in ‘community law’ such as social security law, consumer credit law, migration law, criminal or family law. Yet these are key areas of significant unmet demand for legal assistance, particularly in rural, regional and remote areas. Given the reasonable concerns about work for which they do not have expertise and/or are unable to properly supervise, it is not surprising that firms are reluctant to take on these matters unless they have some training or there are particular schemes in place which provide training and which address professional liability issues.

In the larger firms where the potential exists for expansion of pro bono programs, this skills deficit and, in some cases, a reluctance to accept instructions in matters involving significant levels of litigation, are key reasons why pro bono services are unlikely to make any significant dent in the demand for publicly funded legal services in key areas of need.

Some firms organise training to enable lawyers to take on matters where there is a clear demand for assistance and no relevant expertise. For example, when Blake Dawson Waldron set up their pro bono program, they surveyed CLCs, Aboriginal legal services and legal aid lawyers on the gaps in legal services for disadvantaged people in the community. One identified area was apprehended violence orders (AVOs), particularly for people outside the legal aid means test. Recognising there was no skills base in AVOs within the firm, BDW set about training their own lawyers as well as lawyers from other firms, to act in AVO matters. The firm has now acted in defended AVO matters in the Local Court and appeals to the District Court in Sydney and has participated in Women’s Domestic Violence Court Assistance Schemes (WDVCAS) in local courts. Other firms that undertook training participate in WDVCAS in various local courts. Expertise developed in this area has also enabled firms to be involved in law reform work around AVOs.

Training is often conducted in partnership with legal aid bodies or CLCs. For example, another area of unmet legal need is in the area of victim compensation (VC matters). CLCs are often overwhelmed with the volume of these sometimes complex matters. To help meet the need, Marrickville CLC and Clayton Utz ran training in VC matters

CONSTRAINTS ON PRO BONO SERVICE DELIVERY

for a number of firms who now undertake these matters in-house.

There are clear benefits from this kind of cross-sector training. Apart from increasing lawyers' skill base and job satisfaction, training and information-sharing create expertise which others can call upon, and which can be used not only to assist individual clients but in law reform initiatives aimed at systemic change.

Another approach to address the skills or expertise mismatch is that adopted by QPILCH in Brisbane. QPILCH has set up 'panels' in family law, discrimination law and guardianship and administration matters (GAAT). The discrimination and GAAT panels include lawyers who will accept referrals in these areas and the family law panel has been established primarily as a point of advice for CLC lawyers who need access to family law expertise. In the case of the family law panel, QPILCH will put the CLC in touch with a panel firm who can give discrete advice to the CLC. It is then up to the firm whether it will accept a referral. This 'discrete task assistance' is a useful way to share expertise and help the CLC's disadvantaged clients.

7.4 Conflicts of interest

Firms can have legal and commercial conflicts that act as barriers to taking on particular matters on a pro bono basis. Management of these conflicts presents a challenge for firms and can mean that the firm declines to take on the work.

Conflicts of interest may be:

- legal conflicts;
- 'indirect' or 'commercial' conflicts/potential commercial conflicts;
- non-legal or non-commercial conflicts where the matter is viewed as prohibitively controversial.

The areas in which conflicts of interest are likely to arise vary according to the size and location of the legal practice but can include immigration, family law, professional negligence matters (against doctors and lawyers) and matters against banks as well as mining and insurance companies. There is also evidence that conflicts may pose a particular problem in rural, regional and remote areas where there are fewer practitioners available to take on pro bono matters.

Many firms have identified conflicts as a particular issue when asked to provide pro bono assistance in matters against government – at local, state and commonwealth levels. The Centre, in consultation with the profession, has advocated for the Federal and State governments to introduce a Conflicts Protocol (the Protocol)²⁹³ designed to minimise the perception that lawyers undertaking pro bono work against government may be prejudiced in securing government legal work.

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293 See Information paper and proposed protocol at www.nationalprobono.org.au/publications

MAPPING PRO BONO IN AUSTRALIA

In response to the Centre's submissions, most Attorneys-General formally agreed that legal service providers should, subject to avoiding direct legal conflicts, be given the same level of consideration in relation to the provision of tender bids for legal services, whether or not those lawyers have acted pro bono for clients against Government.

The Commonwealth Attorney-General had been considering implementation of the Protocol in the Office of the Legal Services Commission's review of the Legal Services Directions²⁹⁴ (the LSD) that set out the framework and requirements for the performance of Commonwealth legal services. Regrettably, the Commonwealth failed to adopt or implement the Protocol in the new LSD which came into force in April 2006. The Centre is continuing to advocate for the adoption of the Protocol as the perception of prejudice persists as a live issue for the profession.

At a State/Territory level, at least four jurisdictions have proposed action. The Victorian Department of Justice has consulted stakeholders in relation to a proposal to incorporate a form of the Protocol into the Government Legal Services Panel Contract. However at the end of 2006 no government had implemented any firm direction, policy or other instrument to address the issue²⁹⁵.

7.5 Litigation & procedure

Litigation has unique characteristics that present challenges to obtaining pro bono assistance.

The uncertainty as to size and scope

Unlike advice, transactional, drafting or training assistance, the size and scope of litigation is particularly difficult to estimate. This means that lawyers may be unwilling to consider litigation if the impact on their budgets and resources seems open-ended. This can adversely affect the management of a law firm's pro bono program as most programs are managed on the basis of a commitment by the partners to an annual pro bono budget. Open-ended liability is especially prohibitive in the case of smaller law firms and rural and regionally-based lawyers, who are already struggling to run their businesses.

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294 Made under the *Judiciary Act 1903*.

295 See report at esvc000464.wic006u.server-web.com/documents/AGprotocolResponses.doc

Lengthy litigation is prohibitive

The case of *Mallard*²⁹⁶ in WA involved over 25 days of hearing before the Criminal Court of Appeal of Western Australia and the High Court. It was the single largest pro bono case ever undertaken by Clayton Utz with their lawyers spending over 3,000 hours on the matter. The firm became involved at the Criminal Court of Appeal stage with the strong belief that the application would be successful and they could therefore accommodate the resources required. However, the application was not successful in the Court of Appeal and they then pursued a special leave application and High Court hearing before they were ultimately successful²⁹⁷. Accordingly, a lot more time was spent on this matter than was originally anticipated, restricting the firm's ability to undertake other pro bono work in WA.

It appears that there must be a strong public interest for firms to take on lengthy litigation.

Complexity

Firms with pro bono practices, CLCs and referral agencies all note the difficulty of finding pro bono assistance for complex or lengthy litigation. This is exacerbated where the matter has progressed some way into the litigation process without legal assistance, or with a fractured history of legal assistance. It is a particular problem in some contested family law matters. The resource implications of committing to these kinds of matters often make it difficult for pro bono assistance to be obtained.

Late requests for assistance

Taking on pro bono litigation within a tight timeframe can be difficult and risky. Amongst other things, there is limited time to assess merits and determine strategies and ascertain whether other relevant documents might exist. For counsel, being confronted with such matters is not unusual but without the ongoing support of a firm of solicitors it is difficult for counsel to continue to act. Also the eleventh hour factor makes it difficult for firms who have to juggle existing commitments. Even large firms have a limited capacity to act at short notice.

A report on pro bono legal services in Western Sydney highlighted the assistance that could be afforded to pro bono lawyers by the courts. One respondent suggested that courts could afford some indulgence in terms of procedure: "Don't be quite so critical if the documents aren't quite so good because the person only came in the

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296 *Mallard v The Queen* [2003] WASCA 296 and *Mallard v The Queen* [2005] HCA 68.

297 Late in the matter, \$132,000 was made available as an ex-gratia payment from the Federal Attorney-General's Department to cover counsel's fees for the High Court appeal. However the solicitors' pro bono contribution was vast and not reimbursed. Counsel also spent hundreds of pro bono hours on the matter in the Court of Appeal.

MAPPING PRO BONO IN AUSTRALIA

instant before the hearing, for example”²⁹⁸. Another lawyer surveyed for the report commented that when he takes pro bono cases in his local court, he announces that he is doing the matter on a pro bono basis in the hope that fellow practitioners and the court may afford him some leniency “... not in relation to justice but advantage in relation to time”²⁹⁹.

A Public Interest Law Clearing House (PILCH) or other referral scheme may have the capacity to do the job of sorting out the documents. However there is still the issue of ‘missing’ information such as court dates and filed documents. Current rules pertaining to access to documents from tribunal and court registries can make it difficult for referral schemes to obtain copies of these documents and previous orders. Some courts have copying and access fees and require someone to attend to make copies. Also the dependence on other parties to produce relevant documents, be they solicitors for the other side or supporters of the litigants (such as in the migration law area), can create delays and difficulties.

Professional misconduct or an adverse costs order

Under the *Legal Profession Act 2004* (NSW), the provision of legal services or lodgment of court documentation without reasonable prospects of success may constitute professional misconduct³⁰⁰.

Under recent amendments to the *Migration Act 1958* (Cth) a lawyer must not file a document commencing proceedings unless he or she certifies that the matter has a reasonable prospect of success³⁰¹. Also, a lawyer who encourages a party to commence or continue migration litigation, without giving proper consideration to whether a matter has a reasonable prospect of success, may have a personal costs order made against them for all of the costs incurred by the party for the time that the lawyer acts in the matter³⁰².

The Senate Inquiry into the amending legislation to the *Migration Act* was of the view that these provisions would provide a disincentive for lawyers to take on pro bono matters³⁰³.

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298 Gillian McAllister and Tom Altobelli, *Pro bono legal services in Western Sydney* (November 2005) University of Western Sydney and the Law and Justice Foundation of NSW at 27. Available at www.nationalprobono.org.au

299 *ibid.*

300 S.347 *Legal Profession Act 2004* (NSW).

301 S.486I *Migration Act 1958*.

302 *ibid.* s. 486E and F.

303 Legal and Constitutional Affairs Committee, *Provisions of the Migration Litigation Reform Bill 2005*, at para 3.57, viewed at www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/report/c03.htm

CONSTRAINTS ON PRO BONO SERVICE DELIVERY

Disbursement assistance

The cost of disbursements and the procedures for applying for disbursement funding can act as a barrier to various forms of pro bono activity, in particular more complex litigation in higher courts. Disbursements may include the cost of obtaining expert reports or transcripts of proceedings and the cost of counsel and interpreter fees. Some pro bono schemes have reported that the prohibitive costs of obtaining court transcripts can limit the availability or willingness of barristers, for example, to give an advice on the merits of proceeding with an appeal.

Funding schemes exist in many State jurisdictions to provide disbursement assistance to litigants in some areas of civil litigation. However, the availability of funding is limited, application for assistance can sometimes only be made after the disbursement cost has been incurred, the funds apply application fees, means and merits tests and assistance can be limited to cases involving the likelihood of recovering damages³⁰⁴. Much pro bono litigation is *not* seeking an order for damages.

Most schemes have been established as litigation lending models without any policy view to supporting pro bono litigation. The report on pro bono legal services in Western Sydney suggested that disbursement assistance will not make a significant difference to the capacity of smaller firms to take on less-complex litigation matters in local courts or tribunals³⁰⁵. None of the solicitors surveyed regularly drew on disbursement assistance schemes because the levels of disbursements incurred were not significant for the type of work they did. Several lawyers also referred to the prohibitive administrative burden of applying and accounting for the disbursement assistance³⁰⁶.

The cost of filing fees has also been identified as a constraint on providing pro bono litigation services. However, exemptions or waivers are available in respect of many court or tribunal fees, including exemption from setting down or daily hearing fees. The PILCH schemes of Victoria, Queensland and New South Wales have each produced fee waiver and exemption guides for their respective state courts and tribunals, as well as federal courts and tribunals. The resources have been developed to assist pro bono lawyers identify fee exemption and waiver provisions and to access the relevant application forms³⁰⁷.

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304 Details of the various State and Territory based disbursement assistance schemes are contained in the *Pro Bono Manual* at www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5

305 Gillian McAllister and Tom Altobelli, *Pro bono legal services in Western Sydney* (November 2005) University of Western Sydney and the Law and Justice Foundation of NSW at p 25. Available at www.nationalprobono.org.au/publications/other

306 *ibid.*

307 Links to these guides can be found at www.nationalprobono.org.au/publications/legalguide/index.html

MAPPING PRO BONO IN AUSTRALIA

Pro bono activity that needs disbursement support is a concern that the Centre intends to research further. Some of the emerging issues include:

- greater inter-professional cooperation is one way that expert report costs might be met. This is a real challenge but there may be scope for reciprocal arrangements³⁰⁸;
- the need for funds to be flexible enough to suit different needs and circumstances;
- addressing cross-jurisdictional access issues. For example, NSW-based firms would be more likely to assist pro bono clients in another jurisdiction if they could more readily access that other jurisdiction's disbursement fund (if such a fund exists).

Costs recovery

The possibility of an adverse costs order may deter litigants and their legal representatives from enforcing their rights.

A factor which may act as a disincentive to taking on pro bono matters is the lack of clarity about whether a lawyer is able to recover costs in matters that are successfully litigated. Party-party costs are awarded as an indemnity, and as such, there must be a liability to costs for the client for a costs order to be made³⁰⁹. To preserve the entitlement for recovery of such costs, and provide more of a level playing field for settlement negotiations, many pro bono lawyers include a provision in their retainer for recovery of costs, should such entitlement be obtained³¹⁰.

A recent decision of the NSW Court of Appeal in the long running matter of *Wentworth v Rogers*³¹¹ seems to endorse the position that the indemnity principle does not abrogate the use of such provisions to underpin a costs order in favour of the party who has been acted for 'pro bono' and that costs can be recovered from the client.

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308 The Centre notes that other professionals are embracing the pro bono ethic. The Australian Medical Association (NSW) Ltd maintain a database of practitioners who may be willing to volunteer their services to occasionally provide free medical opinion and reports via the NSW Law Society pro bono scheme. See, also, the not-for-profit organisation 'Architects for Peace' at www.architectsforpeace.org/ who consider that professionals within the reach of their organisation should "assist in the creation of more democratic, fair and better cities for all, wherever we are based." See also 'Architects and pro bono' in *PILCH Matters*, Issue 8, March 2006 at 4, available at www.pilch.org.au/

309 Marina Wilson, 'Preserving party-party costs in pro bono cases', in *Law Society Journal* Vol 24(9) October 2004 at 34.

310 Examples of useful costs agreements can be found in 'sample letters of engagement' in *The Australian Pro Bono Manual*, at www.nationalprobono.org.au/probonomanual/ProBono_Manual_03.htm

311 *Wentworth v Rogers* (2006) NSWCA 145 (7 June 2006).

CONSTRAINTS ON PRO BONO SERVICE DELIVERY

As Basten JA noted³¹²:

“Whether the term ‘pro bono’ now extends to situations where the lawyer, satisfied that the client has a meritorious claim, nevertheless enters a speculative fee arrangement to charge a usual fee, taking some risk of non-payment, is a question of fact to be determined in the context of the particular case”.

The 2004 Senate Report suggested that the ineffectiveness of costs orders in pro bono matters may indirectly increase the cost of litigation³¹³. The report noted that costs orders may be a means of sanctioning certain conduct, for example, where a litigant has unduly wasted time or raised irrelevant issues. However, in pro bono matters where a lawyer is not paid, a cost order may be less effective as a sanction.

The 2004 Senate Report also referred to anecdotal information that suggested that some lawyers use delaying tactics against clients who are represented on a pro bono basis. Order 80 Rule 9 of the Federal Court Rules, however, allows a solicitor providing pro bono services to recover amounts where a costs order is made. There does not appear to be any similar court rule in other jurisdictions. The 2004 Senate Report recommended that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in circumstances similar to those where litigants pay for legal representation³¹⁴. The Government response to this recommendation noted that this is a matter for the courts³¹⁵.

A number of pro bono organisations are advocating legislative reform in the area of costs in public interest and pro bono litigation. QPILCH, in a research paper titled *Costs in public interest proceedings in Queensland*, recommends that consideration of the public interest and whether the person has been represented pro bono be mandatory considerations when a costs order is sought³¹⁶. The paper also suggests that Commonwealth and State governments should consider developing a policy where, in public interest and other pro bono matters against the Commonwealth and State agencies, they might not seek to enforce costs orders in certain matters even when these are awarded by the courts³¹⁷. PILCH (Vic) is also advocating the adoption of guidelines for costs orders in public interest litigation to develop an environment more conducive to undertaking public interest casework. One of the

.....
312 *ibid* at para 132.

313 2004 Senate Report, www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/contents.htm at para 9.74.

314 2004 Senate Report, Recommendation 52, at www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/contents.htm

315 Government Response to the Senate Legal and Constitutional References Committee inquiry report *Legal Aid and Access to Justice 2004*, at 29, available at www.ag.gov.au/agd/www/Agdhome.nsf/Page/RWP2A2EFAF08AB7C28BCA2571060007E514

316 See www.qpilch.org.au/publications

317 *ibid* para 5.4.3.

MAPPING PRO BONO IN AUSTRALIA

arguments in favour of a non-punitive approach to costs in test case litigation is the element of general public benefit in the clarification of the law, including the benefit of certainty.

Costs are a particular barrier in test-case litigation. In the Tampa litigation in 2001, the Commonwealth government sought costs against the parties represented by pro bono lawyers. In its judgment, the Full Federal Court noted that the invaluable pro bono assistance representation ensured that the proceedings and the important questions to which they gave rise, were pursued and resolved with expedition and efficiency and so no order for costs was made – but the risk remains³¹⁸.

In the spirit of pro bono, the Centre notes in its *Australian Pro Bono Manual*³¹⁹ that firms should consider the benefits of allocating monies received from successful pro bono litigation to their firm's pro bono budgets. Alternatively they might use them to meet disbursements in other pro bono cases or donate the monies recovered to a charity so as to remove any doubt that the matter is being conducted on a pro bono, not a 'no win no fee', basis.

Unmet legal need

In 1998, the Senate Inquiry into the Australian Legal Aid System: Third Report concluded that an indicator of how well the legal aid system was working was the number of litigants who appear before the courts without legal advice or representation. Evidence at that time suggested that these numbers were increasing.

In the *2004 Senate Report*, the committee said,

*Various reports and research projects, including those by the Australian Law Reform Commission and the Family Law Council, have established a strong link between cuts to legal aid funding and the rising incidence of self-representation, particularly in the Family Court. While some individuals may choose not to have a lawyer because, for example, they perceive they will have a tactical advantage, evidence to this inquiry suggests that reduced legal aid funding is directly responsible for the lack of legal representation for many others.*³²⁰

It now seems beyond doubt that the decrease (in real terms) of funding to legal aid and CLCs has been a factor which has led to a rise in unrepresented litigants³²¹.

Legal Aid periodically reviews guidelines and means tests and recently the NSW Legal Aid Commission announced small increases in rates for lawyers in family,

318 Black CJ and French J in *Ruddock v Vadarlis* (No.2) 115 FCR 229 at para [28].

319 *The Australian Pro Bono Manual*, edited by Jill Anderson, NPBRC and Victoria Law Foundation, 2005 at 66.

320 See www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/b01.htm

321 Australian Law Reform Commission Report *Managing Justice* and *2004 Senate Report* accessed at www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/b01.htm

CONSTRAINTS ON PRO BONO SERVICE DELIVERY

criminal and civil matters and a significant increase in the means test threshold³²². The CLC reaction to tight funding has sometimes meant that they are forced to restrict the areas in which they can assist clients and to do more strategic policy work (at the expense of representing individual clients³²³). This puts pressure on pro bono to do more than complement publicly funded services.

7.6 Community service and pro bono legal services

The recent interest in corporate social responsibility has seen the development of community service programs by many corporate law firms. Community service programs may include activities such as supporting children's literacy programs and student mentoring, getting involved in a working bee at a community centre or lending a hand at a soup kitchen at a welfare organisation. One of the stated rationales of these programs is that community service programs facilitate participation in philanthropic work by the large number of firm employees who are not lawyers.

Whether the existence of both a community service and a pro bono legal assistance program does, or will, play out in a competition for lawyers' time and expertise, and result in a reduction of capacity to undertake legal work, has not been conclusively tested. However, it is clear that there is some tension and debate about how the two are being increasingly conflated. The possible constraint for pro bono legal service delivery is that a firm's resources and pro bono budget may be diverted towards community service projects, often involving no legal skills, when there is clearly increasing demand for legal assistance to help with unmet legal need³²⁴.

7.7 Rural, regional and remote pro bono

The relative lack of access to legal services for disadvantaged people in regional, rural and remote (RRR) areas is generally well-accepted³²⁵. According to the most recent ABS data, 79% of all solicitor practices are located in capital cities, with

322 Base rate for criminal and family law matters went from \$130 to \$140 an hour effective from 1 August 2006. Means test financial eligibility thresholds have risen 40% this year.

323 Sources: CLC Budget Submission to 2006/7; Submissions to NSW CLC Review.

324 Anne Cregan, 'As a law firm, how do you help?' originally published in *Living Ethics* (Autumn 2006, Issue 63), St James Ethics Centre, available at www.nationalprobono.org.au/publications/other.html

325 For recent reports and research into the relative lack of services for rural Australians see, for example, Tony Vinson, *Community adversity and resilience: the distribution of social disadvantage in Victoria and New South Wales and the mediating role of social cohesion* (The Ignatius Centre for Social Policy and Research, March 2004); Senate Legal and Constitutional References Committee Report *Inquiry into Legal Aid and Access to Justice* (June 2004) 113-136 and references to submissions available at www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/contents.htm (viewed April 2006); see also Victorian Parliament Law Reform Committee *Review of Legal Services in Rural and Regional Victoria* (May 2001); see also Council of Social Services of New South Wales, *Counting the Cost: What Future for Human Services in NSW* (October 2004) available at www.ncoss.org.au/bookshelf/rural/submissions/counting_the_cost.pdf; see also submissions to the Joint Commonwealth/NSW Review of Community Legal Service Funding Program, and in particular submissions by the Council of Social Services of New South Wales (NCOSS) and the Regional Rural and Remote Network of the Combined Community Legal Centre Group (Inc) NSW.

MAPPING PRO BONO IN AUSTRALIA

capital city practices averaging higher returns per lawyer³²⁶. Lawyers working in RRR areas face particular challenges in delivering legal services to their clients, including geographical isolation and limited access to resources and services. There are also difficulties with inflated costs and economies of scale associated with running a (usually) small practice, as well as conflicts of interest and confidentiality issues. There is evidence that many smaller private legal practices are finding conditions harder as a result of economic difficulties in rural areas generally, and as a result of the ‘tort-reforms’ and resultant restrictions on an important traditional area of practice³²⁷.

Rural firm capacity to do pro bono work

There is increasing evidence that the number of lawyers in RRR areas is either static or falling, adding pressure on those remaining (generally older) lawyers to do more pro bono work. But many rural firms, like other small firms, are already providing significant pro bono legal services and have limited capacity to provide more³²⁸. Private law firms in remoter areas may also be less able to afford to provide pro bono services because of insufficient regular, profitable work to supplement their pro bono work. As mentioned above, conflicts of interest are also more likely to occur in small practices and costs and disbursements are likely to be higher for rural pro bono clients, especially travel and telephone costs, so it is not surprising that some professional organisations resist or deflect the proposition that RRR lawyers should do more pro bono work.

RRR CLCs

RRR community legal centres (CLCs) face additional barriers when trying to address the unmet needs of their communities. For example, RRR CLCs:

- usually service much larger geographical areas, often with far fewer resources and fewer staff than metropolitan CLCs;
- often don’t have the advantage of being able to refer clients to local legal aid offices or other specialist CLCs;
- face particular problems relating to recruiting and retaining experienced staff;
- may face difficulties managing resource allocations which do not adequately cover the additional costs of running outreach programs; and

326 ABS Legal Practices Survey 2001-2002 at 8.

327 See various submissions to the Senate Inquiry into Legal Aid and Access to Justice at www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/index.htm (viewed April 2006); see also Gillian McAllister and Tom Altobelli, *Pro bono legal services in Western Sydney* (UWS & LJF November 2005), available at www.nationalprobono.org.au/publications/other.html (viewed April 2006).

328 M Gawler, ‘Pro Bono in the Suburbs and Country’, Paper given at the First National Pro Bono Conference, August 2000, cited in Victorian Parliament Law Reform Committee, *Review of Legal Services in Regional and Rural Victoria*, May 2001 at 273.

CONSTRAINTS ON PRO BONO SERVICE DELIVERY

- have greater difficulties than metropolitan CLCs incorporating volunteer assistance from private lawyers and law students into their service delivery models.

It has been suggested that the pro bono output of many RRR private lawyers is more likely to involve direct work with community organisations, schools and churches (as well as direct client work) than working in partnership with CLCs³²⁹. RRR CLCs also indicate that even where there may be a sizeable local profession available as volunteers, or to whom CLCs could refer clients, there is sometimes little capacity or expertise in community law – for example, in social security or discrimination law. There is also an apparent unwillingness and/or lack of economic viability for local solicitors to do legal aid work. These are all unsurprising when practical barriers, as well as a higher likelihood of conflicts of interest in comparatively small RRR communities, are taken into account.

Lack of lawyers

There is a general shortage of lawyers in RRR areas. This takes a variety of forms.

- Lack of lawyers with particular expertise and knowledge in areas such as migration law, social security discrimination law, and family law³³⁰.
- Limited numbers of private lawyers in RRR areas willing to undertake legal aid work, due to restrictions imposed by Legal Aid Commissions (eg. preferred supplier arrangements)³³¹ and the departure of private practitioners from pro bono work generally³³², attributable in some cases to the financial pressures of providing pro bono work³³³.
- A shortage of RRR lawyers generally, leading to problems such as conflicts of interest, lack of privacy and compromised confidentiality³³⁴, RRR lawyers tend to practise as sole practitioners or in small practices and are significantly more overtasked in pro bono matters than their capital city counterparts³³⁵.
- Lack of non-RRR lawyers able and/or willing to undertake pro bono matters in RRR areas even where within traveling distance. This hesitation extends to the placing of secondments in regional areas.

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329 See Glenn W Ferguson, President of the Queensland Law Society in *Proctor* (April 2005), at 2–3.

330 Submission to Senate Inquiry from CLCs; see *2004 Senate Report*, Ch 6.

331 As exists in Legal Aid Queensland (see QAILS, sub 73).

332 Submission to Senate Inquiry from CLC Association WA, sub 93.

333 *2004 Senate Report*, Ch 6.

334 *ibid.*

335 As mentioned above, RRR lawyers do 227% more pro bono work than their capital city counterparts (ABS, *Legal Practices, Australia, 2001-2002*, 8667.0, 25 June 2003 in Clayton Utz, sub 43).

MAPPING PRO BONO IN AUSTRALIA

- CLCs and private law firms encounter ongoing staffing issues both in recruiting and retaining experienced staff on the low wages offered, and simply in the small ‘pool’ of volunteer lawyers and law students from which to draw³³⁶.

Some regional areas straddle two states and thus demand a certain level of cross-border knowledge from lawyers who must be eligible to practise in multiple jurisdictions.

Technology as a constraint or opportunity

While generally viewed as a cost effective tool to promote access to information and networks, technology can sometimes be a constraint where the infrastructure for pro bono delivery using technology is simply not in place. For example, RRR clients often have limited telephone and Internet access. The sole telephone in remote communities is often in the general store, which offers very little privacy. Some clients, especially Indigenous clients, hesitate to use telephone helplines or other electronic resources, either for technical reasons or because they are perceived as impersonal or threatening.

These issues have been put forward to explain why the Commonwealth Government’s Regional Law Hotline failed to fulfil its aims³³⁷. But even where clients have access to and are comfortable with facilities such as the Internet, there are concerns that without face to face contact, it is difficult to assess their understanding and to follow up their decisions.

Technological ‘solutions’ must be handled carefully to ensure they are developed to effectively meet demand. With telephone advice lines, a good use may be to assist people in police custody over the weekend. The rationale is that in these circumstances, telephone advice is better than no advice.

7.8 Limited resources and criteria

Pro bono is a limited resource and the ability of any lawyer to assist at a particular point of time is contingent on many factors including expertise, conflicts, pro bono budgets, capacity and individual firm policy restrictions. Any or all of the above constraints, however, change from time to time. For example, while a firm’s litigation team may on a given day not have capacity to undertake a litigious pro bono matter, if a team’s large commercial matter settles, the firm may find itself with capacity. This unpredictability may be difficult for clients or referring organisations to accommodate.

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336 2004 Senate Report, Ch 6.

337 *ibid.*

CONSTRAINTS ON PRO BONO SERVICE DELIVERY

Some programs and schemes limit the area of law in which they will provide pro bono assistance, and others are restricted to matters that are in the ‘public interest’. While the public interest criteria facilitates assistance for matters that may have a broader public benefit, from the client perspective it can make it difficult to obtain pro bono assistance in matters that have no apparent impact beyond the importance to an individual client. From the pro bono lawyer’s perspective, the expectation to provide pro bono services may be, in some circumstances, unrealistic. In some cases, this expectation combined with the sentiment that government should be making a greater investment in publicly funded services, can lead to some cynicism in the profession that government is renegeing on its responsibilities to provide access to justice to disadvantaged people.

7.9 Consumer confusion about pathways to services

Reports from CLCs and individuals indicate that multiple entry points into the pro bono system, different guidelines for eligibility and particular areas of legal expertise within a law firm can make it difficult for those seeking assistance to easily find legal help. Clients may need to be persistent and may have to tell, and retell, their stories to a range of different people and service providers before they find a source of assistance. Requiring consumers to go through the legal aid application process and be rejected before they become eligible for pro bono assistance, while understandable, can be frustrating for consumers. The ‘referral merry-go-round’ or ‘referral fatigue’ is an increasingly noted phenomenon for consumers, some of whom may drop out of the system altogether³³⁸.

Ideally, pro bono schemes need to be well informed about what other pro bono providers are doing and be prepared to tell people openly that they have no legal remedy or that there may be no legal aid or pro bono service that can help them. Clearly, better coordination, simpler guidelines and better information flow between service providers, including government funded legal service providers, can assist.

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338 See Christine Coumarelos, Zhigang Wei, Albert Z. Zhou, *Justice Made to Measure, NSW Legal Needs Survey in Disadvantaged Areas* (March 2006), available at www.lawfoundation.net.au, “The value of ensuring that referral to legal services by non-legal workers is appropriate and efficient is highlighted by recent overseas studies which demonstrate that individuals typically experience ‘referral fatigue’ and give up trying to resolve legal problems if they are referred from adviser to adviser without receiving useful advice quickly (Genn 1999; Pleasence et al. 2004b). The use of non-legal professionals to signpost legal problems requires a simple, effective referral system, just as efficient, appropriate referral is required from generalist legal service providers to more specialist legal services.”

8 Ways forward

8.1 Introduction

This chapter makes some concluding observations about the key contours of the pro bono landscape and raises important issues and strategies for optimising pro bono service delivery. These are premised on recognition of the particular role for pro bono services in complementing, not replacing, publicly funded legal services.

Despite the absence of comprehensive data about pro bono, a situation which itself needs rectifying, we know that there is potential to build capacity within the profession to deliver better-targeted services to clients most in need of legal assistance. And we know that there are numerous and innovative ways of providing these services, particularly through partnerships between legal practices and community based and legal aid organisations.

It is also clear that there are barriers to the delivery of pro bono services that need to be addressed if pro bono is to optimise its role in the access to justice sector.

8.2 Client-focused pro bono

One of the key principles articulated in the *Task Force Report* is that the design, organisation and provision of pro bono legal services should be driven by client need³³⁹. Put another way, provision of pro bono services should not be driven by what lawyers are prepared to offer. Flowing from this is the need to identify client needs and to recruit and equip lawyers with the necessary skills and expertise to provide appropriate services.

Clients' unmet legal needs vary according to state and region, population and demographics. Those most aware of unmet legal need are local community organisations, particularly community legal centres and legal aid commissions. Community organisations may themselves have important unmet legal needs.

There are examples where the profession has come together to provide significant pro bono support for people whose legal needs are visible and for whom publicly-funded services are not readily available – for example, the substantial pro bono advocacy and representation provided to asylum seekers and assistance to homeless people through the Homeless Persons' Legal services across Australia.

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339 See *Task Force Report* at 12.

Pro bono providers now have access to mounting empirical evidence about pathways to justice for disadvantaged people, and about the critical role non-legal services play in traversing those paths³⁴⁰. The evidence suggests that better coordination and integration of legal and non-legal services have the potential to provide improved access, increased efficiency, enhanced effectiveness, reduced administrative duplication and potential long-term cost savings³⁴¹. In particular, research in this area concludes that increased coordination among legal and non-legal services is likely to be beneficial for disadvantaged groups including those with a chronic illness or disability and for Indigenous Australians, noting that these groups tend to have multiple legal and non-legal needs³⁴².

Firms in particular are encouraged to be strategic about how they develop their pro bono programs and direct their limited resources. This is likely to involve more than simply becoming a member of a pro bono clearing house. *The Australian Pro Bono Manual* contains information on identifying needs and sources of work³⁴³. It describes the main ways in which the legal needs of people who cannot afford private legal services are met in Australia, cites some of the research reports and suggests different ways of sourcing pro bono work.

The Centre will continue to work with legal aid bodies, CLCs, ILOs, referral schemes, clearing houses, government and the legal profession to better identify areas of client need where it would be most beneficial for the profession to focus its pro bono effort.

8.3 Working with other service providers

Pro bono practice exists alongside the work of Legal Aid Commissions, CLCs, ILOs and other government-funded legal services. It also works alongside the ‘no win-no fee’ legal practices that provide services for people who would otherwise not have access to justice. Pro bono must continue to develop in a way that is complementary to the activities of these primary service deliverers.

Where pro bono involves representation in litigation or in a duty solicitor service, it is important to work with the court or tribunal concerned. Courts are usually grateful for pro bono representation, particularly when a person would otherwise be self-represented. Greater dialogue with a court or tribunal may lead to better organised pro bono, making it easier for practitioners to participate.

Pro bono providers almost universally take the view that legal assistance will not

340 Christine Coumarelos, Zhigang Wei, Albert Z Zhou, *Justice Made to Measure, NSW Legal Needs Survey in Disadvantaged Areas* (March 2006), available at www.lawfoundation.net.au/

341 *ibid* at 225.

342 *ibid* at 222-225.

343 *The Australian Pro Bono Manual* – Chapter 1.6.

MAPPING PRO BONO IN AUSTRALIA

be provided if it is available from a government-funded legal service but there are areas of law where publicly funded assistance is inadequate to meet demand. Also, some lawyers and firms take the view that there are core areas of government responsibility, such as family law, where government should do more to make legal services available. In these circumstances, broader based pro bono initiatives may not be effective and this highlights the need for better dialogue and coordination between government-funded legal services, pro bono providers and referral schemes at a local, state and national level.

Some of the most successful pro bono activities involve partnerships between firms and community agencies, CLCs, university law schools and referral schemes. The Homeless Persons Legal services³⁴⁴, partnerships between referral services, law firms and community organisations, are good examples. Another is the partnership between Mission Australia, the Salvation Army and Freehills that has run the Shopfront Youth Legal Centre in Darlinghurst, Sydney since 1993. There are many others referred to in this Report and described in the Centre's *Working together* and RRR papers. In the latter, the Centre explored partnership arrangements between capital city based firms and regional CLCs. These have largely been successful and provide a model that could be adopted for future relationships.

Service providers should work more closely together and avoid duplication. For example, nearly 60% of PILCH (Vic) referrals come from not-for-profit organisations with public interest aims and objectives and many are seeking similar kinds of advice. PILCH (Vic) has resolved to implement an ongoing program of training sessions to be run collectively for these organisations, rather than deliver one-on-one advices.

There is also scope for pro bono providers to work more collaboratively with publicly funded legal service providers to assist disadvantaged people. For example, civil lawyers in legal aid offices in NSW assisted a severely disabled man gain access to a property owned by his mother and in which he had been left only a life interest. The client's disabilities were such that he would soon need alternative accommodation, health and home care services. Legal aid negotiated a favourable settlement for the client so that the house was transferred to him. The private law firm then assisted the same client, on a pro bono basis, in relation to a loan and mortgage transfer and obtained an exemption on the stamp duty³⁴⁵.

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344 See 3.6 for details.

345 Legal Aid News, March 2006, Issue 2, available at www.legalaid.nsw.gov.au/asp/index.asp?pgid=364, viewed April 2006.

8.4 Better coordination of pro bono service delivery

The sections above refer to the ideal of legal and non-legal service providers working together towards an integrated and coordinated approach to justice. Implicit in this ideal is a commitment to working efficiently and avoiding duplication and to ensuring that appropriate quality assurance mechanisms are in place³⁴⁶.

Players in the justice sector are sensibly looking at ways of streamlining the many avenues of access to services. Projects such as the Cooperative Legal Service Delivery Model in NSW noted above [see 4.3] are good examples of how legal service providers, including pro bono lawyers, can effectively and efficiently work together. The Victorian Attorney-General's Community Law Partnership Scheme [see 6.1] also exemplifies how pro bono lawyers and the publicly-funded legal assistance sector can work together in a more coordinated and collaborative way.

Coordination of the delivery of pro bono services has improved in some ways and in some jurisdictions, through clearing houses, referral schemes, pro bono coordinators at firms and a greater awareness in the community sector of the availability of pro bono services. But for legal consumers, the array of available services can be confusing. And it is not only the end-users of pro bono legal services who are confused. There is room for better coordination of pro bono service delivery in general, and in particular for improving pro bono referrals, communications and resource sharing amongst pro bono providers.

Legal aid bodies, CLCs and ILOs are sometimes bewildered by the variety of pro bono referral schemes. They prefer to use 'local knowledge' or contacts rather than go through what they regard as the complicated application processes required by some formal pro bono referral schemes.

However, the historically reactive and ad hoc nature of pro bono service delivery has resulted in an array of schemes, programs and services. Some efforts have been made to address this, for example the three referral schemes in Victoria co-ordinated by PILCH (Vic), have adopted identical application forms and are jointly managed and housed. The three pro bono referral schemes in NSW have occasional 'coordination meetings' but each has quite a separate focus. QPILCH is also exploring options to coordinate one scheme that represents the interests of the Queensland Bar, the Queensland Law Society and its own QPILCH members.

One figure that may help put referral schemes into context is that in the 2004-2005 financial year the total number of referrals from all the professional association and PILCH referral schemes was just over 1000. During the same period, five firms with

³⁴⁶ Pleasence, P, Buck, A, Balmer, N, O'Grady, A, Genn, H & Smith M, *Causes of action: civil law and social justice*, Stationery Office, Norwich, 2004, as noted in Coumarelos, C, Wei, Z & Zhou, AH, 2006, *Justice made to measure: NSW legal needs survey in disadvantaged areas* (Law and Justice Foundation of NSW, Sydney 2006).

MAPPING PRO BONO IN AUSTRALIA

structured pro bono programs handled over 2100 matters. The Centre recognises that the importance of quantitative output can be easily overstated and that it is often the quality of service delivery, and the unquantifiable saved and ‘avoided’ costs of providing assistance in both casework and other kinds of assistance that is significant. However these figures illustrate the point that there are many referral pathways for pro bono. Some of the 2100 matters handled by the five firms may have originated through referral schemes but many will have come directly via the outreach efforts of a firm’s pro bono coordinator or directly from a community legal centre or other community organisation.

PILCHs operate on limited budgets, provide differing levels of support for pro bono activity and the numbers of referrals to firms differ markedly from state to state. The broad support from the legal profession in Victoria that PILCH (Vic) enjoys has allowed it to provide ‘one stop shopping’ for pro bono legal services in Victoria. This has significant administrative benefits by facilitating easy referral to all schemes. The numbers of inquiries to, and referrals from, PILCH (Vic) continue to rise from year to year.

From a client perspective, PILCH (Vic)’s single pathway avoids confusion and ‘the referral roundabout’ by enabling staff to readily direct clients to the appropriate scheme and while this model may not fit all jurisdictions, better coordination of service delivery ought to be an objective in each state and territory. It requires broad acceptance of better coordination models as a worthwhile goal and then active support from the existing referral schemes, legal professional bodies and government.

Successes such as the Homeless Persons Legal services that now exist in four states require considerable planning and coordination and are well-supported by private law firms. Even so, there is scope for these and other clinic-based pro bono services to more effectively share resources and optimise time and cost benefits.

The Centre has noted that some court Management Plans are recommending pro bono referral schemes as a solution to the increasing number of self-represented litigants appearing in court. However, the number of referrals made through these schemes is low and has been falling. Anecdotally, some firms have complained about inappropriate referrals, perhaps because some Registrars are tasked with placing matters but have little experience or knowledge about the type of work a firm has expertise to undertake. And the rules of some court schemes can make it difficult for a firm to cease to act once a matter has been referred. It seems that in many cases the same pro bono providers, most notably barristers who have placed themselves on various court scheme pro bono registers, are frequently being called upon, with the result that their goodwill and availability are tested.

Some of these schemes have now been operating for a number of years (the Federal Court scheme has operated since 1998) and it may be useful to review their operation to identify ways in which the courts can make more – and more effective – referrals. The Centre believes that independent evaluations or reviews of existing court-based pro bono schemes should be undertaken before any further schemes are implemented³⁴⁷.

Another area where coordination may make a difference is through the use of web-based tools, particularly ‘matching’ services. Some are listed in the Report. They provide a highly convenient method for individuals and organisations to post pro bono opportunities and for providers to respond. With Internet use continuing to rise and the volunteering sector in the community predicted by some to increase significantly in the next 10 years, these online resources are likely to play a larger role in coordinating connections between clients and providers.

Many larger firms have significantly increased their commitment to pro bono and have expanded their pro bono programs. Putting adequate resources into the coordination of their various activities has been essential for this to be achieved. It is clear that having a designated pro bono coordinator at a firm (and preferably a written policy that has the broad support of the partnership) makes a considerable difference to firms output.

8.5 Collecting better data

The absence of comprehensive and publicly available information about how much pro bono is undertaken, how it is delivered, who does it and who receives it, has already been noted. Better tracking, recording and sharing of information and data would be helpful to all participants in the access to justice sector. This is a responsibility that needs to be shared across the profession.

Better data will allow the profession to assess whether their resources are being used efficiently and effectively, and whether their pro bono output is meeting its goals and complying with any policy or budget. Keeping records and data about pro bono activities may also be a requirement to provide evidence of the type, range and quantity of pro bono work undertaken for certain legal contracts (such as tenders). Information about measuring and recording pro bono activity can be found in the *Australian Pro Bono Manual*³⁴⁸.

Better information will undoubtedly help identify areas to which greater legal aid services should be directed and provide a perspective on where it would

347 See comments reflected in AIJA Report, *Forum on Self-Represented Litigants* (2004), available at www.aija.org.au/online/SRLForumReport.pdf at 19.

348 See www.nationalprobono.org.au/probonomanual/ProBono_Manual_01_d.htm#13

MAPPING PRO BONO IN AUSTRALIA

be most appropriate to support an increase in the provision of pro bono services. It is anticipated that the Centre's national survey of the profession will provide useful information which can be used to assist the profession in planning service delivery.

Many firms understandably do not want details of their pro bono work published broadly: some consider their pro bono output as part of their role as professionals, and do not see the need to publicise it. Others however, publish annual reports about their pro bono and community service activity. These reports contain information on the scope and variety of their pro bono programs and provide useful descriptive and qualitative information for emerging pro bono practices.

8.6 Sharing information

As the amount of structured pro bono has increased, so have the pro bono networks of those involved in the provision of services to the disadvantaged. We need to find ways to more effectively share the resources and valuable information across these networks.

There have now been three national pro bono conferences, each of which resulted in publications recording ideas and issues relating to pro bono service delivery³⁴⁹. Regular meetings now take place between state and territory PILCHs who all have websites and publish newsletters. Pro bono coordinators are developing their own information networks and the Centre's website and e-newsletter provide accessible communication channels through which information is being shared.

Some states have formalised their approach to sharing information and expertise. For example, in Victoria, the Victoria Law Foundation provides secretariat support for regular meetings of Victorian and national pro bono coordinators. New South Wales-based pro bono coordinators also organise regular meetings. Both groups use these meetings to discuss operational issues and problems and as an opportunity for other stakeholders to consult on pro bono issues in general.

The Centre trialed *probono.net*, an on-line tool developed in the USA, specifically for information sharing in the pro bono community but it has not had substantial uptake by the profession. It may be that local knowledge and face-to-face networks are, at this stage, an effective way to keep informed or simply that having to use a password to access a website is too great a barrier. It may also be a symptom of the relatively small Australian pro bono community.

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349 *For the Public Good*, Christopher Arup and Kathy Laster (eds), Federation Press 2001; *Transforming Access to Justice*, National Pro Bono Resource Centre 2005; Selected papers from *National Access to Justice and Pro Bono Conference 2006* available at NPBR website.

The Northern Territory Law Society Public Purposes Trust has supported two pro bono and legal aid conferences in Darwin. These usefully bring together the NT access to justice service providers to identify unmet need and to plan responses.

8.7 Building capacity

Building the capacity for the profession to undertake pro bono is one of the Centre's key tasks. This involves encouraging and supporting a greater number of legal professionals to fulfil their responsibility to provide pro bono legal services and includes a focus on the involvement of non-legal professionals. It also requires that barriers to pro bono be addressed.

Capacity building involves encouraging pro bono activity with law students and academics, government lawyers and in-house corporate lawyers. It also involves training lawyers in the areas of law and practice where the unmet legal need is great, and where pro bono can make an impact.

It appears that some firms and lawyers do a lot more pro bono work than others. The burden of providing services should be shared across the whole profession. For certain issues, such as asylum seekers, a broad response has been forthcoming. Generally however, the day to day burden tends to be carried by a few lawyers and a few firms and from time to time they reach saturation point. The Centre believes that this pressure could be reduced through a greater contribution from all lawyers, but particularly those in some of the larger and mid-tier firms and those in-house with government or corporations.

There is scope to extend and enhance pro bono services through more organised and structured programs, more efficient referrals and coordinated referral schemes, cooperative partnerships, training, mentoring and developing systems for sharing expertise. However, capacity to undertake additional in-house pro bono in smaller solicitor practices, especially in rural areas, is unlikely. There are also other areas of the legal profession that are close to capacity in terms of providing further pro bono services.

Training and skills

A commonly identified barrier to pro bono is the mismatch between the skills and knowledge of pro bono lawyers and the expertise and services typically required by pro bono clients. The *Australian Pro Bono Manual* outlines responses to this problem.

Firstly the matter may be less serious than supposed. Lawyers have a range of generalist and generic skills that can be adapted and built upon to provide useful assistance to disadvantaged clients. Similarly, lawyers can work from their own skill

MAPPING PRO BONO IN AUSTRALIA

base to assist with meeting community need. For example, lawyers can provide important transactional assistance to community organisations in areas such as tax, contract, corporate governance, employment and intellectual property.

Secondly, there are some areas where it is relatively easy for lawyers to acquire skills and knowledge through research, training or supervised practice. CLCs have expertise in welfare rights, consumer credit and tenancy. The training opportunities provided by, for example, Homeless Persons' Legal services across Australia are another good example of how skills and knowledge transfer can be used to build capacity. The following examples illustrate how pro bono lawyers, with training from CLC or legal aid lawyers with expertise in the relevant areas of law, can provide assistance for pro bono clients:

- banking and finance lawyers have been trained to prepare financial statements for child support applications;
- trained private lawyers are rostered to assist women with domestic violence applications in local/county courts;
- corporate lawyers have been trained in drafting affidavits for interim orders in family law child contact matters³⁵⁰, preparing wills for disadvantaged clients³⁵¹ and assisting cancer patients early access to superannuation benefits³⁵²;
- training has been provided to assist clients with victim compensation matters.

Recently in Sydney, LACNSW has opened its in-house training courses for pro bono solicitors. Conversely, some pro bono firms have provided training for community sector workers in areas such as trade practices and consumer protection, intellectual property as well as corporate governance training for not-for-profit organisations.

Thirdly, there are models of pro bono practice that involve complementary partnerships between pro bono lawyers with particular skills and community legal sector or legal aid staff with different skills. For example, lawyers can provide research support or case mentoring to a solicitor based in a CLC or a partnership may involve co-counselling arrangements. There may be scope for these opportunities to be credited towards lawyers' mandatory continuing legal education obligations.

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350 See the Family Law Affidavit Project, at www.lawsociety.com.au

351 Note in particular Blake Dawson Waldron's 'Wills Project', Pro Bono Annual Report 2004–2005.

352 See Baker&Mackenzie's work with the Peter MacCallum Cancer Centre at www.justiceprobono2006.com.au/abstractpapers/Jennifer%20McVicar%20cancerpatients.pdf#search=%22baker%20mackenzie%20cancer%20patients%22

Law schools

The Centre is working with the Council of Australian Law Deans (CALD) with a view to encouraging a long term pro bono ethos in law students (see 2.5). In particular, the Centre has sponsored the development of the Pro Bono Students Australia (PBSA) pilot program with the University of Western Sydney (UWS). The PBSA model has a student-led management aspect and it is conceivable that this model could be expanded and supported by a central coordination resource.

There is scope for more law schools to provide students with greater access to organised pro bono activities or clinical education programs. The Centre believes there are opportunities to roll-out the PBSA program in some law schools, particularly as much of the ground work has now been done.

The Centre is aware of considerable enthusiasm for improving links between universities and CLCs. CLCs point to scope for assistance with advice work and to assistance from academics (with expertise in areas such as human rights or employment law) in running workshops for not-for-profit organisations.

Looking at US law schools that have recommended the adoption of pro bono policies³⁵³, it is clear that pro bono culture and indeed legal professionalism can be promoted in Australian law schools in ways other than clinical legal education initiatives. To this end, the Centre has recently commenced formal dialogue with the CALD to focus on student and faculty pro bono. The Centre is interested in participating in any discussion or policy initiatives that systematically encourage legal professionalism at the earliest stages of lawyers' careers.

Corporate and government lawyers

In-house corporate and government lawyers are a significant part of the profession, as much as 25% of all legal practitioners. While many corporations have active community service programs, often through community partnerships and/or Foundations which support charitable causes, few Australian corporate legal departments have become involved in pro bono legal work. Some notable exceptions are the National Australia Bank, Tabcorp and the Victorian Transport Accident Commission. They are members of PILCH (Vic), which has also recently recruited other corporations as members. The United States practice of corporate law firms assisting the in-house counsel of their corporate clients to develop pro bono projects is relatively under-

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 353 Based on its 1999 report *Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities*, the American Association of Law Schools recommended that law schools adopt a policy with 6 components: an annual expectation, universality, beyond teaching and institutional service, institutional support similar to research support, autonomy and annual reporting. see www.aals.org/pro++bono/report.html viewed April 2006.

MAPPING PRO BONO IN AUSTRALIA

developed in Australia, and there is capacity to develop it further³⁵⁴.

There is also scope for governments to proactively support pro bono service delivery by the lawyers they employ. The Centre has encouraged Attorneys-General and their Departments across Australia to consider developing pro bono policies to cover their agencies and staff. The Centre's *Information Paper on Government Lawyers and Pro Bono*, while broadly supported, has not yet translated into any agency-auspiced pro bono initiatives nor any policy developments beyond encouraging their lawyers to volunteer at CLCs, an activity many government lawyers already undertake.

The barriers such as statutory restrictions on government lawyer practice areas³⁵⁵ and practising certificates, conflicts of interest and professional indemnity insurance for all in-house lawyers are not, in the Centre's view, problems of a magnitude or complexity sufficient to warrant the relative lack of support for more proactive pro bono legal service initiatives by the corporate and government sector.

Inter-professional cooperation

Finding funds to pay for the costs of experts in litigation matters, such as the costs of medical or environmental reports, is a perennial problem in pro bono service delivery but there have been some local developments. The Environmental Defender's Office (EDO) has developed an Expert Register of scientific and technical experts willing to help the EDO on a pro bono basis in public interest environmental matters³⁵⁶. Many CLCs and firms keep their own informal registers of experts. Not surprisingly, there is some reluctance for professionals to publicise their willingness to provide reports on a pro bono basis.

QPILCH has recently commenced coordination of a panel of psychiatrists who are willing to provide free services on public interest legal matters and further work could be done in all states and territories through direct approaches to professionals and professional associations at a local level. The *Task Force Report* provides some guidance on strategies in this area³⁵⁷.

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354 For example, in the USA, lawyers and paralegals from MacDonaldis Corporation have partnered with lawyers from Baker & Mackenzie to assess loan applications for predatory lending practices. See www.corporateprobono.org/ for more information on corporate pro bono in the USA.

355 For example, the *Judiciary Act* 1903 (Cth) prescribes the nature of work that may be undertaken and the category of clients who can be represented by Australian Government Solicitor lawyers.

356 See www.edo.org.au/edonsw/site/science_expert.php

357 See *Task Force Report* at 17–18.

8.8 Voluntary ‘aspirational’ pro bono targets

*There are many reasons for [pro bono service], apart from the common decency of helping those in need. Much has been given to our profession; it seems right to give something back — indeed, it is an ethical obligation. If we are a profession committed to justice, then we should want to participate in making justice accessible. Finally, pro bono service almost always turns out to be a matter of great satisfaction in a profession that has its share of pain and tedium.*³⁵⁸

The American Bar Association adopted Model Rule 6.1 in 1983, quantifying an aspirational pro bono goal. Model Rule 6.1 states that “every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year”³⁵⁹.

In Australia, four separate inquiries³⁶⁰ have recommended the inclusion of aspirational targets in professional association rules or codes of conduct. Aspirational targets are voluntary and the Centre suggests that they should be seen as a formal statement of principle about the profession’s values, not a regulatory burden. They provide a clear statement of how seriously the profession considers its responsibility to do pro bono work.

The Centre has announced the introduction of an aspirational pro bono target (the Target)³⁶¹ of 35 hours³⁶² per lawyer per year, commencing 1 January 2007. The principal aim of the Target is to raise the profile of pro bono work across the profession by providing a benchmark for pro bono legal work and confirming the shared professional responsibility of lawyers to further access to justice.

International experience has shown that aspirational targets have helped to significantly increase the volume of pro bono work and that they have challenged lawyers to be more innovative in their approach to pro bono work³⁶³.

358 Jerome J Shestack, former President American Bar Association, in California Bar Journal (1998) discussing the introduction of the Association’s voluntary pro bono target, at calbar.ca.gov/calbar/2cbj/98jan/98jan-22.htm

359 Adoption of the ABA Model Rule 6.1 in 1983 was preceded by considerable discussions about lawyers’ professional responsibility to assist disadvantaged people, since at least 1963. See the historical timeline of the development of the Rule at www.abanet.org/legalservices/probono/stateethicsrules.html#appendix_b

360 See 8.8, above.

361 For detailed information about the Target see www.nationalprobono.org.au/target/

362 This figure is based on consultations with the profession, and informed by data from the Centre’s 2006 national survey.

363 See, for example, the positive effect of introducing and reporting on targets in some USA states: at www.abanet.org/legalservices/probono/reportingguide.html

8.9 Beyond the casework model

The traditional model of pro bono legal assistance involves a lawyer advising or representing a client as part of their ordinary legal practice, but not charging the client for the services. While there is undeniably a need for this kind of assistance, increasing attention is being given to other kinds of legal assistance including professional development, training, research and mentoring as well as IT and publication assistance to community organisations. Such ‘multi-tiered’ relationships and partnerships provide opportunities and benefits for both the recipients of the assistance and the lawyers involved.

Some CLC lawyers, especially those in regional, rural and remote areas, report the benefits of informal mentoring they receive when they develop a relationship with larger corporate law firms. Having the opportunity to talk through issues or matters in areas of law unfamiliar to community lawyers and, conversely, having corporate lawyers apply their expertise to community law practice, has clear benefits to all. Co-counselling arrangements where a pro bono firm and a CLC work collaboratively on a matter have similar benefits. The CLC does the groundwork including merits assessment, client liaison and any campaigning work while the firm assists with preparing documents, witness statements and general litigation processes.

Some firms have developed a relationship with a community group or charity that provides opportunities for non-legal volunteering and for non-legal staff at the firm to donate money through a ‘workplace giving’ program³⁶⁴. These initiatives provide an opportunity for all employees of a firm to be involved in activities that ‘give back’ to their community.

Discrete task assistance

Lawyers routinely undertake limited or discrete legal tasks for clients, for example, undertaking research on a particular cause of action but not providing representation, or assisting a client with a divorce application but not with a property settlement. These are sometimes referred to as ‘unbundled legal services’.

There has been a concern that this discrete task assistance may raise liability issues but there seems no reason why liability would be enhanced simply because the legal assistance is provided pro bono. Differences of opinion between client and lawyer about the scope of assistance being offered, difficulties of communication between lawyers and clients and restrictions on services available are neither novel, nor unique to pro bono. The essential element is that there is a clear understanding of, and agreement to, the limited scope of assistance being offered and provided.

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364 For example, Mallesons Stephen Jaques ‘Mallesons in the Community’ program at www.mallesons.com/community/5502397W.htm

By clearly defining and providing training in discrete areas of law or time limited projects in which lawyers can deliver pro bono legal services, discrete task assistance provides a good opportunity for some consumers to get some legal assistance, as opposed to none at all³⁶⁵.

Law reform and community legal education

Law reform research and submission writing are tasks that are well suited to pro bono activity as they draw on the considerable research capacity that exists in law firms, can be done in-house and are often not urgent. Submissions that address a systemic issue or injustice have the potential to benefit a broad range of people, including those who have poor access to legal services in rural areas.

Law reform work typically involves the preparation of a submission to a Minister, government agency or inquiry for, or in partnership with, a community agency. Examples where pro bono lawyers have assisted community organisations in this way include submissions on the impact of the *Vagrancy Act 1966* (Vic) on people experiencing homelessness; on social status discrimination under the *Equal Opportunity Act 1995* (Vic); on women and the right to adequate housing; legal capacity; and on the feasibility of establishing a Homeless Persons' Court. In addition, several larger law firms with pro bono practices have made submissions to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice advocating, in their own right, for increased government support for publicly funded legal services³⁶⁶.

To effectively harness pro bono lawyer involvement in law reform initiatives, the tasks need to be made clear. Thus, rather than asking a firm to write an entire submission, a firm can be asked to assist with discrete questions or issues, background and library research, even proof-reading.

Pro bono legal assistance may also include providing community legal education, or assisting a community organisation with one of its community legal education initiatives. Some firms have assisted CLCs with funding applications for community-based projects, including the development of community legal education resources.

Community legal education can take a variety of forms. As with law reform activities, firms may undertake such work either alone or in partnership with another firm or community organisation. It can include seminars or the preparation of standard materials designed to advise sectors of the community about the effect of the law

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365 See G Renouf, J Anderson and J Lovric, 'Pro bono opportunity in discrete task assistance', in (2003) 41(6) *NSW Law Society Journal*.

366 See www.aph.gov.au/senate/committee/legcon_ctte/legalaidjustice/report/contents.htm

MAPPING PRO BONO IN AUSTRALIA

in particular areas. For example, legal academics and lawyers working for private firms contribute pro bono to legal publications such as the state based editions of *The Law Handbook*, a plain English guide to the law.

8.10 Researching and addressing constraints

An analysis of some of the constraints on pro bono practice is contained in Chapter 7 of this Report. These issues require further research to ascertain the extent to which they restrict or restrain the ability of lawyers to provide pro bono services and to suggest what might be done to overcome them. For example, the issue of disbursements and the development of a model disbursement fund which addresses cross-jurisdictional issues requires further research. The Centre continues to work on these issues.

Other constraints are well known and could be addressed with government support. Others require more direct support from courts and might include:

- fostering a ‘green light’ approach in the court system that will facilitate pro bono representation by paying for reasonable disbursements (with recovery by a disbursements fund in appropriate cases) or by waiving certain disbursements such as copy costs;
- funding interpreters and translation services for pro bono matters as well as making court transcripts available to pro bono parties (and possibly self-represented litigants to help them access pro bono assistance);
- affording referral schemes and pro bono lawyers some indulgence in terms of procedure and access to filed documents – especially in circumstances where a lawyer has been engaged moments before a court appearance.

8.11 Role of government

Pro bono legal service is a relatively small player in the access to justice sector. The main player is the government whose *primary* role in this sector is to adequately fund legal aid, CLCs, and other government-funded legal services. Its *secondary* role is to encourage and support the legal profession to provide pro bono legal services.

The Federal Government and more recently all the State and Territory governments, have committed financial support for the Centre until 2009. The Victorian Government has taken a number of initiatives to encourage and support the legal profession in Victoria to provide pro bono legal services. Specific examples are:

- the introduction (*Legal Profession Act, 2004*) of a new class of practising certificate issued without charge for practitioners engaged as volunteers at a CLC;
- support for the Pro Bono Secondment Scheme pilot, started in 2002,

under which lawyers from private practice were seconded to public legal service providers in Victoria. This successful scheme provided the incentive for some firms to start a pro bono practice. It has now been renamed the Attorney-General's Community Law Partnerships Scheme and is coordinated by the Victorian Federation of Community Legal Centres (Victoria);

- the Victorian Department of Justice's Government Legal Services Contract scheme, introduced in 2003, under which panel law firms commit a percentage of the amount of fees generated from government legal work to 'approved cause' pro bono activity in order to be selected onto the Panel.

These initiatives have made a significant difference and other governments are encouraged to examine them with a view to considering introducing similar schemes.

Government role in addressing barriers

There are a number of barriers that can be addressed through government initiatives and/or legislative reform. For example, government could:

- implement the Centre's Conflicts Protocol³⁶⁷ to minimise the perception that lawyers undertaking pro bono work against government may be prejudiced in securing or retaining government legal work;
- consider when introducing legislative amendments that affect court processes whether they might impact on the willingness of lawyers to act in pro bono matters, particularly public interest test cases. Legislative amendments, such as those made to the *Migration Act*, which require lawyers *before a matter is initiated*, to certify that it has reasonable prospects of success, allow the Court to penalise lawyers where it finds a matter has been initiated or run without such prospects of success. This can have a chilling effect on pro bono by deterring lawyers from assisting disadvantaged people to pursue their rights.

Government has a key role in managing the administration of the court system. It could play a role in assisting self-represented litigants by providing funding for court-sponsored legal advice, for example, by rostered government lawyers or court-appointed counsel paid out of the justice budget³⁶⁸. It could also remove court fees for matters undertaken on a pro bono basis when clients could not otherwise

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367 See Chapter 7.4.

368 See Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System in WA, Recommendation 208, available at www.lrc.justice.wa.gov.au/RevCCJS-p92/finalreport/finalreportpdf/ch18selfreps.pdf

MAPPING PRO BONO IN AUSTRALIA

afford to enforce or protect their rights.

While Governments often commend the private profession's record in providing pro bono legal services, there is scope for the Government to encourage its own lawyers to undertake pro bono work, both at an individual and agency level. In particular they can:

- encourage their lawyers to undertake pro bono work in a personal capacity by promoting pro bono opportunities;
- pay for practising certificates, where relevant;
- allow flexible work arrangements for volunteer work;
- allow reasonable use of government agency resources (such as library, telephone and photocopying) to do pro bono work;
- commit government agency resources and/or personnel by seconding lawyers to community legal organisations;
- provide outreach services (either alone or with other lawyers from private practice or publicly funded services);
- become members of a Public Interest Law Clearing House and receive referrals in a designated non-contentious/conflict free area of law; and
- participate in providing community legal education programs and materials.

8.12 Conclusion

Australian lawyers make a significant contribution to providing access to justice through pro bono legal services. However, government bears the ultimate responsibility for vulnerable people who need access to legal advice and representation, and the first line of defence in the fight for access to justice will *always* be legal aid, CLCs and ATSIILS³⁶⁹.

In his speech to Victorian pro bono coordinators in 2005, the Victorian Attorney-General Rob Hulls referred to government 'upholding its part of the bargain' with the private profession and pointed to a symbiotic relationship between government funding for legal aid and the legal profession's pro bono effort. The implication is that there is an unwritten agreement that the private profession's pro bono effort is directly related to the extent to which Government adequately resources primary legal service providers.

This public-private partnership is at the heart of the system through which pro bono services are delivered and there is little doubt that the decline in funding in

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369 Speech by the Hon. Rob Hulls, Attorney-General of Victoria to the Victorian pro bono coordinators workshop, 19 October 2005.