australian law reform commission

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14 June 2001

Dear Attorney

Report of the National Pro Bono Task Force

I have the pleasure of attaching for your consideration the Report of the National Pro Bono Task Force, which contains our Recommended Action Plan for the Commonwealth to facilitate national co-ordination and development of pro bono legal services in Australia.

I would like to take this opportunity to thank Members of the Task Force for their hard work and cooperation, and thank the staff at the Australian Law Reform Commission for providing secretariat services to the Task Force. (A full list of Members and acknowledgments is contained in Appendix A to this Report.)

On behalf of the Task Force, I would like to thank you for providing the initiative for the First National Conference on Pro Bono Law, for establishing and supporting the work of the Task Force, and for securing funding in the May Budget ($1M over four years) to ensure prompt implementation of the Task Force's recommendation.

Yours sincerely,

Chair,
National Pro Bono Task Force

Attachments

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NATIONAL PRO BONO TASK FORCE

RECOMMENDED ACTION PLAN FOR NATIONAL CO-ORDINATION AND DEVELOPMENT OF PRO BONO LEGAL SERVICES

14 June 2001

INTRODUCTION

The establishment of the National Pro Bono Task Force was announced on 13 October 2000 by the Attorney-General of Australia, the Hon Daryl Williams AM QC MP (see Appendix B), following on from the success and undissipated energy of "For the Public Good: The First National Pro Bono Law Conference", held in Canberra on 4-5 August 2000.

The First National Conference was attended by about 500 members of the public, private and community legal sectors, legal educators, judges and judicial officers, government officials, and representatives from professional associations and the business and philanthropic sectors. The 17-member Task Force is similarly broadly constituted with respect to work experience, professional orientation and geographic base (see Appendix A).

The Conference was the initiative of the Attorney-General, and a number of working groups were formed to assist with the development of the program, as well as to come together as an "Outcomes Working Group" at the conclusion of the Conference, to debrief and consider how to advance matters further. It was that large group that suggested the creation of a smaller Task Force which, as a practical matter, would be in a better position to do the necessary detailed follow-up work.

The Task Force has had the benefit of the notes capturing the major consultative/deliberative exercise conducted at the Conference – the Roundtable Discussion involving all Conference participants (see Attachment C) – as well as an Outcomes Issue Paper (see Attachment D) prepared by some of the Conference organising group.

The role of the Task Force is to crystallise the suggested outcomes of the First National Conference, and to report to the Attorney-General with a practical blueprint about how best to achieve progress in the implementation of those outcomes. In particular, the Task Force sees its mission as:

(1) identifying and weighing options for the development of pro bono initiatives nationally, especially those areas in which the federal government can assist

with leadership, targeted funding, or the removal of impediments to enhanced levels of pro bono legal work; and

(2) identifying the means, and the organisations, institutions and individuals, best placed to advance these priority activities.

One of the working groups established at the time of the Conference was a Research and Publications Working Party, with responsibility (among other things) for developing and publishing the Conference Proceedings. This collection, *For the Public Good: Pro Bono Law in Australia*, is being co-edited by Associate Professor Chris Arup and Associate Professor Kathy Laster of La Trobe University's School of Law and Legal Studies, and will be published simultaneously as a double Special Issue of the journal *Law in Context*, as well as in book format.

A number of other publications in recent years have looked at pro bono practice in Australia. The Law Foundation of New South Wales published two major studies in 1998: Centre for Legal Process, *Future Directions for Pro Bono Legal Services in New South Wales* and *Supplementary Report: Proposed Models*. The Pro Bono Secretariat of Voluntas, a project of the Victorian Law Foundation, conducted a valuable survey in 1999 on the pro bono practices and attitudes of Victorian practitioners. The Australian Law Reform Commission considered pro bono practice in the federal civil justice system, as part of its Managing Justice inquiry.[1] During the life of this Task Force, the Law Society of New South Wales also published a Discussion Paper on pro bono practice and its place in Australian legal culture.[2]

Consequently, this Report is not designed to be a comprehensive treatise on pro bono legal practice, but rather is organised primarily around the Task Force's Recommended Action Plan.

Some original research is presented in the form of survey research projects undertaken on behalf of the Task Force by student summer clerks in the Sydney office of Malleson Stephen Jaques, who surveyed almost all Australian law schools (see Appendix F), and 60 metropolitan firms in New South Wales (Appendix G, hereafter 'MSJ law firm survey').[3] A small survey of firms in country New South Wales (about 20 lawyers in five firms) also was conducted, but has not been written up (hereafter 'MSJ country survey').

'Regional' meetings of the Task Force were held in Sydney (6 December 2000) and Melbourne (11 December 2000), as well as meetings with individual members in

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[1] Australian Law Reform Commission, *Review of the federal civil justice system* (Discussion Paper 62, 1999) paras 6.2 and 6.39-6.46; and *Managing Justice: A Review of the Federal Civil Justice System* (Report 89, 2000) paras 5.2, 5.12-20.

[2] Law Society of New South Wales, *Pro Bono Work – Promoting Cultural Change* (Discussion Paper on the Review of Pro Bono Services by the NSW Legal Profession, March 2001).

[3] That work is attached as Appendices F and G for the information of readers. Please note, however, that the full Task Force did not have the opportunity to consider these papers before publication, and the conclusions contained therein do not necessarily reflect the views of the Task Force collectively or those of any particular member.

Adelaide and Perth (in early March 2001). The full Task Force met in Sydney for a weekend workshop (30-31 March 2001) aimed at refining its previously circulated Draft National Plan for Pro Bono Legal Services.

In the modern manner of things, most of the work of this Task Force has been conducted by way of 'virtual collegiality', utilising new information technology to arrange meetings, set agendas, and disseminate material and documents for information and comment.

In part, this reflects the logistical difficulties involved in managing a large and geographically dispersed group of busy people. However, there also was a conscious strategy adopted by the Chair and endorsed by the Members that this should be a low-cost process, with no suggestion that resources have been diverted from the delivery of legal services to support the work of the Task Force. For example, no sitting fees have been paid to any member of the Task Force – all of whom have accepted this responsibility in the spirit of pro bono practice.

DEFINING 'PRO BONO' PRACTICE

There are very interesting and important – and difficult – philosophical questions about the essential nature of legal ethics and professional responsibility, and increasingly about how the changing nature of the market for legal services (with increased competition and a premium placed upon 'business-like' practices) may clash with the 'service ideal' which traditionally is said to distinguish the 'profession' from other 'occupations' and service-providers. However, the role of the Task Force is to focus on pragmatic methods for enhancing access to the justice system (and equity within it), especially for disadvantaged members of the community, outside of the formal system of publicly funded legal aid.

Notwithstanding a plea 'not to get bogged down in issues of definition', there inevitably was considerable discussion about what is meant by 'pro bono' practice at the First National Conference. This was repeated as well as in the early stages of the Task Force's deliberations, and we note that the Law Society of New South Wales' Working Group on Pro Bono Legal Services also 'discussed extensively' the 'definition of what constitutes pro bono work', before settling on the one established by the Law Foundation of New South Wales for its report on Future Directions (see above):

> Pro bono work is generally in the nature of legal advice or legal representation performed free of charge or at a substantially reduced rate, for clients who cannot afford to pay full market rates or for an organisation working for disadvantaged groups or for the public good.

This is similar to the definition adopted by the Law Council of Australia in a 1992 resolution, and utilised by many practitioners,[4] which states that:

> Pro Bono work is defined in instances where:
> 1. A lawyer, without fee or without expectation of a fee or at a reduced fee, advised and/or represents a client in cases where:
> (i) a client has no other access to the courts and the legal system; and/or
> (ii) the client's case raises a wider issue of public interest; or
> 2. The lawyer is involved in free community legal education and/or law reform; or
> 3. The lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations.

At the Roundtable discussions held during the Conference, a number of general approaches to defining 'pro bono' legal practice emerged. One approach – strongly advocated by many participants – was that you need a *client-centred* definition, emphasising:

- advice and assistance to clients suffering disadvantage;
- matters in which a client would suffer serious consequences;
- an expansive definition, without the superimposition of 'an overriding requirement of a public or community benefit' – which might prevent otherwise deserving and needy parties from receiving assistance;
- matters in which the client is itself an organisation which assists the disadvantaged (eg community welfare groups, the Salvation Army, etc); and
- the pursuit of public interest test case litigation.

Another approach defined pro bono work more from the perspective of the lawyer or law firm involved, to cover any work done for no fee, or for a substantially reduced fee. There were mixed views about whether this also should include legal work done 'on spec' (speculative fees) or on a contingency fee basis.

There were also those who argued that, from a private lawyer's perspective, even legal aid work should be considered pro bono practice, given the relatively low level of fees paid. For example, a survey by National Legal Aid of 260 private firms doing legal aid family law work showed that in 1998-99, Australian solicitors 'provided a subsidy of at least $17,500,000 and more likely in excess of $20,000,000 if they had agreed to accept 80% of the ordinary professional rate of $213 per hour'.[5]

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[4] In the 1999 Victorian Law Foundation/Voluntas survey of Victorian practitioners, 80% of respondents reported that they used the Law Council definition: N Gration, Pro Bono Secretariat, Voluntas, *Pro Bono Survey Report* (June 1999) at p 6 (hereafter, 'Voluntas survey').

[5] National Legal Aid, *Survey of legal firms doing legal aid family work*, cited in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000) at para 5.15.

There was also a view that definitions of pro bono work must not be overly fixated on representation, and that non-litigious work should be included within the concept. This would take in such (no fee or reduced fee) legal assistance as:

- involvement in ADR processes, mediation, and 'preventative law';
- involvement in law reform work, lobbying on justice issues, and making submissions to parliamentary committees, inquiries, and law reform commissions;
- involvement in the regulation of the legal profession, or service on committees of professional associations;
- offering community and/or continuing legal education; and
- broad community service work (eg general legal advice/assistance to community groups, such as Rotary).

In 1994, the federal Access to Justice Advisory Committee (AJAC) considered a wide range of mechanisms aimed at achieving greater equality of access to the justice system. In setting out its mission, AJAC noted that:

> Equality of access to legal services requires that individuals who may not be able to afford legal services, but who have arguable cases, should have a range of opportunities available to them to bring (or defend) proceedings, without necessarily incurring liability for their fees. Legal aid, provided through publicly funded authorities and community legal centres, is critical in assisting such people. It is fundamental to access to justice that legal aid agencies (including community legal centres and services catering for disadvantaged groups) should have adequate resources. Inevitably, however, legal aid agencies do not and cannot have unlimited resources and complementary schemes, such as litigation assistance funds, group legal insurance and contingency fee arrangements, are beginning to emerge. The need for a variety of approaches has influenced us in our treatment of these complementary schemes.[6]

Interestingly, the enhancement of pro bono legal services was *not* among the matters considered by AJAC in 1993-94 – perhaps this area has a higher profile now that 'community-business partnerships' and 'social coalitions' are part of the common discourse of politics and community development in Australia and overseas.[7]

For example, in the United States, President Bill Clinton issued a "Call to Action" to American lawyers in 1999, urging a greater commitment to pro bono legal services, and applauding the legal professional associations and institutions working

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[6] AJAC, *Access to Justice: An Action Plan* (1994) para 1.10. The Chair of the National Pro Bono Task Force, Prof David Weisbrot, was also a member of AJAC.

[7] See, eg, S Wheeler and G Wilson, "Corporate Law Firms and the Spirit of Community" (1998) 49 *Northern Ireland Legal Quarterly* 239.

individually and collectively to promote diversity and community service.[8] Among other things, this call led the American Corporate Counsel Association and the Pro Bono Institute at Georgetown University law school to establish CorporateProBono.Org (CPBO) – an initiative designed 'to exponentially increase the amount of pro bono work performed by in-house counsel and to assist legal services, pro bono, and public interest programs in publicizing and placing pro bono matters with in-house lawyers'.[9]

Similar partnership initiatives have been emerging in Australia in recent times. For example, the Consumer Law Centre in Melbourne has been commissioned by the Victorian Department of Consumer Affairs to provide a consumer litigation service, in addition to the work the Centre already does in research, education, policy development and lobbying. The Centre's full-time lawyers will be supplemented by a practitioner seconded from Victorian Legal Aid; backroom support is being provided by the Lance Reichstein Foundation and the major commercial law firm Blake Dawson Waldron. With assistance from the Ronald Henderson Foundation, there are also plans to establish pro bono internship placements at the Centre for law students.[10]

This all suggests that the establishment and work of this Task Force is timely. The Task Force agrees strongly with AJAC that it is important to develop our strategies and recommendations in terms of 'complementary schemes' aimed at articulating with – rather than in any way derogating from or supplanting – the critical frontline services provided by legal aid services and community legal centres. (See the Preamble, below.)

The Task Force did not see any need to resolve the global debate about what is or is not included in 'pro bono' legal services, and it is arguable that adopting a fixed definition actually may be counter-productive. Different working definitions and operational assumptions and models may be required for different contexts and purposes. For example, a private law firm may utilise a different definition of pro bono work than, say, a community legal centre, for its billing and internal record-keeping purposes and to encourage (or at least not discourage) its solicitors to engage in pro bono work.

There would be little public benefit in forcing a 'one size fits all' approach upon this dynamic. Dubious claims about the provision of pro bono services would be better dealt with through the development of professional ethics and practice rules, as well as through the development of a best practice management handbook – as suggested in the Task Force's Recommended Action Plan (below).

Thus, in carrying out its work, the Task Force has utilised a broadly inclusive operational definition of 'pro bono legal practice'. In the words of one Task Force

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[8] The full text can be found at http://www.lawyersforoneamerica.com/executive_message/archive_clinton.html

[9] For further information, see the CPBO website at http://www.corporateprobono.org

[10] This material is drawn from an unpublished paper by Associate Professor Chris Arup.

Member, wherever possible we have endeavoured to 'fudge the definition in the spirit of generosity and inclusiveness'.

PATTERNS OF PRO BONO PRACTICE

Figures released around the time of the First National Conference confirm that the legal profession makes a very significant contribution to the community through its pro bono work. According to the Australian Bureau of Statistics,[11] solicitors donated approximately 1.8 million hours and barristers a further 489,000 hours doing pro bono work in 1998-99 – services worth at least some hundreds of millions of dollars in cash terms.

The Law Society of New South Wales, utilising data from its 1997-98 practising certificate renewal survey, estimated the amount of pro bono work at around 63,000 hours, or about $74 million in value.[12]

The Australian Law Reform Commission's review of the federal civil justice system noted the comparison between the considerable amount of pro bono work undertaken and the federal government's funding of legal aid commissions and community legal centres, which in 1997-98 totalled about $124 million.[13]

The Commission's own empirical research on Family Court matters showed that many self-funded litigants also received some pro bono assistance from their lawyers. Even in cases funded by legal aid, a larger proportion of the time spent on the case by lawyers was *uncharged* time.[14] The Federal Court also acknowledged 'with gratitude the substantial amount of pro bono work undertaken by the legal profession and the widespread support by the profession for the Federal Court's own pro bono scheme'.[15]

The 1999 Voluntas survey of Victorian practitioners, however, also pointed to the problem with statistics in this area – 91 per cent of respondents reported that they did not keep formal records of pro bono work undertaken, and 87 per cent did not account for such work in the system of recording 'billable hours'.[16] The MSJ law firm survey also found problems with billing systems unable to record pro bono work, and practitioners eager for advice about how this might be improved.[17]

It is often suggested that pro bono work is mainly the preserve of the large commercial law firms located in the capital city CBDs, which have the size, flexibility, and economies of scale to 'leverage' the legal and other resources (such as

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[11] Australian Bureau of Statistics, *Legal Services Industry 1998-99*, Report No 8667.0 (18 August 2000).
[12] Keys Young, *Practising certificate survey 1997-98 Final Report* (September 1998) 33.
[13] ALRC 89, at para 5.14.
[14] Ibid.
[15] Ibid, at para 5,12.
[16] Voluntas survey, at pp 8, 11.
[17] MSJ law firm survey, at p 12; see Appendix G.

administrative, IT and management support systems) necessary to sustain an active pro bono practice.

However, the 'MSJ country survey' of some small-to-medium sized firms in rural and regional New South Wales found that most of the solicitors contacted were undertaking very high levels of pro bono work, ranging from 2-7 hours per week. Many of the pro bono clients in these circumstances are former paying clients who are not presently able to afford the full level of fees. The subject matter tended to be criminal law, family law, wills and estates, and work for charitable organisations and community groups. For the country solicitors concerned – and no doubt the same situation would obtain in the outer metropolitan suburbs – pro bono work is not so much a professional lifestyle choice as an essential aspect of living and working in communities with a high level of disadvantage and unmet legal needs.

Even the large, well-resourced law firms face a number of challenges in providing extensive pro bono services. These include ensuring that:

(a) pro bono activities are built into the structure of the firm, and are not regarded as a 'side activity' or an 'add-on' to the 'real work' of the firm;

(b) there is equal treatment of pro bono files, in terms of quality, resources, the seniority of lawyers involved, reward structures, and inclusion in group/departmental/divisional budgets; and

(c) mechanisms exist for the ready identification, and proper handling, of real and potential commercial conflicts of interest.

Most importantly, law firms (of all sizes and practice types) need to develop and maintain a healthy 'pro bono culture' – and in this regard, all of the evidence suggests that the attitude of senior partners is critical in setting the right tone.

Despite the scale of activity, it is clear that much of the pro bono work in Australia takes place in an unstructured – even disorganised – manner. There is no doubt that pro bono services would benefit greatly from better coordination, more information and education, and the introduction of some best practice management principles. For example, the 1999 Voluntas survey of Victorian legal practitioners found that only 25 per cent of respondents reported having a pro bono policy in their firm, and of these only 11 per cent had a written policy.[18] Two-thirds reported that their firms did not have a designated staff member responsible for the coordination of pro bono work.[19]

Similarly, the MSJ law firm survey found that only five of the 60 firms telephoned had a designated pro bono contact point; many receptionists professed to knowing nothing about any pro bono services, and some actively discouraged any further inquiries. Most respondents accepted the importance of developing pro bono policies

[18] Voluntas survey, at p 7. Firms with five or more partners were nearly twice as likely to have a pro bono policy.
[19] Ibid.

and guidelines, and expressed strong enthusiasm for external assistance in this regard, including the development of a best practice management handbook or manual.[20]

THE TASK FORCE'S APPROACH

The Task Force identified a list of specific (but inevitably related) needs, aims and projects, including among other things:

- the improvement of communication and information-sharing among pro bono providers;
- the active promotion of a strong pro bono culture in Australia, commencing at law school and continuing through all levels and styles of professional practice;
- the development of clear, consumer-oriented standards of professional practice for insertion into the Law Council of Australia's proposed National Conduct Rules, to guide lawyers undertaking pro bono work;
- the creation of a 'best practice' management handbook and other guides and material to encourage and enhance pro bono practice;
- the removal of a variety of structural barriers to pro bono practice;
- the negotiation of protocols regarding inter-professional cooperation in pro bono efforts;
- the commissioning of solid empirical research to underpin reform efforts, such as a client-centred 'needs and pathways' study; and
- the facilitation of partnership opportunities – across the different parts of the legal profession, as well as between lawyers and other community organisations, professions and business enterprises.

The Task Force also spent considerable time addressing in particular the key issue of the mismatch between client needs on the one hand, and the supply (and accessibility) of pro bono legal services on the other. At the Conference, it was widely remarked upon that major law firms were reporting that they had a strong commitment to pro bono practice, but were actually *unable to spend* their annual pro bono budgets because of insufficient referrals – this despite the high level of unmet demand for legal assistance.

To some extent, this mismatch could be addressed at the local level by improvement and better coordination of the various referral schemes. However, the Task Force believes strongly that the problem goes much deeper than fine-tuning the mechanics of referral. At the heart of the mismatch is the fact that the areas of greatest need are

[20] MSJ law firm survey, at pp 11-14; reproduced in Appendix G.

in family law and criminal law,[21] personal injury, migration and administrative matters (eg social security appeals). However, these are precisely the areas in which the large corporate law firms do not have in-house expertise – indeed, they generally have made a strategic commercial decision *not* to work in these areas of 'personal plight', most of which are associated with legal aid (to the extent it is available) and/or low fees.

Thus, the Task Force believes that an effective remedy for the mismatch must involve a more long-term and complex approach, that includes most of the matters referred to above: promoting a culture receptive to pro bono work; improving outreach services and community education; providing tools and training to willing lawyers; providing 'matchmaking' opportunities that will enable skills and resources to be sent from wherever they are located to wherever they are most needed; removing structural barriers; sharing information about successful programs in Australia and overseas; and so on.

All of these matters find expression in the Recommended Action Plan, below. After considerable discussion, and the emergence of a clear consensus about what needed to be done, the Task Force was left with the issue of *who* would be responsible for all of this facilitation, creative development, liaison, and coordination in the first instance – and then who would be responsible for maintaining oversight, ensuring that valuable corporate memory was not lost, and sustaining the commitment, energy and continuity?

The centrepiece of the Recommended Action Plan, therefore, became the establishment of an Australian Pro Bono Resource Centre, with a mission to help facilitate, coordinate and sustain pro bono activity in this country. As designed (see Action 1, below), the Task Force does not believe that the Centre will be (or be seen to be) overly prescriptive, or likely to stultify local initiatives or draw resources away from the frontline delivery of pro bono legal services – which is paramount.

UNDERLYING PRINCIPLES/PREAMBLE

As noted above, the Task Force has utilised a broadly inclusive operational definition of 'pro bono legal practice' for the purposes of this report. This is in keeping with the primary role of the Task Force to focus on pragmatic methods for addressing access and equity concerns about the justice system, complementing the role of publicly-funded legal aid and community legal centres.

Although the Task Force did not need to specify the precise contours of pro bono practice for these purposes, it was nevertheless influenced by a number of shared assumptions about the principles that should underpin the organisation and provision of pro bono legal services, including that:

[21] See the Voluntas survey, at p 10.

- **Pro bono practice is *not* a substitute for legal aid.** It is essential to distinguish lawyers' professional/ethical obligation to do pro bono work from the fundamental government/community responsibility to provide adequate levels of legal aid, especially in such core areas as criminal law and family law. Therefore, there was appreciation of the Attorney-General's express assurance at the First National Pro Bono Law Conference that the present Government's encouragement of pro bono activities was *not* a precursor to decreased levels of legal aid funding or to a diversion of funds from basic legal aid to other areas of legal assistance.

  However, there is also a recognition that even dramatically *increased* levels of legal aid funding would not completely relieve the demand for pro bono work, given the high level of unmet legal need in the community.[22]

  Further, pro bono schemes have a number of benefits that are not always possible through legal aid schemes, such as: choice/diversity; flexibility; motivation; ability to tap the specialist expertise of leading practitioners; and ability to tap the resources/infrastructure of major law firms, the Bar and the legal academy.

- **The design and provision of pro bono services should be driven by client needs.** The provision of pro bono services should not be driven by what lawyers are prepared to offer. Rather, there is an urgent need to 'map client needs' – and if corresponding legal resources are not available, then there should be a concerted effort to recruit and/or equip lawyers with the necessary skills and expertise, and provide the necessary back-up support.

- **Pro bono clients should expect, and receive, the same high quality of service as all other clients.** Pro bono legal work always must involve legal services of the highest quality – not 'second rate justice'. Similarly, pro bono work should not be regarded as being the preserve of young lawyers, giving them an opportunity to learn on the job before they are let loose on 'real' paying clients. Professional associations need to clarify the ethical framework for pro bono legal work – this entails a recognition that pro bono practice may involve different circumstances, but must never mean lower standards of ethics or quality of service. Common problems that may inhibit or compromise the delivery of pro bono services, such as conflicts of interest, also need specific treatment.

- **Pro bono practice is a voluntary activity**, deriving from the legal profession's service ideal,[23] and is a shared responsibility involving individual

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[22] The Voluntas survey, at p 10, found that 34% of respondents reported no increase in demand for pro bono services over the past three years, with 28% reporting a small increase in demand, and 29% a large increase.

[23] The Voluntas survey canvassed the reasons why practitioners did pro bono work, at p 12. The two dominant reasons were, in order, 'Social conscience, social responsibilities, sense of duty and professional obligation'; and 'To provide a service not otherwise available; if we didn't who would?

practitioners, law firms, peak professional bodies, courts, law foundations and others. There is strong opposition in Australia to any element of compulsion in the performance of pro bono legal work (eg, through the imposition of conditions for the maintenance of a current practising certificate) – including, it should be said, from those lawyers with the strongest record of actually providing such services. There is somewhat less opposition, but certainly no clear groundswell of support, for any statement of 'aspirational targets', such as the American Bar Association's Model Rule urging lawyers to perform at least 50 hours of pro bono work per year.[24] The Task Force has chosen not to press for such targets, noting that this approach may be inconsistent with the essential voluntariness of pro bono work, the accepted and acknowledged importance of this work, and the willingness with which it has been provided in the past by the Australian legal community.

- **In the interests of a fair and efficient justice system, there is an important role for government in encouraging and supporting – but not controlling – pro bono initiatives.** For example, governments might: (a) assist in overcoming some of the structural barriers to pro bono work (eg, filing fees and other court-related costs and disbursements), (b) provide resources to facilitate coordination and enhancement of pro bono services, and (c) encourage pro bono practice by taking into account evidence of a record of such 'good professional citizenship' as a factor in awarding tenders for government legal work.

The Task Force sees this statement of principles as constituting, in effect, a Preamble to the detailed recommendations contained in the Action Plan following immediately below.

And to meet a need'. This was followed by 'Justice'; 'To put something back into the community'; and 'Good will, public relations and marketing'. Similarly, the MSJ law firm survey found that a sense of professional responsibility was one of the main reasons lawyers did pro bono work, as well as the benefits to law firm morale and professional development; the need to meet unmet demand for legal services; and public relations and marketing: at p 7; see Appendix G.

[24] The American Bar Association's *Model Rules of Professional Conduct*, rule 6.1, states that a lawyer 'should aspire to render at least (50) hours of legal services without fee or expectation of fee'.

NATIONAL PRO BONO TASK FORCE

RECOMMENDED ACTION PLAN FOR NATIONAL CO-ORDINATION AND DEVELOPMENT OF PRO BONO LEGAL SERVICES

14 June 2001

ACTION 1: ESTABLISHING AN AUSTRALIAN PRO BONO RESOURCE CENTRE

ACTION 2: PRODUCING A BEST PRACTICE HANDBOOK FOR MANAGING PRO BONO LAW

ACTION 3: SUPPORTING CLIENT-FOCUSSED RESEARCH

ACTION 4: DEVELOPING NATIONAL PROFESSIONAL PRACTICE STANDARDS FOR PRO BONO LEGAL SERVICES

ACTION 5: FOSTERING A STRONG PRO BONO CULTURE IN AUSTRALIA

ACTION 1: ESTABLISHING AN AUSTRALIAN PRO BONO RESOURCE CENTRE

An Australian Pro Bono Resource Centre

The Task Force considered the potential value of the establishment of an ongoing body such as a secretariat or centre that would stimulate and encourage the development, expansion and co-ordination of pro bono services, as well as offering practical assistance for pro bono service providers (and potential providers). The Centre would play the key roles of facilitating pro bono practice and enabling the collection and exchange of information.

The Task Force strongly recommends to the Attorney-General that the Commonwealth Government initiate and provide financial assistance for the establishment of an Australian Pro Bono Resource Centre. The Task Force is concerned that unless such a body is established, the full potential value of the

Commonwealth's significant efforts and commitment to promote pro bono legal services will not be captured and sustained.

The Centre's name reflects that it is not intended to play a direct role in the delivery of pro bono legal services, nor is it meant to serve as a client referral agency for such work. As discussed blow, the Task Force acknowledges that this type of service is best managed at the local level.

Similarly, the Task Force wishes to make very clear that the Centre is not meant to replace, nor impinge upon the activities of, the many and varied pro bono programs already in existence, such as those operated by the Public Interest Law Clearing Houses in New South Wales and Victoria (and the recently established QPILCH in Queensland); private firm pro bono committees and co-ordinators; Law Society/Institute and Bar Association schemes; law foundation initiatives such as Voluntas in Victoria; community legal centres; university advocacy programs, and so on.

The Task Force does not believe that the Centre would stultify such initiatives nor draw resources away from the main game, which is the frontline delivery of pro bono legal services. On the contrary, the Centre's *raison d'etre* is to play a facilitative and coordinating role in support of all of this – to date, ad hoc and uncoordinated – pro bono activity.

The Task Force recommends that the Centre be established as a small, independent organisation, with a high profile Director and at least two support staff to begin with. Growth of the Centre would be contingent upon developing income and resources over and above the funding from the Commonwealth.

In the blueprint below, the Task Force has provided a large and ambitious menu of activities and responsibilities for the new Centre – an initial Mission Statement. In practice, of course, the Centre will steadily develop its own identity and niche, determine its own priorities accordingly, and seek to make most effective use of human and other resources. The Centre also will need to remain sufficiently alert and flexible to be able to respond to opportunities and challenges for pro bono practice as these arise.

Objectives

The fundamental aim of the Centre is to promote access to high quality pro bono services. The key objectives underlying its establishment are set out below. In the pursuit of these national objectives, the Centre would recognise the differential development of sectoral infrastructure between particular states and territories and seek to avoid any unnecessary duplication of effort by working collaboratively wherever possible with existing organisations.

(a) promoting pro bono work throughout the legal profession

The Centre would play a role in marketing pro bono to lawyers, to inspire their interest, and capture their enthusiasm for pro bono work. It would draw on the high level of goodwill amongst lawyers, and draw out the strong sense of community support and responsibility that is inherent in the traditional ethical standards of the legal profession.

This would involve the Centre in working with the profession and other institutions to encourage the further development of pro bono work, and would involve such activities as:

- collecting and sharing information;
- holding conferences and seminars;
- providing information about pro bono opportunities;
- working with interested professional bodies; and
- supporting and assisting in the development of referral schemes at the State and Territory level (and below that at regional level).

(b) assisting and supporting pro bono service providers

The Centre would serve an important function in providing a central resource for members of the profession interested in developing pro bono services, but unaware of the range of options and assistance available to support such services. The Centre would also review and report on the range of pro bono work being carried out.

The Centre would provide practical guidance for lawyers wanting to do pro bono work, including:

- developing and providing a 'start-up package' of information, as well as ongoing material, guides and other assistance;
- advising on aspects of pro bono practice management, such as costs letters, internal treatment in divisional budgets, and identifying and dealing with conflicts of interest (see also Action 2, below, regarding the development of a Best Practice Management Handbook for pro bono practice);
- identifying and working to eliminate structural barriers to pro bono practice, such as court fees, transcript fees and other related costs;
- assisting with the development of disbursement support schemes;
- facilitating continuing legal education and training in key areas of client need/demand for pro bono services – which would enable practitioners to volunteer to provide competent pro bono services in areas (such as criminal

law, family law, children and migration) outside of those in which they normally operate (in, say, the large commercial firms);[25]

    - brokering relationships between high volume service providers (eg, community legal centres, small firms, community organisations) on the one hand, and large firms and specialist barristers in the other; and

- working with other professional groups to develop registers of non-legal experts willing to assist on pro bono cases.

Brokering and 'matchmaking'

In relation to the brokering and matchmaking function, for example, major firms might agree to take on responsibility for a particular area or areas (substantive or geographical) on a 12-24 month rotational basis.

Alternatively, large firms might negotiate twinning arrangements with – or second staff to, or provide direct financial support for – smaller firms, rural and regional firms, or community legal centres. As well as handling some matters directly, barristers may be even more willing to provide 'back-up' advice and support to solicitors providing pro bono services in areas requiring some specialist expertise or experience.

The Centre also might give consideration to facilitating the greater use of government/Crown lawyers for pro bono advice and assistance – where it is clear that this would not present a conflict of interest or a breach of that officer's contract or commission. Such officers may have expertise and experience in areas of public and administrative law (such as human rights and FOI) that are not widely available in private practice.

Similarly, other creative support arrangements could be managed across the various sectors of the legal profession. For example, the Public Interest Advocacy Centre (PIAC), the Public Interest Law Clearing House (PILCH), and five university law schools in New South Wales have combined efforts to develop an intensive Public Interest Law Program, which combines classroom instruction with carefully selected internship placements.

Inter-professional cooperation

The need for greater and more reliable/regularised inter-professional cooperation emerged strongly at the First national Conference, with many lawyers noting that their efforts at providing pro bono services were often compromised by the costs involved in obtaining medical reports, engineer's reports, and so on.

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[25] The MSJ law firm survey, at p 16, indicated strong support for 'the idea of a state or national body which provided training in general lawyering skills' as well as 'training in specific areas of law' for pro bono lawyers; some firms preferred the idea of in-house education if 'appropriate training manuals were produced'. See Appendix G.

The Australian Pro Bono Resource Centre might approach the Australia Council of Professions to initiate and conclude protocols providing for inter-professional cooperation (on a reciprocal basis) in the provision of professional services in pro bono matters. However, the Law Council of Australia is no longer a member of the ACP, and gaining progress on a national, multilateral basis probably would be slow and difficult.

More likely, success would be achieved through direct approaches to professionals and professional associations at the local level. The Centre would be able to build upon the feasibility study already undertaken by Louise Kyle for Voluntas, the Pro Bono Secretariat of the Victorian Law Foundation (reproduced as Appendix E to this Report), which surveyed 54 professional associations (with a response rate of 24%) about their attitudes to members providing expert evidence, advice or a report, from time-to-time, on a no-fee or reduce fee basis.

The study found that 'professional associations are aware of the need in the community for professionals to assist lawyers doing pro bono work. Members of professional associations are performing such work but their associations generally see this as a matter for individual members. The associations either do not consider it to be within their brief or they are not resourced to organise their members.'

However, the study also found that 'There is an indication that some professions would accept a more formal role in the performance of pro bono work'. The Task Force is aware that Legal Aid Queensland successfully negotiated with a number of medical specialists for the provision of pro bono services. (Negotiations to establish a broader protocol with the Queensland Branch of the Australian Medical Association were not successful, however). The Centre would be ideally placed to keep track of this kind of experience and to explore further such opportunities.

Conflicts

Issues also were raised within the Task Force about the difficulty some times in securing pro bono legal assistance in actions involving Government departments and agencies that retain large numbers of private lawyers and law firms (or a significant portion of experts in an area of specialist legal expertise) – and thus cast a large shadow of real and perceived conflict of interest.

The Task Force believes that the Centre would be well placed to work with the Office of Legal Services Coordination in the federal Attorney-General's Department (the office which provides advice to government agencies in relation to the supply and procurement of legal services to the Commonwealth, and oversees compliance with the Attorney's legal services directions) to develop a protocol aimed at minimising this obstacle to the delivery of pro bono services. Similar initiatives should be pursued in relation to State and Territory governments.

Removal of structural barriers

Similarly, the Centre would be in a good position to report on, and lobby for the removal of (such as through court rules, practice directions and special disbursement

funds for pro bono matters) other structural barriers to effective pro bono assistance, such as court fees, transcript fees, the costs of translation, and other related costs.

Costs

For example, the Task Force noted that the former common law position that a successful pro bono litigant was not entitled to an order for costs in his or her favour is no longer followed in practice.[26]

Members were of the view that the threat of adverse costs orders provided a significant barrier to pro bono work and needs addressing. In the United Kingdom, an Adverse Costs Insurance Scheme operates to enable a litigant to insure against an adverse costs order. In Queensland, a similar scheme[27] is presently being developed – at this stage the operators are endeavouring to lock in underwriters. Such schemes, however, may be of limited assistance in the case of the impecunious pro bono litigant unless third party finance is provided. The Centre would be well-placed to monitor such developments in Australia, and share information about successful programs.

Tax laws

At the First National Conference, some concerns were expressed about whether there may be disincentives to pro bono practice in the taxation system. The Task Force considered it important to explore this further, and was greatly aided in this by a Member with extensive tax experience. In the event, the Task Force does not see any serious problems in this area under the present law, but it is a matter that should be kept under review.

Court fees

The Task Force noted that the Access to Justice Advisory Committee identified court filing fees as a structural barrier to access to justice, and recommended that consideration be given to the waiver of court fees in cases that can be classified as public interest litigation because of the special benefits to the community as a whole.[28]

Most Courts do make provision in their rules for the waiver of filing fees in cases of hardship.[29] However, the Task Force believes there is scope for the Australian Pro Bono Resource Centre to work with courts to develop and establish rules and guidelines and a more regularised process for dealing with court fees in pro bono matters (as distinct from only hardship cases). For example, the Law Society of New South Wales has been pressing for an amendment to the Federal Court regulations[30] to

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[26] And see, eg, Rule 80(9)((2)) of the Federal Court Rules, which specifically provides that in Court-appointed referrals a pro bono practitioner is entitled to recover fees and disbursements if an order for costs is made in favour of the pro bono client.
[27] By Legalsure, marketed by Greystokes of the United Kingdom.
[28] Access to Justice Advisory Committee, *Access to Justice - an Action Plan* 1994, para 16.25.
[29] See, eg, *Federal Court of Australia Regulations* reg 2(4)(c); *Family Court of Australia Regulations* reg 11(d); *Supreme Court of Victoria Act*, s129(3).
[30] *Federal Court Regulations*, Reg 2(4)(a).

provide a *general* exemption for those matters referred under the Court's own pro bono scheme as well as from other recognised pro bono referral schemes (such as PILCH, and law society and bar association schemes).

Other court-related costs

The Task Force also noted that other court-related costs, such as the high costs of transcript services and interpreter's fees, operated as a significant deterrent to the provision of pro bono legal services. It was noted that the Australian Institute of Interpreters and Translators has previously indicated an unwillingness on the part of its membership to waive their fees in pro bono matters, given the relatively low incomes of interpreters and translators (see, the *Voluntas* Feasibility Study, discussed above).

The 1994 Access to Justice Report also recommended the establishment of a national disbursement fund. The Law Council of Australia supported the establishment of this fund. However, the Commonwealth Government considered that such a fund was not sustainable and the recommendation was not acted upon.

A number of such funds have been in operation in Australia, such as the Law Access Scheme in Western Australia, the Litigation Assistance Fund in South Australia and the Litigation Support Disbursement Fund run by the Law Society of New South Wales. These funds supply an important adjunct to the provision of pro bono services, enabling lawyers to offer their services without the additional imposition of direct financial burden. It is noted that the Western Australian disbursement fund is presently not operating due to insufficient financial reserves. These Disbursement Funds source their income variably from money from the public purpose fund, percentage of winnings awarded or a combination of both.

The 1999 Voluntas survey found that the burden of disbursements was the second most common reason (after insufficient resources) offered by respondent practitioners for *not* doing pro bono work.[31] The Task Force is of the view that the Centre should explore further the feasibility of establishing special funds or programs that can assist in removing such structural barriers to access to justice.

(c) making available resources and information to pro bono providers

The Centre could liaise with referral organisations and provide an interface between the lawyers providing pro bono services and the organisations referring clients for such assistance.

This may involve the Centre in:

[31] Voluntas survey, at p 13.

- maintaining an electronic, moderated 'LISTSERV' to facilitate national discussion, debate and electronic information exchange among pro bono providers;[32]
- compiling, analysing and publishing data about requests for pro bono legal services;
- assisting with broad strategies to develop pro bono services that match client need;
- advising community organisations about referral bodies; and
- assisting with the development of national professional practice standards in relation to pro bono services (see Action 4, below).

(d) promoting pro bono law to community organisations and the general public

The Centre should play a key role in greatly increasing community education and promotion about pro bono practice. This may have the welcome side effect of improving the image of lawyers, but more importantly the aim is to increase the awareness of, and access to, pro bono legal services.

Efforts in this area would involve utilisation of media opportunities to discuss issues of access to justice, and working through community and interest/support groups, as well as direct publication by the Centre of informational and promotional material (written and otherwise).

The Centre should consult widely with key stakeholders to determine the most effective means of publicising the availability of pro bono services. Successful completion of the empirical research project on clients' needs and knowledge about legal assistance, called for in Action 3, below, also would provide important background information for developing education campaigns.

Particular attention should be devoted to targeting communities and individuals that have had particular problems with achieving reasonable levels of access to the justice system, whether by reasons of socio-economic disadvantage; gender, race or ethnicity; language skills; disability, or geography.

Location and affiliation

The Task Force believes that the Centre would be developed most effectively with the assistance of an auspicing agency. As a practical matter, the possible host institutions include university law schools, private law firms, and state-based law foundations.

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[32] The MSJ law firm survey, at p 15, found strong support for the establishment of a network of information and expertise-sharing. See Appendix G.

There are a number of potential concerns or disadvantages with affiliation, particularly the danger that the Centre would not be seen as *truly* independent or *truly* national, and so on.

These concerns would have more resonance in the case of a private law firm, or a State-based law foundation, which might discourage feelings of national ownership or inhibit cooperation from competitors in the marketplace. Location within a university could result in the Centre being seen as 'too academic'.

Most or all of these concerns could be dispelled through proper management of the Centre, by maintaining a clear focus on the mission of the Centre, remaining attentive to its national dimension, and by ensuring that the Advisory Council is broadly representative, both in terms of expertise and geography (see below).

However, the Task Force believes that the benefits of co-locating the Centre with another body or institution clearly outweigh the drawbacks. In our view, the major advantages would include:

- opportunities for collegiality and sharing of expertise, with a concomitantly reduced chance of isolation and low profile;
- free or heavily subsidised accommodation;
- free or heavily subsidised infrastructure (networked computers, email and internet access, printing and copying, library);
- free or heavily subsidised administrative support services (human resources, accounting, public affairs, IT services, etc);
- in the case of universities, the possibility of attracting high level staff because of the conferral of academic rank (or honorary academic rank); and
- also in the case of universities, eligibility for application for competitive academic and industry (eg SPIRT) grant schemes, such as those administered by the Australian Research Council.

Any such linkage should not, of course, inhibit in any way the tendering or commissioning of specific projects to other bodies or individuals not associated with the host institution.

Accordingly, the Task Force recommends that the Attorney-General call for detailed expressions of interest from institutions that might wish to host the Australian Pro Bono Resource Centre. These expressions of interest should contain information similar in nature to the applications made by institutions for designation as a Key Centre, or for the establishment of a Cooperative Research Centre (CRC).

Funding

Funding for the establishment of the Centre effectively has been ensured by the Attorney-General in the form of an appropriation of $1 million over four years in the 22 May 2001 federal Budget, earmarked to support the findings and recommendations of the National Task Force.

Assuming that accommodation and infrastructure can be provided at little or no cost by a host institution (above), this should provide sufficient funds to sustain a Director and basic support staff, as well as develop a number of the other programs and initiatives referred to in this Action Plan.

As noted above, expansion of the Centre and its activities would be contingent upon developing income and resources over and above funding from the Commonwealth. The Centre should actively pursue a strategy of cultivating partnerships with the corporate and professional legal communities to enhance its resource base. There are a number of good precedents in the United States, including the Washington-based CorporateProBono.Org, the San Francisco-based Lawyers for One America, and the Chicago Volunteer Legal Services – all of which have been successful in securing corporate and legal sponsorships and donations, as well as in-kind support.

Advisory Council

The work of the Centre should be overseen by an Advisory Council, which meets from time-to-time (but no less than once per year) and advises the Centre about directions and priorities.

The Advisory Council should accommodate a wide array of interests, with representation from the Commonwealth (assuming it is supported with federal funds), the host institution, and the various sectors of the legal profession involved in pro bono services. The latter would include, among others, the private profession, community legal centres, the legal professional associations, and referral organisations such as legal aid.

Assuming the Centre also develops partnerships with other sectors, such as business, other professions, philanthropic organisations, and community organisations, appropriate representation should be provided to ensure continued cooperation and successful maintenance of these relationships.

Given the Centre's national role, attention also should be given to ensuring a strong measure of representation from among the various states and territories, and from rural and regional areas as well as from metropolitan centres.

Responsibility for the day-to-day management of the Centre should rest with the Director, and perhaps a small executive group, depending upon the requirements of the auspicing institution.

No Referral or Clearinghouse Role

The Task Force does not consider that the Centre should have any direct role in client referral or matching, given its mission, single location and proposed size. It would be very difficult to organise referrals successfully on a national basis; rather, experience strongly suggests that this is best handled at the state, regional and local level – and only works effectively where there is some 'sense of ownership'.

Relationship with other forms of legal assistance

Once established, the Centre should engage in an on-going dialogue with legal aid commissions, community legal centres, pro bono service providers and others. The aim should be to ensure that pro bono services are carefully targeted to meet the spill-over demand for legal assistance, as well as meeting other imperatives, such as public interest test case litigation, advice to charitable and community welfare groups, and so on.

The Centre also will need to have particular regard to the relationship with Aboriginal and Torres Strait Islander communities. Indigenous legal services provide legal advice, representation and advocacy for Indigenous Australians from over 50 locations throughout Australia. These services cover wide areas of legal need, but focus on native title, criminal law, domestic violence and family law. Some assistance is provided in other civil law matters. However, it remains the case that there are significant unmet legal needs in Aboriginal and Torres Strait Islander communities.

Consultation with key indigenous groups will provide important opportunities to identify and facilitate the delivery of needed legal assistance. Bearing in mind the number of Indigenous service providers (many of which are in rural and remote regions of Australia), matching legal needs with legal service providers through a pro bono scheme would best be addressed through peak bodies serving Aboriginal and Torres Strait Islander communities. Through this strategy, the legal expertise 'locked up' in the cities could be brought into county areas.

Responsibility for Second National Pro Bono Law Conference

If the Centre can be established quickly, as is hoped, it would be the obvious body to play the major coordinating role in the organisation of the anticipated Second National Pro Bono Law Conference, to be held (tentatively) in Canberra in mid-late 2002.

There is a fundamental decision to be made about how the second conference should be structured. As was the case with the successful first event, this conference could bring together a large and broadly constituted group of stakeholders and interested parties, with a premium on inclusion and diversity. Or, it could be a more focussed event, organised around smaller working parties (invited or self-selecting) prepared to do the hard work of development of detailed policy and practice.

In either case, it would be an excellent opportunity for the Centre to promote its existence, establish the necessary contacts and networks, and begin to fulfil its mission.

ACTION 2: PRODUCING A BEST PRACTICE HANDBOOK FOR MANAGING PRO BONO LAW

A Best Practice Handbook

The survey of metropolitan law firms conducted by the Mallesons Stephen Jaques summer clerks indicated strong support for the development of a 'Best Practice' management handbook, to encourage and enhance the provision of pro bono legal services (see Appendix G). A similar theme emerged from the First National Conference (see Appendix C).

The Task Force strongly agrees that there would be considerable benefit in developing such a Handbook, which (a) identifies 'World's Best Practice' in the establishment, administration and effective provision of pro bono legal services, and (b) provides detailed, practical advice to law firms and legal practitioners about how to achieve such standards in the Australian context.[33]

Such a Handbook should include practical, 'how-to' advice on such matters as:

- promoting a pro bono culture within a firm (or at the Bar);
- pro bono as an aspect of recruitment and retention of top staff;
- models of pro bono practice (ad hoc referrals, participation in a regular scheme, specialist public interest practice, etc);
- meeting educational and training needs to support pro bono programs;
- budgeting, accounting, taxation and record-keeping issues;
- quality assurance programs;
- risk management, including identification of potential conflicts of interest; and
- access and marketing schemes, including through the use of websites.

[33] Most existing work of a similar nature has been developed in the United States, for use by American lawyers. See, for example, the excellent resource maintained by the US consortium CorporateProBono.Org, at <http://www.corporateprobono.org/resources/best_practices.cfm>.

Responsibility for the project

Given the other tasks and responsibilities of the Australian Pro Bono Resource Centre in its start-up phase, and the imminent need for the Handbook, the Task Force believes it would be best for this project to be tendered out to a third party, for production within about one year. (Copyright for the work should remain with the Centre.)

The Centre would be charged with: (a) awarding the tender and overseeing the development of the Best Practice Handbook; (b) maintaining the currency of the Handbook over time; and (c) ensuring its widespread accessibility (both in hard copy, and over the Centre's website).

ACTION 3: SUPPORTING CLIENT-FOCUSSED RESEARCH

Empirical research exploring clients' needs and knowledge

Another theme that emerged at the First National Conference was the need for empirical research into client needs and knowledge about how to access pro bono legal services, to complement the emerging understanding of what lawyers do, and are prepared to do, in this area. The notes of the Roundtable Discussion at the Conference (see Appendix) relate that:

> There was also a strong view that the provision of pro bono services should not be driven entirely on the basis of what lawyers were prepared to offer. Rather, there is an urgent need to 'map client needs' – and if corresponding legal resources are not available, then there should be a concerted effort to recruit and/or equip lawyers with the necessary skills and expertise, and provide the necessary back-up support. (Concern was expressed that it sometimes happens that well-meaning lawyers do clients a disservice by providing pro bono services in areas in which they have no specialist expertise, such as family law or migration.)

Other recent research indicates that some commercial law firms have expressed a desire for such a 'needs analysis' in order for them to structure properly referral services and their own pro bono practices.[34]

The Task Force strongly agrees with the need for an empirical study looking at client needs and how (potential) pro bono clients actually go about searching for, and securing, the provision of pro bono legal services. Such a study should build upon the research, consultation and recommendations of the Attorney-General's Family Law Pathways Advisory Group, established in May 2000, which is focussed on improving coordination of services in the family law system and improving outcomes for those experiencing family breakdown.

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[34] MSJ law firm survey at pp 9-10; see Appendix G.

Specifically, the Task Force recommends the initiation of research into:

(a) the nature and scope of clients' pro bono needs; and

(b) mapping client pathways to accessing pro bono legal services. (For example, do clients access pro bono legal assistance via professional associations' referral services; legal aid commissions, hotlines, websites, community legal centres, other bodies or individuals?)

The aims of the project would be to:

- enable the supply of pro bono services to be aligned more closely with demand for those services;
- gain a better understanding of the pathways clients utilise to obtain pro bono assistance, and the perceived problems in gaining access, so that steps can be taken to maximise access;
- encourage community agencies, who are often the first port-of-call for clients, to think carefully and creatively about how pro bono services can most effectively meet client needs.

The research methods would include consultation and interviews with key community referral agencies (such as community legal centres, Aboriginal Legal Services, migrant resource centres, domestic violence advisory services) in order to ascertain both the nature and scope of client pro bono needs, including:

- what forms of pro bono assistance are needed (eg, advice, representation, ongoing assistance etc), and in what proportions;
- in which subject areas;
- what kinds of pro bono services are currently utilised by clients and by referral agencies;
- how pro bono services could be most effectively delivered to clients; and
- the strengths and weaknesses of current referral systems for pro bono service provision.

Responsibility for the project

As with the Best Practice Handbook, the Task Force believes that given the other tasks and responsibilities of the Australian Pro Bono Resource Centre in its start-up phase, and the imminent need for this research, it would be best for this project to be tendered out to a third party, for production within about one year. (Copyright for the work should remain with the Centre.)

The Centre would be charged with: (a) awarding the tender and overseeing the research project; and (b) ensuring that the information and insights that emerge are disseminated widely, and used effectively in designing and delivering pro bono services.

ACTION 4: DEVELOPING NATIONAL PROFESSIONAL PRACTICE STANDARDS FOR PRO BONO LEGAL SERVICES

Setting professional standards for pro bono practice

As part of its national professional blueprint, the Law Council of Australia has developed and adopted *Model Rules of Professional Conduct and Practice*. The 'advocacy rules' included in the Law Council's Model Rules are based upon uniform practice standards developed by the Australian Bar Association in 1995.

In the Managing Justice report, the Australian Law Reform Commission strongly encouraged legal professional associations and regulatory bodies to 'give priority to the development and implementation of national model professional practice rule'.[35] The Task Force agrees that there is a need to develop client-focussed, national rules of professional practice, particularly dealing with matters of ethics and quality assurance.

Unlike the position in some other countries (see, eg the American Bar Association's Model Code), there are no provisions in the codes of practice developed by the Australian legal professional associations expressly dealing with pro bono practice.

The Task Force does not believe that there is a need for a *separate* comprehensive Code of Practice governing the provision of pro bono services. Once a practitioner undertakes to provide legal professional services, the governing standards should be identical regardless of fee-paying status (whether full fee, reduced fee, speculative fee, or no fee).

However, we do believe that pro bono clients should be expressly assured of this position in a professional practice rule. Because many pro bono clients are disadvantaged in social, economic and/or political terms, they may wield less power than other clients in directing the conduct of their matters. A guarantee that they will not be receiving 'second class' services, but rather the same high level of services that all clients are entitled to expect, is thus an important statement for the legal profession to make.

It should not require a lengthy process to develop one or more dedicated provisions in this area that may be integrated within existing professional codes or rules. The MSJ law firm survey indicated strong support for the development of such industry

[35] ALRC 89, Recommendation 13, at p 225.

standards relating to pro bono work.[36] Reproduction of these provisions for pro bono clients in a brochure or similarly accessible form would be highly desirable.

As noted in the introductory material, there is a strong view in the Australian legal profession that pro bono work should remain a voluntary activity, with no formal requirements making it compulsory (eg for the maintenance of a current practising certificate). The Task Force has chosen not to press for ABA-style 'aspirational targets', on the basis that such targets may be seen as by some in the profession as a first step towards compulsion ('the thin edge of the wedge'), or as a ploy designed to take the pressure off governments to provide adequate legal aid funding. Equally, the Task Force believes that such targets can militate against a true embrace of the spirit of pro bono practice by appearing to establish a *maximum* expectation, discouraging the provision of higher levels of pro bono service (as presently achieved by some Australian lawyers).

Responsibility for the project

The Law Council of Australia, with the assistance of the Australian Pro Bono Resource Centre, should develop the suggested pro bono practice provisions as soon as possible, for inclusion in its own Model Rules, and to serve as a model for state and territory professional associations and other bodies responsible for professional practice standards.

ACTION 5: FOSTERING A STRONG PRO BONO CULTURE IN AUSTRALIA

The challenge of enhancing pro bono practice

The Actions recommended above relate primarily to facilitating the operations of the private profession in providing pro bono legal services to clients in need. The ethical imperative to do pro bono work stems from the legal profession's traditional 'service ideal'.

However, one of the major debates within the profession – reflected by statements by the Chief Justice, and other commentators – is the extent to which such professional sentiments can survive the application of competition policy to, and competitive pressures upon, the market for legal services.

The notes of the Roundtable discussions at the First National Conference (see Appendix C) record that

> There was frequent comment that the challenges of 'Hilmerisation' have not yet been fully thought-through or addressed – ie, if law is 'just another service industry', legal services are subject to competition policy, and lawyers are instructed to act more

[36] MSJ law firm survey, at p 16; see Appendix G.

> 'business-like', then what remains of 'professional' values, such as the 'service ideal', which underpin the pro bono ethos? (On the other hand, it was noted that a record of pro bono work also can be 'good for business', in terms of marketing, attraction and retention of quality staff, and so on.)

The Law Society of New South Wales conducted a survey of members in 1999-2000 (in association with the renewal of practising certificates) and found that, of the nearly 10,000 respondents, only 36 per cent said that they were personally handling a pro bono matter at the time; only 6 per cent reported that were conducting more than five pro bono matters.[37]

There is also evidence of a significant drop in pro bono performance in the United States over the past decade, despite a strong economy and record profits for law firms. According to a survey conducted last year by *American Lawyer* magazine, the average time spent doing pro bono work by lawyers at the 100 highest-grossing law firms in the US fell from 56 hours per annum in 1992 to 36 in 1999. Only 18 of those 100 firms reported that their lawyers met the ABA's 50-hour target.[38]

A similar survey in February 2000 in Washington DC – long considered the centre of pro bono activity – conducted by a committee of the DC Circuit Court found that less than 25 per cent of the lawyers in the 142 law firms surveyed were meeting the 50-hour target. On the positive side, there is evidence that some firms have stepped up their donations to legal services providers in an effort to compensate for declining pro bono hours.[39]

The Task Force believes that it is essential to complement the recommended Actions with sustained efforts aimed at fostering a strong pro bono culture in the Australian legal profession, commencing at law school and meaningfully supported at all levels of continuing professional practice.

Role of university law schools

Australian law schools should be encouraged to support programs that (a) highlight the legal professions' service ideal and promote a pro bono legal culture, and (b) enable students to acquire 'high order professional skills and a deep appreciation of ethical standards and professional responsibility'.[40]

This would include providing all law students with opportunities for internships/outreach programs with a pro bono focus; opportunities to undertake clinical experience, clinical components within the academic curriculum, and stand

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[37] Law Society of New South Wales, *Pro Bono Work – Promoting Cultural Change*, Discussion Paper on the Review of Pro Bono Services by the NSW Legal Profession, March 2001, at p 11.
[38] American Bar Association, *Model Rules of Professional Conduct*, rule 6.1, states that a lawyer 'should aspire to render at least (50) hours of legal services without fee or expectation of fee'.
[39] See G Winter, "Legal Firms Cutting Back on Free Services for Poor", *New York Times*, 17 August 2000, at p A1.
[40] As recommended by the Australian Law Reform Commission in *Managing Justice*, ALRC 89, Recommendation 2, at p 142).

alone electives such as 'Public Interest Advocacy'; and opportunities for reflection upon and critical analysis of ethical matters (including pro bono) in the classroom.

In June 1998, the US-based Soros Foundation announced that it would match donations by law firms and corporations in order to create 70 two-year 'public interest' fellowships for recent law graduates, with the program to be coordinated by the National Association for Public Interest Law. With strong support from the American Bar Association and Ford Motors, among others, the fellowship program is now up and running. Fellowship recipients each receive about $60,000 per annum, as well as assistance in paying off law school debts, with the aim of encouraging some of the best and brightest young lawyers to practice in areas of poverty law and public interest law, rather than go to high-paying jobs in the legal and corporate sectors.

Pro Bono Students Canada (PBSC) is an organisation with 12 member law schools across Canada, with a mandate to match law students interested in doing pro bono work with local non-profit or charitable organisations that require their assistance (under supervision from a qualified legal practitioner). The program started in Ontario (and is based at the University of Toronto), but national expansion was made possible by a large grant from the Kahanoff Foundation of Calgary, Alberta.

It is unlikely that the scale or scope of these initiatives would be matched in Australia in the short term. However, a more modest program along these lines and supported through community (university-profession-corporate) partnerships may be conceivable; for example, providing a fellowship stipend in the $5,000-6,000 range (which would cover annual HECS liability) for students who undertake summer clerkships/internships in approved pro bono/public interest law programs in Australia, or perhaps even internationally. (A good precedent is the National Australia Bank (NAB) financial support for the Victorian Public Interest Law Clearing House (PILCH).)

The results of a survey of Australian law schools conducted in January 2001 by a group of summer clerks at the Sydney office of Mallesons Stephen Jaques is attached to this report as Appendix F. As a general matter, the survey indicates that, unlike many or most American law schools, very few Australian law schools have a considered or coherent policy in relation to developing a pro bono ethos in law students – although there are many scattered courses and programs.

One interesting initiative is the 'Practising in the Public Interest' program, a partnership bringing together the private legal sector (PILCH law firms), the community sector (PIAC/PILCH) and New South Wales law schools (the Universities of New South Wales, Sydney, Western Sydney and Wollongong). The aims of the program are to foster an understanding of public interest and pro bono legal work, and to promote greater interaction between law schools and the private legal profession.

The program both has classroom training and clinical components, the latter exposing students to pro bono work and opportunities within law firms, community legal centres, professional associations and legal aid. As raised by the MSJ survey, funding

is a barrier to greater university and student participation in the program (which in most cases is now being credited as part of the core curriculum).

Clearly more work is needed, but there is a generally sympathetic environment in which further developments can take place.

Role of State and Territory admitting authorities

Following graduation from law school, intending lawyers in Australia are obliged to complete another phase of professional preparation prior to admission to practice – this generally takes the form of an articled clerkship or a further course of study at a practical legal training (PLT) institution (many of which are now incorporated within, or allied with, university law schools, in addition to the stand-alone programs such as the NSW College of Law and the Leo Cussen Institute in Victoria).

There are perhaps more limited opportunities for fostering a strong pro bono culture during this phase, but the Task Force nevertheless would encourage:

- State and Territory admitting authorities to recognise that pro bono placement work meets the practical legal experience requirements within formally taught PLT courses;
- State and Territory admitting authorities to continue the policy of giving approval for practitioners within community legal centres, legal aid offices and the like to act as principals for purposes of supervising articles and employment requirements for admission; and
- the Australasian Professional Legal Education Council (APLEC) and the Consultative Committee of State and Territorial Admitting Authorities, as part of the current review of PLT standards, to consider whether there should be any compulsory component (practical or reflective) of the curriculum which highlights the legal profession's service ideal and promotes a pro bono culture.

Responsibilities for implementation

The Council of Australian Law Deans (CALD) should review and report to the Australian Pro Bono Resource Centre regarding policies and institutional commitment to clinical and pro bono placement programs among member law schools. CALD should consider the development of national policy about whether at least one such program should be a compulsory part of the curriculum for all law students.

The Australian Pro Bono Resource Centre, in association with CALD, should explore the possibility of developing community (university-profession-corporate) partnerships to support a national pro bono fellowship scheme.

The Australian Pro Bono Resource Centre should monitor admission standards and pre-admission requirements, and discuss these with State and Territory admitting

authorities, where appropriate, measures needed to promote a strong pro bono culture among Australian lawyers.

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