



Pro bono legal services in Western Sydney

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November 2005

Acknowledgements

This research could not have been conducted without the generosity of those legal practitioners in Western Sydney who set time aside to be interviewed for the project. The authors would like to thank them for their enormous contribution to the research.

The authors would also like to thank the staff of the National Pro Bono Resource Centre, and particularly the Director, John Corker, for their support for the research and their careful review of the draft report. Their suggestions and ideas were extremely helpful at several points in the research process.

Finally, the authors would like to thank the staff of the Law and Justice Foundation of NSW for the invaluable assistance they provided throughout the course of this project, and for their continued interest in the important topic of pro bono legal services.

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This publication has been produced with the financial assistance of the Law and Justice Foundation of NSW. The Foundation seeks to advance the fairness and equity of the justice system and to improve access to justice, especially for socially and economically disadvantaged people. (<http://www.lawfoundation.net.au>)

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Executive Summary

Background

This report presents an exploratory study of the provision of pro bono legal services by law firms in Western Sydney. The research was carried out to provide information on the following issues:

- The type of pro bono work carried out by practitioners in Western Sydney;
- Their motivation for conducting pro bono work;
- The constraints on pro bono work; and
- Ways to support the pro bono commitment of firms in Western Sydney.

Research approach

The research was conducted through a program of interviews with practitioners in Western Sydney. A total of 12 practitioners were interviewed. Most of the practitioners interviewed came from small firms, with fewer than five partners.

Key findings

The practitioners who participated in this study were involved in a diverse range of pro bono matters. They were particularly active in representing disadvantaged people who have limited access to the legal system, and in doing work on a pro bono basis for charitable and community organisations. Further, a number of the practitioners took part in community legal education programs.

When asked about their motivation for performing pro bono work, one factor presented itself quite strongly, and this was a sense of attachment and obligation to the community in which the practitioner was working. Many of the practitioners interviewed for the project also mentioned the importance of social justice as a factor underpinning their pro bono work. Social justice considerations also flowed into the criteria the firms applied in deciding whether to accept pro bono matters. Although none of the firms represented in the study had highly developed systems for organising pro bono work within the firm, there was consensus that social justice was a key criterion for taking on a pro bono matter. One practitioner described the test he applied as “basically whether it would be a grave injustice if this individual didn’t get the benefit [of legal advice]”.

This report has also identified some important constraints on the capacity of small firms to accept pro bono matters. An obvious constraint is the limited financial capacity of smaller firms to carry non-paying matters. Smaller law firms work within tight budgetary limits, and their ability to undertake pro bono work is directly affected by the economic environment and by their ability to generate a sufficient profit from other work to cover pro bono matters. There is some evidence that the financial

capacity to undertake pro bono work has been further limited by the recent changes to laws concerning personal injury compensation.

Another constraint identified in this research was the challenging nature of pro bono cases. Pro bono matters are often at a critical point when they reach the practitioner and pro bono clients are often disadvantaged in ways that affect their capacity to communicate with legal representatives. This complexity means that pro bono cases are often very demanding of the time and energy of the practitioner.

Finally, the practitioners who participated in this study were asked whether there were any measures that could be put in place to support their pro bono work. The most common suggestions related to the development of a network of experts who would be prepared to work on pro bono cases. Practitioners would also like greater recognition of pro bono work by the courts, and suggested that practitioners appearing in pro bono matters could be given some consideration in relation to the procedural aspects of their cases. However, it was also evident that practitioners in smaller firms preferred to retain autonomy and flexibility in relation to their pro bono work, so the establishment of highly structured support systems is unlikely to suit their style of pro bono practice.

Conclusion

A principal aim of this study has been to shed some light on the pro bono work of smaller firms practising outside the Sydney CBD. There appear to be some important differences between the pro bono work of small firms and that of large firms. Financial capacity to undertake pro bono matters is one obvious difference, but the local, community-based nature of the pro bono work of small firms is another. These differences need to be taken into account in the development of any policy approaches or support mechanisms relating to pro bono legal services.

1 Introduction

1.1 Background

In the last few years, there has been an increased level of interest in pro bono legal services, particularly since 1998, when the (then) Law Foundation of NSW published its report *Future Directions for Pro Bono Legal Services in NSW*. In 2002, the Law Society of NSW revised its policy on pro bono work, and in 2003 the Victorian Government gave preferential status in its tender for legal services to firms that carried out pro bono work. At Federal Government level, funding has been provided for the National Pro Bono Resource Centre, which opened in 2002. This Centre has produced a range of materials and manuals to support the pro bono work of law firms and has organised several national pro bono conferences.

Much of the research and resourcing effort to date has focused on community legal centres and larger law firms. Yet there is evidence that smaller firms in suburbs and regions carry a large part of the burden of pro bono work. This project aims to address this knowledge gap by examining the way that pro bono work is conducted in law firms that are located in Western Sydney. Specifically, it provides information about:

- The type of pro bono work carried out by firms in Western Sydney;
- The motivation for conducting pro bono work;
- The constraints on pro bono work; and
- Ways to support the pro bono commitment of firms in Western Sydney.

While the project looks specifically at firms in Western Sydney, the information it provides is likely to be of relevance to smaller firms throughout Australia.

1.2 What are pro bono legal services?

There is no universally accepted definition of ‘pro bono legal services’. At their simplest, services provided ‘pro bono publico’ are services provided for the public good. However, views differ about the range of services that should qualify as ‘pro bono’. For example, in its 1998 report, the Law Foundation of NSW proposed the following definition of pro bono services:

Pro bono legal services are services that involve the exercise of professional legal skills and are services provided on a free or substantially reduced fee basis. They are services that are provided for:

- People who can demonstrate a need for legal assistance but cannot afford the full cost of a lawyers’ services at the market rate without financial hardship;
- Non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good; and
- Public interest matters, being matters of broad community concern which would not otherwise be pursued (Law Foundation of NSW 1998: 97).

The Australian Bureau of Statistics has adopted part of this definition for its surveys of legal practices. It counts as pro bono work:

... work 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 (Australian Bureau of Statistics 2003: 44).

However, after consultations with the National Pro Bono Resource Centre, this report will rely on the definition put forward by the Law Council of Australia. The Council defines pro bono work as situations where:

- A lawyer, without fee or without expectation of a fee or at a reduced fee, advises and/or represents a client in cases where:
 - a client has no other access to the courts and the legal system; and/or
 - the client's case raises a wider issue of public interest; or
- The lawyer is involved in free community legal education and/or law reform; or
- The lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations (National Pro Bono Resource Centre 2005: s. 1.3).

As noted by the National Pro Bono Resource Centre:

This definition is used by many firms. It is broad – it covers not only legal advice and representation but also law reform and community education – but it is limited to work done by lawyers and does not cover some kinds of assistance that firms may wish to include in their pro bono programs, such as secondments of non-legal staff and/or the provision of financial or in-kind assistance to community organisations (such as community legal centres and Public Interest Law Clearing Houses) which undertake activities that enhance access to justice (National Pro Bono Resource Centre 2005: s 1.3).

1.3 Research approach

1.3.1 Site of the study

The broad aim of this research is to provide insights into the provision of pro bono legal services by practitioners in smaller firms. Information for the study was collected from the following regions within the Western Sydney area: Liverpool, Macarthur, Parramatta and the north-west. A focus on Western Sydney is appropriate for a study such as this, as it is generally acknowledged that the population of Western Sydney suffers from a higher level of disadvantage than populations in other parts of Sydney. As a result, there is likely to be a higher demand for pro bono legal services.

A social profile of Western Sydney, published in 2002, shows the extent of the disadvantage in this region (Gleeson, Holloway et al. 2002). Using an index created

from 1996 census data, the report showed that Greater Western Sydney is more disadvantaged than the Sydney Statistical Division area and New South Wales. Within the Greater Western Sydney area, Fairfield, Auburn and Liverpool are the most disadvantaged of the local government areas in Greater Western Sydney (Gleeson, Holloway et al. 2002: 74).

This index is derived from attributes such as low income, high unemployment, unskilled occupations and low education levels (Gleeson, Holloway et al. 2002: 94). The lower the score, the more disadvantaged an area is supposed to be. The scores for each area are set out in the table below.

Table 1: Relative Socio-Economic Disadvantage Scores for Local Government Areas in Greater Western Sydney, 1996

<i>Area</i>	<i>Index of relative socio-economic disadvantage (score for 1996)</i>
Auburn	932
Bankstown	969
Baulkham Hills	1,128
Blacktown	964
Blue Mountains	1,071
Fairfield	905
Hawkesbury	1,036
Holroyd	982
Liverpool	956
Parramatta	1,004
Penrith	1,009
Camden	1,051
Campbelltown	964
Greater Western Sydney	998
Sydney Statistical Division area	1,027
New South Wales	1,007

Source: Gleeson, B, D. Holloway and B. Randolph (2002: 74)

A review of income data also shows that overall, people in Western Sydney earn less than those in other parts of Sydney. In 2001, approximately 38 per cent of individuals in Greater Western Sydney earned less than \$300 per week. This compares with 35 per cent of individuals in the total Sydney area. At the other end of the income scale, only 3% of people in Greater Western Sydney earned more than \$1,500 per week compared with 6% of people in Sydney as a whole (Gleeson, Holloway et al. 2002: 63).

Taken together, higher levels of social disadvantage and lower incomes suggest that the barriers to legal assistance will be greater for people in Western Sydney than for people in other parts of the Sydney metropolitan area. The availability of pro bono legal services is therefore likely to be of particular importance to people in this region.

1.3.2 Methodological approach

Interview program

This study has taken a qualitative research approach, with information being collected through a series of face-to-face interviews with Western Sydney legal practitioners. Each of the interviews was guided by an interview schedule. The schedule was developed after a review of existing research in the area, and consultations with the National Pro Bono Resource Centre.¹ The research protocol was submitted to the University of Western Sydney's Human Research Ethics Committee and was approved in January 2005.

Each interview was divided into three parts. As an introductory question, the interviewee was asked to provide background information about their firm, including size and main areas of practice. The next section of the interview consisted of a set of questions about the solicitor's involvement in pro bono legal services, while the final part of the interview was a discussion of the way that solicitors could be supported to provide pro bono legal services.

Recruitment of participants

Recruitment of interview participants started in February 2005. The following steps were taken to recruit project participants:

- On 14 February, an advertisement appeared in the Law Society President's *Monday Briefs*, a weekly email message sent out to all members of the Law Society. This gave a brief description of the project and asked interested solicitors to contact the researchers.
- In mid-February, the researchers made contact with the solicitor in charge of pro bono activities for NSW Young Lawyers. He undertook to email an advertisement for the project to his members.
- On 25 February, an advertisement for project participants appeared in the *Watts McCray e-newsletter*, sent out to approximately 350 solicitors. Watts McCray is a specialist family law firm based in Parramatta.
- On 11 March, information about the project was sent to the President of the Liverpool-Fairfield District Law Society. He offered to circulate an advertisement for project participants to the members of his executive.
- In early April, the researchers made email approaches to some 50 solicitors in Western Sydney, asking them to consider participating in the project.
- Also in early April, the researchers contacted Macquarie Legal Centre at Merrylands, which offered to publicise the project to its volunteer solicitors.
- An advertisement for the project was also sent to the President of the Parramatta and District Law Society for circulation.
- In May, several firms in the Liverpool area were contacted and asked to participate in the project.

¹ A copy of the interview schedule is attached at Appendix 1.

In spite of these extensive efforts, the target of 30 interviews was not reached. Instead, 12 solicitors were interviewed for the project. While this seems a relatively low response rate, it could be regarded as sufficient for an exploratory research study such as this. Qualitative research can be considered complete when saturation is reached; that is, when additional interviews begin to yield similar information and no new themes are introduced (Sarantakos 1998: 204-5). This occurred with this study. The last few interviewees echoed many of the themes raised in the earlier interviews.

None of the practitioners interviewed for this study are identified by name in this report. Instead, they have been given identifiers P1 to P12, where 'P' stands for participant.

Analysis of the data

Interviews conducted for the project typically lasted between 30 minutes and one hour. All but one of the interviews was taped and then transcribed. One interview was conducted by telephone, which meant that taping was not possible. In this case, the interviewer took detailed notes.

Analysis of the interview data took place in several stages. The first step in this process was to conduct a preliminary analysis of the interview data; the researcher read each transcript and set of notes carefully and noted down the chief ideas contained in each chunk of data.

The researcher then reviewed these ideas across all the interviews and developed categories and sub-categories for grouping the topics together. Inevitably, some of these categories followed from the interview schedule. However, new issues and ideas also emerged from the data, and these were noted down under their own category names.

The interview transcripts were then entered into QSR N6, a software program designed to support the analysis of qualitative research data. QSR N6 allows the researcher to code text documents, and then analyse and explore the coding. Eighteen principal themes (or nodes, as they are called in QSR N6) were developed. Files were created for each data node and the researcher then reviewed the chunks of data at each node. These themes form the basis of chapters 3 and 4.

1.4 Structure of this report

The following chapters set out the researchers' findings on pro bono legal services provided by Western Sydney firms. The report is structured as follows:

- Chapter 2 provides a profile of the firms included in this study and sets out the context in which they are working;
- Chapter 3 looks at the types of pro bono work undertaken by these firms and solicitors, their motivation for engaging in pro bono work and the way pro bono work is organised within their firms. It also considers the constraints on solicitors who want to provide pro bono legal services;
- Chapter 4 considers ways in which pro bono work could be supported; and
- Chapter 5 provides concluding comments.

2 Contextual factors affecting law firms in Western Sydney

2.1 Introduction

The Australian legal services industry has been subject to extensive change over the last 20 years. These changes have been both regulatory and market-based, and have affected many aspects of legal practice. This chapter starts by providing an overview of the industry and by locating the firms interviewed for this study within the industry. The chapter then discusses the ways in which changes in the environment for law firms have affected those firms which are the subject of this study. Contextual change was raised as an important issue by a number of the practitioners interviewed for this study. In particular, they talked about the impact of recent regulatory change on their capacity to undertake pro bono legal work. Thus, the environment in which these firms are operating needs to be considered in any discussion of the provision of pro bono legal services.

2.2 A profile of the legal profession

2.2.1 Law firms in Australia

The Australian legal services industry is becoming increasingly important to the Australian economy. While comprehensive statistics are not regularly collected on legal practices in Australia, several different reports are available that provide a picture of the shape and development of the industry.

In 2001, a report on Australia's business and professional services sector made the following findings.

- The output of the legal services sector grew by 6% in 1998-99, compared to growth in the broader economy of 4.2% (Allen Consulting 2001: 20).
- International trade in legal and accounting services combined also grew strongly during the 1990s, rising from a deficit position in 1991 to a net exporting position. By the late 1990s, Australian legal and accounting services were consistently exporting in excess of \$30 million of services each quarter (Allen Consulting 2001: 22).

The most recent survey of legal practices, conducted by the Australian Bureau of Statistics, provides some further details about law firms² in Australia (Australian Bureau of Statistics 2003). At the end of June 2002, there were 7,566 law firms in Australia, employing a total of 79,258 staff (Australian Bureau of Statistics 2003: 4). Comparing these results with the survey carried out by the Bureau in 1998/99, the number of firms increased across the period by 6.3%, while total employment increased by 17.8% (Australian Bureau of Statistics 2003: 8).

Thus, the legal services industry is a growing industry. However, it is also changing shape and becoming bifurcated. The Allen Consulting report referred to above found that the number of middle-size firms in the industry fell in the late 1990s, while the

² The term 'law firms' is being used to refer to firms of solicitors and barristers, not to barristers in solo practices.

number of very small firms grew (Allen Consulting 2001: 20-21). Small firms – those with two or fewer principals – currently account for 87% of all solicitor practices (Australian Bureau of Statistics 2003: 21). However, industry revenue is concentrated in the largest firms. While firms with 10 or more partners represent only 1.2% of all firms in the industry, they account for 48% of all income from legal services (Australian Bureau of Statistics 2003: 21). Viewed in terms of return per solicitor, the return per solicitor for the smallest firms (practices with only one principal/partner) was \$63,000, while for the largest firms (10 or more principals/partners) it was \$196,600 (Australian Bureau of Statistics 2003: 21).

According to the Australian Bureau of Statistics, area of practice is also a factor that differentiates the largest firms from smaller firms. For firms with 10 or more partners, the top three fields of practice (measured by income) are:

- commercial law;
- property; and
- banking and finance (Australian Bureau of Statistics 2003: 17).

For firms with one partner, the top three areas of practice are:

- property;
- personal injury; and
- family law (Australian Bureau of Statistics 2003: 17).

This changes slightly for firms with two to five partners, where commercial law also becomes an important area of practice (Australian Bureau of Statistics 2003: 17).

2.2.2 Firms included in this study

The firms represented in this study are generally smaller law firms. The distribution of the firms by size is set out in the table below.

Table 2: Profile of the firms included in this study

<i>2.2.2.1.1 Practice size</i>	<i>No. of firms in this study</i>
1 principal/partner	5
2 principals/partners	2
3-5 principals/partners	2
6-9 principals/partners	2
Community legal centre	1

The practitioners interviewed for this study were located in the Liverpool, Macarthur, Parramatta and north-west districts of Western Sydney.

2.3 The changing environment for the legal profession

2.3.1 Regulatory and competitive change in the 1990s

Over the last two decades, Australian governments have been working within a policy framework that emphasises deregulation and the fostering of competition. A significant point in the development of this framework came in October 1992, when

the Council of Australian Governments (COAG), comprising representatives of federal, state and territory governments, agreed to a set of principles for a national competition policy. COAG also established the Independent Committee of Inquiry into National Competition Policy. The Inquiry reported in August 1993 and made a range of recommendations aimed at enhancing competition (Independent Committee of Inquiry 1993, known as the Hilmer Report). These included recommendations to extend the application of the Australian anti-monopoly law (the Trade Practices Act 1974) and recommendations concerning the reform of government regulations that impacted on competition. The Inquiry's recommendations were accepted by COAG in February 1994.

The Hilmer Report impacted directly on the legal services industry. One of the Hilmer Report's recommendations was that the Trade Practices Act be extended to the professions. Following from this, in 1994 the Federal Trade Practices Commission undertook an inquiry into the legal profession (Trade Practices Commission 1994). In its report, the Commission described the Australian legal profession as being "heavily over-regulated and in urgent need of comprehensive reform" (Trade Practices Commission 1994: 3). The report recommended extensive changes to those regulations, "with the objective of exposing legal practitioners to more effective competition and of obliging them in that way to provide more efficient and competitively priced services to the business sector and the Australian public" (Trade Practices Commission 1994: 6). These recommendations were endorsed by a Federal Government report on access to justice, also released in 1994 (Access to Justice Advisory Committee 1994).

Given Australia's federal system, the actual task of abolishing restrictive practices in the legal industry fell to state and territory governments. The first state to act on these issues was New South Wales, which introduced the Legal Profession Reform Act in 1994. That Act introduced a series of changes, including the abolition of scale fees and the removal of the legal profession's monopoly on property exchange. In addition, advertising by lawyers was allowed, speculative fees were permitted and an independent consumer complaints systems was established.

A further round of changes began in 1997 with the introduction of a system for national practising certificates. Since that time, legislation has been introduced in most states (including NSW) allowing lawyers to practise in other states relying on their home state practising certificate, insurance arrangements and fidelity fund contributions. In July 2002, the national practising certificate scheme appeared to receive new momentum when the Attorneys-General of all states and territories made a commitment to implementing a national legal services market. Model laws to achieve this goal were released in May 2004 but are yet to be implemented in all jurisdictions.

2.3.2 Changes to the law affecting compensation for personal injury

According to a number of the solicitors interviewed for this project, the changes described above have had their intended effect, with law firms now needing to be much more competitive to survive. One interviewee noted that there had been a time

when there was a lot of money “sloshing through” smaller law firms as a result of the conveyancing monopoly, “but that’s all changed the last 10 or 12 years”.³

However, the most critical change referred to by almost all interviewees was the so-called tort law reforms introduced by the NSW State Government in the last three years. These changes have been implemented in two stages.⁴ In 2002, the first round of changes placed limits on the amounts that could be awarded in personal injury claims, and also restricted solicitors’ rights to advertise. The second round of reforms took effect in 2003. These were “much broader, having a fundamental impact on the law of negligence itself” (Tarakson 2005: 10). Among other things, the changes affected the general principles of negligence and strengthened certain defences available to claims of negligence (Tarakson 2005: 9-14).

Interviewees commented that these changes had had a dramatic effect on law firm profitability and had “changed the landscape”⁵ for law firms. One interviewee explained that, since the changes to personal injury law, the income of the firm had dropped by over 50% and the number of employed solicitors had been reduced from four to three. Another interviewee said that, in spite of planning ahead for the changes, his firm still lost “just on a million dollars” in one year. This had come as something of a surprise:

I mean even when it hit home it still, it knocked just on a million dollars out of one year in income from this practice. It just went like that and that’s what I wasn’t ready for. I knew it was going to come, I knew it was going to hurt but I didn’t, we didn’t anticipate such a big hit so quickly. It just disappeared. And I’ve never seen, you know with conveyancing we’ve sort of had years to adjust. But with personal injury there was just no time. And a lot of them are still hanging in there thinking there’ll be enough work but there isn’t, it’s just not enough to go around.⁶

Others described the current climate for law firms as extremely difficult:

I’ve been a lawyer 30 years and the reality is that the profitability of legal practice has diminished and there tends to be a general focus, or anti-lawyer focus, by the government which ultimately feeds into the bottom line. You know, removal of third party and workers compensation – there’s substantial funds there – continual reviews of the family law position and that sort of stuff.⁷

I would have 10 years ago, five years ago, I would have had 30% of my revenue from personal injury work; today it would be less than 5 and those cases are long tail exercises. I get a lot of people coming in that years ago probably would have had a claim that meant something, and today I have to go and explain the problems of thresholds, medical evidence, percentages. And they generally walk away confused and bewildered and say why is this happening to me, I don’t believe this.⁸

³ P4.

⁴ An overview of these changes can be found in Tarakson, S. (2005) *Personal Injury: Hot Topics 51* Sydney: Library Council of NSW: 9-14.

⁵ P11

⁶ P4

⁷ P11

⁸ P12

Of significance to this study is the link drawn by some interviewees between their firm's tighter financial position – over the last 10 years but particularly since the passage of the Civil Liability Act – and their capacity to conduct matters on a pro bono basis. For example:

I think the reality is the harder it becomes for lawyers to earn a reasonable profit well, of course, the less likely they are to devote to pro bono.⁹

Until we can get a bigger cash flow I suppose [extensive pro bono work is] just not going to happen. And I don't think it'll ever go back to that sort of situation. I think with the number of lawyers and fierce competition from non lawyers and other issues, business is going to be very tightly run.¹⁰

We're on the Law Society list for pro bono in the area. We'll do anything that we feel that we're competent in, if we have the time. And that's been a problem because there's been massive changes in the law in relation to tort law and personal injury law. Whereas we used to be able to have, we used to have a policy of trying to do as much as we could because we were making quite a good income in relation to that personal injury side of the practice, which is my area. But now, because of the massive changes, the income of the firm has dropped by over 50%. So now it's more like an all hands on deck situation, where we've had to ... This is why I was quite happy to be interviewed; we've had to cut our pro bono work down massively but for that very reason, because we need everyone working on income.¹¹

2.4 Conclusion

This chapter has provided a profile of the firms who are represented in this study. It has also sought to place those firms in context by examining the environment in which the firms are operating. Many of those interviewed for this study argued that recent regulatory changes have had a major impact on the profitability of small law firms and that this has, in turn, imposed financial constraints on the capacity of many such firms to carry out pro bono work. Personal injury work represents an important source of income to small law firms, such as those operating in Western Sydney. However, for some of the firms in this study, this income stream has been significantly affected by the recent changes to injury compensation systems in NSW.

Contextual factors are therefore an important consideration in any examination of the provision of pro bono legal services. The next chapter moves on to examine the different ways in which the solicitors interviewed for this study approach pro bono legal work.

⁹ P11

¹⁰ P4

¹¹ P6

3 Pro bono legal services in Western Sydney

3.1 Introduction

In spite of the shifting environment for law firms, most of the solicitors interviewed for this project engaged in pro bono work. As one of the interviewees noted, pro bono work has a long tradition within the legal profession and is always likely to be present, even if changes within the profession mean that pro bono work will be undertaken “in a different, more structured way”.¹²

This chapter explores some of the key questions posed at the beginning of this report:

- What sort of pro bono legal work is performed by lawyers in smaller firms?
- What motivates them to undertake pro bono work?
- How is pro bono work organised within the firm?
- What are the constraints on pro bono work?

3.2 Pro bono legal work undertaken

In Chapter 1, ‘pro bono legal services’ were defined as services where:

- A lawyer, without fee or without expectation of a fee or at a reduced fee, advises and/or represents a client in cases where:
 - a client has no other access to the courts and the legal system; and/or
 - the client’s case raises a wider issue of public interest; or
- The lawyer is involved in free community legal education and/or law reform; or
- The lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations (National Pro Bono Resource Centre 2005: s. 1.3).

The types of pro bono services provided by participants in this study covered virtually all elements of this definition. Firstly, many of the solicitors provided direct legal services to individuals for free or on a reduced fee basis. Most of the examples given by the solicitors who were interviewed covered matters where clients were disadvantaged through intellectual disability, poverty, lack of English literacy or low levels of education. In many cases, several of these factors were present. Some of these clients could not obtain legal aid, while others had been through the legal aid system but, in the opinion of the solicitors involved, had received little assistance. One firm had a longstanding practice of accepting particular types of children’s matters from the Legal Aid Commission even though the legal aid fee falls well short of the professional time involved. They accepted a large number of such matters and considered this to be “a large part of our contribution to the community”.¹³

¹² P4

¹³ P5. The issue of the relationship between legal aid work and pro bono work is discussed in section 4.5.

Some of the free legal work referred to by the study participants came to them directly; that is, clients approached them with legal problems and the solicitor accepted the case even though it was obvious that the client would be unable to pay the full cost of the matter. In some cases, clients were referred from the Law Society Pro Bono Scheme. In other cases, clients were referred for free advice from community organisations with which the solicitor had some association.

Yet other free work was undertaken under the auspices of another organisation. For example, one solicitor regularly volunteered at a local community legal centre, another helped to staff a legal advice service for in-patients at a local hospital, while another participated in the Salvation Army's 'will days'. While some of these schemes can be used by people who would not be regarded as disadvantaged, it is likely that much of the work done would fit the definition of pro bono legal work given the nature of the community in Western Sydney.

In talking about pro bono legal work, several solicitors mentioned their participation in a duty solicitor scheme at Parramatta Court. This scheme no longer operates. However, when it did, it involved local solicitors participating in a roster to provide legal advice to people at Parramatta Court for a minimal fee.

Secondly, a number of the solicitors interviewed were involved in free community legal education. One regularly gave a seminar on contract law for Mission Australia, while others were involved in the Law Society's Speakers Bureau, giving talks to community groups about legal issues.

Thirdly, most of the solicitors interviewed were involved in the provision of legal advice to community organisations. One solicitor mentioned having been appointed honorary solicitor for a community organisation of which he was a member, while others talked about providing free legal advice on request to local community organisations. In some cases, solicitors volunteered as board members of local organisations. These appointments often led to the solicitor providing free legal advice to the organisation.

None of the solicitors interviewed mentioned being involved in public interest cases or law reform activities. However, several of them referred to their role in providing free *legal information* to clients and community organisations. One such solicitor described this as "road map advice".¹⁴ He gave the example of referring people to free government publications that contained all the information they needed on a legal issue. Other solicitors talked about providing similar consultations for free.

I'll set aside a few minutes and see what we can do and then take it from there. It's just a sort of a walk in the dark sometimes and sometimes a little door opens and everything solves itself. But a lot of times people have just got no idea what they're supposed to be doing ... or one idea about this and the area they should be looking at is something else completely different because the consequences of course A are going to be more graphic than course B. Or they can avoid all sorts of problems then altogether if they follow course C. But they don't have that experience. They're usually people that haven't risen up the educational ranks very highly and there's a

¹⁴ P1

certain limit to how far people can go by living on their wits. And sometimes they just get caught out and realise they're caught out and they have to be fixed up.¹⁵

Yes, I feel sometimes like I'm a little community legal centre with those sort of things. Come in, what is it and let's see what we can do for you, or this is what has to be done. It might involve an application being made somewhere to a court or a tribunal. Or they might have to go somewhere themselves where I can't represent them, like the Fair Trading Tribunal or the Tenancy Tribunal. But without any information they don't know where to start. ... And every year I file away a couple of lever arch folders of enquiries of that nature that never become files. Someone approaches us for assistance and we give them some help and direction but never charge for it.¹⁶

We regularly see people and, you know, assess their needs and then refer them to someone where we think they could get assistance, whether that be just the Law Society to be referred on or to another solicitor or service provider.¹⁷

But we give a lot of general advice out initially which is free, it is free to the community, which would be considered pro bono. But there are some things we will refer to the Chamber Magistrate rather than take it on.¹⁸

Thus, the pro bono work being undertaken by solicitors in Western Sydney covers many of the types of matters included in the Law Council definition of pro bono legal services. In addition, it seems that there is a great deal of free legal information being provided by these solicitors. The next section looks at the motivation of these practitioners to take on this work.

3.3 Why do solicitors undertake pro bono matters?

In the interviews conducted for this project, two themes emerged particularly strongly in the discussion of practitioners' motives for carrying out work on a pro bono basis. These were *community ties* and a sense of *social justice*. Several other motivating factors were also mentioned, such as *professionalism* and *a culture of giving*. These are all discussed in the paragraphs below.

3.3.1 Community ties

Many of the practitioners interviewed for this project had a strong sense of being a part of their local community. Some had grown up in the area, others had practised as solicitors in the area for a very long time. As a result, they were well aware of the difficulties faced by many members of the local community and of the need that existed for pro bono legal services.

There's a need in this community. There's not – it's like anything. You get people screaming and saying look, this is terrible. And there's a lot of people who don't jump up and down and they really do have rights.¹⁹

¹⁵ P12

¹⁶ P12

¹⁷ P11

¹⁸ P2

¹⁹ P2

Particularly where we are, we think it's important here, where we're situated in Blacktown, to do pro bono work ...²⁰

They also felt a sense of obligation to their community. People in the community had provided them with business, and there was a duty to repay that trust by taking on some matters on a pro bono basis. For example:

And the community here has done a lot for us, done a lot for our families and we feel very strongly about that. ... We have the attitude we earn our income here, no use us turning our nose on our people because our community pays our wages.²¹

Another interviewee argued that "if you've got a strong community then you've got a reasonable business and it all sticks together".²² Therefore, it was important to give something back to the community.

This is a factor that seems to distinguish the pro bono work of suburban practitioners. While it is often argued that lawyers should undertake pro bono work because they have an obligation to society generally (Pro Bono Task Force 1992: 5), in suburban firms that obligation is actually seen as owed to the community immediately around them. This suggests that suburban practitioners will be more likely to undertake pro bono matters that are directly linked to their own region rather than take part in work that relates to the Australian community in broader terms.

3.3.2 *Social justice*

Social justice and the protection of the disadvantaged were mentioned by several interviewees as important reasons to take on pro bono matters. For example, one practitioner explained that, before the firm accepted a pro bono matter, he and his partner would discuss the legal issues and risks involved and would also "discuss the social justice issues, basically whether it would be a grave injustice if this individual didn't get the benefit [of legal advice]".²³ Another described his firm's motive for accepting pro bono cases as follows:

The blokes here have got a keen sense of social justice but that only comes from me because I've got a keen sense of social justice and ... and I guess too I'm focused as I said, we're very focused on liberty and rights, particularly handicapped people, disadvantaged people.²⁴

Another practitioner explained that his firm was particularly likely to take on a pro bono matter if there were children involved and there was a protection element.²⁵

Many of the examples of pro bono matters offered by practitioners interviewed for this project involved people with intellectual disabilities, people with little education or migrants with poor English skills. It is evident that the interviewees felt a particular

²⁰ P6

²¹ P6

²² P4

²³ P2

²⁴ P6

²⁵ P5

obligation to assist people who lacked the necessary skills to deal with the legal system.

3.3.3 Professionalism

Pro bono work has long been regarded as part of a lawyer's professional obligations (Law Foundation of NSW 1998: 69). It was therefore not surprising that a number of interviewees referred to this as a reason for taking on pro bono matters. One practitioner expressed it in these terms:

I think it's part of being professional in their approach. And by professional I don't mean businessman. We're here – it might be an old-fashioned view – but we're here to practise a profession, we do what has to be done.²⁶

Another interviewee felt that pro bono work is “just part of being a practitioner”.²⁷ Thus, a sense of professionalism remains an important factor behind the pro bono work of smaller law firms.

3.3.4 A culture of giving

Several practitioners talked about the importance of helping others as a motivation to carry out pro bono work. One practitioner said that his firm wanted to develop this attitude in the younger practitioners in the firm.

I want the younger people to get in to that sort of culture, where there is a culture of giving. We've always had it but I see it in generation X and Y, less of a willingness to give of themselves.²⁸

Another practitioner explained his own reasons for taking on pro bono work, and in particular, for volunteering at a community legal centre, as being simply that “I like to help out”.²⁹ He added:

I'm a bit of a dinosaur from the days of – thanks to Gough Whitlam – of free university. So I mean my way of thinking is – going two hours every month is not a huge thing. And I think that generally speaking in pro bono work, I mean I would be quite happy to do it.

Another interviewee, who currently works at a community legal centre, echoed these comments when he said “I'm here because I really like helping people”. He felt that this same motivation probably applied to many of the solicitors who volunteered at the centre:

There's a lot of solicitors out there ... contrary to the way society sees us, there's a lot of them that, as long as food's on the table, they want to give something back. From a human perspective, we're all born with the capacity and need to feel valued, and one

²⁶ P7

²⁷ P4

²⁸ P4

²⁹ P9

good way to do that is to help those that are poorer in our community. So a lot of them genuinely have that idea and I think that's why they do it.³⁰

3.3.5 Marketing

The fact that some law firms use pro bono work as a marketing tool was acknowledged by several interviewees. One interviewee explained that, before solicitors were allowed to advertise, carrying out free work for community organisations was “how we advertised”.³¹ Another commented that some of his firm's community legal education work had a dual purpose, with some of it serving a marketing purpose as well. A third practitioner stated that he had originally taken on some pro bono matters thinking they might lead to fee-paying work, although this had not occurred.

However, it was clear that marketing was not a principal motivating factor for any of the solicitors interviewed for this project who were actively involved in pro bono legal services. Any marketing benefits of the pro bono work they did could be described as incidental rather than as central to their pro bono contribution.

3.3.6 Other factors

Although only mentioned by a small number of the solicitors interviewed for this project, two other motivating factors merit reporting. The first of these is that solicitors view pro bono work as important. As one interviewee stated:

We only do it because we think it's important.³²

The second is that some solicitors find pro bono work enjoyable. One solicitor who contributed to this project said that he found the pro bono work he carried out for non-profit organisations enjoyable, to the point that he almost didn't see it as part of his practice but more as a personal interest to be pursued.

3.4 How is pro bono work organised within the firms?

3.4.1 Policies and systems relating to pro bono matters

None of the firms represented in this study had highly structured systems for dealing with requests for pro bono assistance. One of the larger firms in the study had a policy manual in which it was stated that it was important to contribute to the community, and the firm's pro bono work was one aspect of this commitment. Another of the larger firms was beginning to develop some structures around its pro bono work, in that the firm was setting budgets for the amount of free legal work it would conduct for specific local community organisations and decisions to take on large pro bono matters were discussed at management level within the firm. In all of the larger firms, pro bono matters were dealt with in the same way as fee-paying matters, in that files were opened and the time spent on the case was recorded.

³⁰ P10

³¹ P4

³² P6

However, none of the firms in the study had written guidelines on pro bono work, and the decision whether to take on a pro bono matter was largely one for individual partners.

3.4.2 Criteria for accepting pro bono matters

The practitioners interviewed for this study applied a range of criteria when deciding whether to accept a pro bono matter. Some firms tended to accept particular types of matters, such as children's matters or work for specific community organisations. In other cases, decisions were based on the following range of factors:

- Social justice.

One practitioner defined social justice as “basically whether it would be a grave injustice if this individual didn't get the benefit [of legal advice]”.³³ Other practitioners saw it in terms of defined types of cases, such as criminal matters where the client's liberty was at stake, cases involving people with intellectual disabilities or cases involving racial discrimination. Yet other practitioners simply talked about accepting cases that represented “a good cause”.

- Client's capacity to pay.

This is obviously an important factor in pro bono matters. Most practitioners mentioned that they looked at the financial position of the client in deciding whether to take a case on a pro bono basis. One firm accepted referrals from the Law Society Pro Bono Scheme, so in these cases a financial assessment would have been done by the Law Society Pro Bono Solicitor.

- Time available.

Several practitioners commented that they took into account the amount of work involved in a potential pro bono matter and the amount of time they had available to work on it. As one practitioner said:

I think there probably has to be an assessment of how much work you think's involved, because once committed you really have to finish the job.³⁴

- Merit of the case.

This is obviously an important issue for any case and no less so for pro bono matters. For one practitioner, merit was the main criterion:

The principle I use is I have to be satisfied – and only reasonably satisfied – that they are genuine. In other words, do they have a credible story? And if they want me to defend the case, it has to have some merit. And if they want to plead guilty, I satisfy myself as far as I can that a plea of guilty is appropriate. Because a lot of people ... plead guilty even though they are not technically guilty. So it's mainly on merit.³⁵

³³ P2

³⁴ P2

³⁵ P8

- Other factors.

Two other factors were mentioned by practitioners as criteria for accepting pro bono matters. These were:

- Whether the practitioner was competent in that area of law; and
- The number of other pro bono cases that the practitioner was currently handling.

The number of other pro bono cases was important for one practitioner because of the complex nature of many pro bono cases and the difficulties that sometimes occurred in working with pro bono clients. Where clients were disadvantaged through mental illness or intellectual disability, tasks such as taking instructions and conferring with the client could require much more time than for other types of cases.

3.5 Constraints on the provision of pro bono legal services

Not all the practitioners interviewed for this project undertook pro bono work, and even those who did talked about the limits on the amount of pro bono work they could accept. This section discusses the two main problems raised by practitioners in relation to pro bono work: the complexity of pro bono matters and the limited financial capacity of small firms to carry out non-fee paying work.

3.5.1 *The nature of pro bono matters*

Many of the practitioners interviewed for this project talked about the challenging nature of pro bono work that is carried out for individuals. As one put it succinctly:

Pro bono matters are often ... by their nature either difficult matters or difficult people.³⁶

Firstly, pro bono matters can be difficult because clients often present at a very late point in a case. One interviewee gave this example:

The worry [with pro bono matters] is that it's too late and you haven't got time to fix the problem. And that's unfortunately because of the innocence or the ignorance of the people. Somebody will come in and say that the sheriff is at my door wanting to take all my furniture. Well:

“Were you served with a summons?”

“What's a summons?”

“Did you notice getting any documents from the court?”

“No”.

Usually no. They don't know what they've got. But it's always the case that they were served the documents, they don't know what they were, they get sued by Joe Blow or Harvey Norman or somebody for \$200 and they say I don't owe them any money. I'm not guilty, so to speak, and they do nothing. And then a month or so later on after judgment and execution, the sheriff turns up and they're horrified. ... Because if that happens and the sheriff is at the door and they've taken the goods for

³⁶ P5

sale and the client admits the debt is due, then there's just no point. You'll get no result in that the client can't have the judgment set aside unless the people dispute the issue. It's different if they say "I don't owe any money to this company". But it's usually not the case, they usually do owe something. So even if you get the judgment set aside and the sheriff hasn't got the right to collect the goods and sell them, when the case is heard on the basis that they have the chance to defend it, the result is going to be the same. A judgment will be entered. But if they come in and see you first of all, you can make some arrangements with the debtor. Maybe they'll accept 50% of the debt.³⁷

Thus, pro bono matters are often at a critical point by the time they reach the practitioner. A consequence of this, noted by one interviewee, was that:

... pro bono work doesn't tend to telephone it tends to come in, it tends to physically walk in the door, ... the reason being that people are so desperate they think ... they think that it's so important that if they make a telephone call they may get brushed off then and I think it's more of a "well, if I'm here, you're going to have to see me".³⁸

Secondly, clients who need pro bono assistance are often disadvantaged through mental illness, intellectual disability, low education levels or poor English language skills. Therefore, pro bono clients often present particular communication difficulties for practitioners. For example:

We're dealing with people for whom English is a second language, or who have severe mental disabilities, or maybe have periods of stability where they're say schizophrenic, where they're perfectly normal at the time that they're treated but have periods of instability. During those periods of stability, they can give you instructions, you can get medical certificates confirming that, they can give you a detailed history, they can tell you everything. At other times, they can't.³⁹

For this reason, according to one interviewee, pro bono work needs to be dealt with by experienced practitioners, rather than by junior lawyers.

I don't think it's one of those things you just give to someone so someone can learn on their feet, no.⁴⁰

Another consequence of the complexity involved in working with some pro bono clients is that it limits how many such cases one practitioner can manage at any time. When there are difficulties in communicating with a client,

... that can be a drain on you as a practitioner, because there's a lot more responsibility involved in taking on that case. And it just isn't simple. It never seems to be a case where you can get straight instructions or reasonable negotiations, or anything like that.⁴¹

Thus, the nature of pro bono work imposes constraints on practitioners accepting pro bono cases. Pro bono cases often need to be dealt with by experienced practitioners,

³⁷ P8

³⁸ P6

³⁹ P2

⁴⁰ P6

⁴¹ P2

because of the particular challenges involved in working with the clients. This complexity also means that pro bono cases can take up more time and energy than other cases.

3.5.2 Financial capacity to accept pro bono matters

An obvious, but significant, constraint on smaller law firms in taking up pro bono matters is financial capacity. As already discussed in Chapter 2, the recent changes to personal injury compensation in NSW have affected the financial position of many of the firms included in this study. However, even without this, smaller suburban and regional law firms work within tight budgetary limits. As noted by one practitioner, in smaller firms,

Solicitors don't ... make that much more than the average wage, when all is said and done.⁴²

This is supported by information collected by the Law Society of NSW. Its 2004 survey of NSW solicitors found that:

- Around one in three solicitors (32.6%) in firms with between one and four principals reported earning less than \$50,000 in the financial year ending June 2003.
- The mean income reported by solicitors in firms of one to four partners was \$77,200 (Urbis Keys Young, 2005: 33).

Therefore, many firms simply cannot afford to take on a lot of non-paying matters.

It does cost money to carry people. Most suburban, most single practices, I think their overheads would probably be ... 50 to 60% of their overheads would be in staff costs and then site costs and technology and insurance. It all adds up.⁴³

A particular concern of several of the practitioners interviewed was the necessity to keep their practice running profitably for the sake of the staff employed there. For example:

We need the income to support the staff who ... some of them have been here longer than I've been here. But it's very important that they don't lose their mortgages and they don't lose their income for their families.⁴⁴

It follows from this that the level of pro bono work undertaken by smaller firms will be directly affected by the business cycle and the capacity of smaller firms to generate a sufficient profit to carry non-paying matters.

If you want to be a solicitor in private practice and run your own business, well you need to make a dollar. So if there's no money to keep yourself there's no point in supporting everybody else for nothing, pro bono or otherwise unfortunately. And that's just commerce.⁴⁵

⁴² P12

⁴³ P12

⁴⁴ P6

⁴⁵ P12

3.6 Conclusion

The evidence presented in this chapter shows that practitioners in Western Sydney law firms are involved in a diverse range of pro bono matters. While none of the practitioners interviewed referred to public interest matters or law reform work, they were very active in representing disadvantaged people who had limited access to the legal system, and in doing work on a pro bono basis for charitable and community organisations. Further, a number of the practitioners took part in community legal education programs.

Unlike many of the larger, city law firms, the firms represented in this study did not have detailed guidelines or policies around pro bono legal services. Nonetheless, there was a consensus as to the appropriate criteria for accepting pro bono matters. Four factors were mentioned in particular: social justice; the client's capacity to pay; the time available to the practitioner; and the merit of the case.

When asked about their motivation for performing pro bono work, the practitioners interviewed for the project mentioned many of the factors that are commonly understood to underpin pro bono work. These are: a sense of social justice; professional responsibility; and a desire to give something back to the community. However, an additional factor presented itself quite strongly, and this was a sense of attachment to the community in which the practitioner was working. Many of the practitioners interviewed had had a long association with their local community and were sensitive to the level of disadvantage within that community. They also felt a sense of obligation to the community which had supported their business over many years. This was an important motivation for their pro bono work.

By contrast, the practitioners who participated in this project generally were not motivated to undertake pro bono work because of the marketing opportunities it can offer. While one interviewee felt that larger firms sometimes undertook pro bono work in order to develop their public profile, none of the practitioners interviewed for this project saw marketing as central to their pro bono commitment.

This chapter has also highlighted some of the factors that make it difficult for practitioners to take on a large amount of pro bono work. An obvious constraint is the limited financial capacity of smaller firms to take on non-fee paying work. However, an equally important limitation is the complex nature of pro bono matters and the amount of time and energy that they often absorb.

This chapter has therefore set out the pro bono landscape for firms in Western Sydney. The next chapter considers whether any mechanisms or systems can be put in place to support this work.

4 Supporting the pro bono work of Western Sydney solicitors

4.1 Introduction

This chapter focuses on the third main research question addressed by this project: whether there are mechanisms that could be put into place to support the pro bono work of practitioners in Western Sydney. Drawing on the findings of previous research, practitioners were asked specifically whether assistance with disbursements would extend their capacity to take on pro bono cases. They were also asked an open-ended question about ways in which their pro bono work could be usefully supported. This chapter reports on their responses.

4.2 Assistance with disbursements

In 1998, the Law Foundation report on pro bono legal services concluded that disbursements assistance could be of enormous value in encouraging lawyers to undertake pro bono work (Law Foundation of NSW 1998: 83). For this reason, the issue of disbursements assistance was raised with the practitioners who participated in this research.

While a number of interviewees agreed that disbursements assistance could be useful in theory, none of the solicitors regularly drew on any disbursements assistance schemes. There were two main reasons for this. Firstly, for most of the practitioners interviewed, the level of disbursements incurred was not significant for the type of work they did, so they tended to cover disbursements themselves. For example:

Well we always do it ourselves, we just do it ourselves. ... the Disbursements Scheme, what's it going to really cover for us? Like photocopying. If you're doing something to do with a local court matter, family law matter or criminal matter, I mean there's not really a lot of disbursements involved in it, I don't see.⁴⁶

Local court litigation wouldn't have a significant disbursement component anyway, but I mean if you then go to the other end of the spectrum, ... Supreme Court matters, you're talking about legal costs in the hundreds of thousands of dollars. I mean incredibly expensive jurisdiction. I can't imagine any suburban firm being able to do pro bono Supreme Court work.⁴⁷

When I was doing personal injury work we tended to, like most firms, particularly doing workers comp, you fund your own disbursements. We had a special account where we basically funded our own disbursements. ... the main thing I do now is criminal work and OH&S work, and in criminal law you don't really get a huge amount of disbursements, other than probably counsel's fees and maybe, if you send someone to a doctor now and again. So it's usually ... you say to people well, you've got to pay it, and they pay it. The pro bono stuff that we've run has been fairly disbursement [free]. Like in that AVO one, I mean the disbursements would have just been a phone call, things like that. There wasn't a great deal that was incurred.⁴⁸

⁴⁶ P6

⁴⁷ P11

⁴⁸ P9

Thus, the firms represented in this project tended to fund disbursements themselves or ask the clients to pay disbursements.

The second reason given by several practitioners for not using disbursements schemes was the amount of paperwork and administrative time involved in claiming on the schemes. One practitioner gave the example of a workers compensation matter he was currently conducting:

The WorkCover Authority will fund disbursements in WorkCover cases, but the amount of paperwork that's involved, that you have to do for free anyway ... it's often cheaper to pay the disbursement, run the risk of not getting it paid back in costs, you're still making more of a profit than if you actually applied for them to pay it.⁴⁹

Another practitioner explained that, for the same reason, his firm doesn't do legal aid matters.

In fact, we as a firm don't do legal aid matters. We'd rather do it pro bono than have a grant of legal aid and be constantly answering to Legal Aid about how and why it should happen. ... The amount of money they pay doesn't cover the cost anyway, so we're giving it away. We don't need the extra paperwork.⁵⁰

As a general matter, then, any scheme that seeks to help solicitors with their pro bono work needs to avoid imposing an administrative burden on firms. One interviewee suggested that this could be achieved by adopting the approach used by the Office of State Revenue in relation to the payment of stamp duty. In that case, the firm's office staff is trained in the purchasing of stamp duty, and the firm is subject to occasional audits by the Office of State Revenue. If any shortfalls in payments are found, the solicitor is held responsible and has to pay the additional amounts.

[In relation to the payment of disbursements], the situation would be a little bit wiser to say well, OK, here are the guidelines for funding. You can get funding if you satisfy these. Keep receipts, keep your records and we'll audit. Make it clear as to when funding can be provided and then ... the solicitor is responsible. If we don't follow those guidelines, we have to pay back the funds. That's much better than having to jump through the hoops.⁵¹

These responses suggest that disbursements assistance will not make a significant difference to the capacity of smaller firms to take on pro bono matters. Further, in smaller firms, where office support staff are few, the level of administrative work required by any pro bono support scheme needs to be kept to a minimum if the scheme is to be of assistance to practitioners.

4.3 Experts' reports

The issue of receiving assistance with the funding of experts' reports was raised by several interviewees. One noted that it would be useful to have access to a network of doctors and other experts who would provide services in pro bono cases. Another

⁴⁹ P2

⁵⁰ P5

⁵¹ P2

practitioner suggested that such experts would not necessarily have to work pro bono themselves. However, it would be useful if they were prepared to work:

... not so much on a different scale but sometimes it means they don't get paid. Sometimes it means they don't get paid at all, or don't get paid until late, or get paid off over a period of time by the client, whatever.⁵²

The same practitioner explained that his firm currently relied on their own network of barristers when they needed counsel in pro bono cases.

At present, we [arrange pro bono assistance] on an informal basis with barristers that regularly do work for us anyway. Essentially we ask them for a favour and 9 times out of 10 they'll accommodate it.⁵³

However, he commented that it would be helpful to the firm to have access to a list of barristers who were prepared to assist in pro bono cases.

4.4 Assistance from courts

Another issue raised by several interviewees was the assistance that could be provided by courts in relation to court procedures in pro bono cases. One practitioner who had participated in the duty solicitor scheme at Parramatta Court explained that, under that scheme:

... the court itself would give some priority to the matters. That was of considerable assistance because you knew if you were the duty solicitor you were going to be flitting between courts and when they saw you come in ... there was an agreement, that they would take you first and you'd be able to get on and do things. And one of the great problems with doing any family law work is the amount of time that is lost in going through the court process and if there was some ... I'm not quite sure how to do this, I haven't thought about it but way of easing the court process and not imposing such pressure on work that is being done pro bono, or if there was some consideration for the fact that you're doing it to help the court and help the community. It'd be nice to get something back from the courts for that. And I mean by that ... for example, maybe making listing matters a little bit easier. I'm not talking about the result, I'm talking about the procedure. The process to get to the result. Don't be quite so critical if the documents aren't quite so good because the person only came in the instant before the hearing, for example. That kind of thing. But you don't get any leeway for those things.⁵⁴

Another practitioner interviewed for the project commented that, when he takes pro bono cases to his local court, he always announces that he is doing the matter on a pro bono basis. He does this both in the hope that fellow practitioners might extend more courtesy to him in relation to that case and that the magistrate might give him some leniency:

... not in relation to justice but advantage in relation to time.⁵⁵

⁵² P5

⁵³ P5

⁵⁴ P5

⁵⁵ P6

This suggests that courts could play a valuable role in supporting the pro bono work of practitioners in smaller firms, by recognising those matters where a practitioner is acting on a pro bono basis and imposing a lesser administrative or procedural burden in those cases.

4.5 Payment for a matter

The definition of pro bono work used for this study allows that work performed on a reduced fee basis can constitute pro bono work. However, this point has not always been accepted, and past studies have canvassed the argument that only work performed for no fee should be considered pro bono work (Law Foundation of NSW 1998: 48).

The information collected for this study suggests that many practitioners in small firms support the view that pro bono work can include legal services provided on a reduced fee basis. As discussed in the previous chapter, smaller firms do not necessarily generate large revenues, and the capacity of practitioners in these firms to perform pro bono work is limited by the need to produce income for the practice. Thus, when asked how their pro bono work could be supported, some of the project participants stated simply that some financial encouragement to do pro bono work would be helpful. That is, being able to recover some payment for the matter would help them to continue their pro bono work.

Therefore, this study lends support to the argument that pro bono work should be considered as encompassing reduced fee work. It does so for the very practical reason that this may be the only way that smaller firms can continue to provide pro bono legal services.

It is important to note, though, that the practitioners involved in this study typically distinguished reduced fee pro bono work and work performed under a grant from the Legal Aid Commission. As already mentioned in section 3.2 above, one firm counted as part of their pro bono contribution the fact that they undertook a large number of matters involving children which were referred by the Legal Aid Commission. However, this was the only instance of legal aid work being described as pro bono work. In fact, the same firm had made a considered decision to stop doing any other sort of legal aid work, preferring to undertake matters pro bono rather than apply for a grant of legal aid.

A similar policy had been adopted by a number of the practitioners who participated in this project. In some cases, this was because legal aid fees rarely covered the cost of the matter, but involved the additional cost of reporting back to the Legal Aid Commission. As a result, the practitioners did not undertake legally aided work.

... we as a firm don't do legal aid matters. We'd rather do it pro bono than have a grant of legal aid and be constantly answering to Legal Aid about how and why it should happen. The amount of money they pay doesn't cover the cost anyway, so we're giving it away. We don't need the extra paperwork.⁵⁶

⁵⁶ P5

Several other practitioners were concerned that legal aid had been “whittled away”⁵⁷ to the point where people who needed legal assistance were unable to get funding. As a result, one practitioner focused his pro bono work on those who were disadvantaged but did not qualify for legal aid. He commented that “... with the dismantlement of legal aid, there’s some that just can’t get any justice at all”.⁵⁸

Thus, although many of the practitioners in this study considered that reduced fee work could count as pro bono work, they drew a clear distinction between legally aided work and pro bono work.

4.6 Conclusion

This chapter has set out the views of the project participants on the question of further support for pro bono work. While disbursements assistance was seen as less important by the practitioners interviewed for this project, the availability of experts to work on a pro bono basis was regarded as potentially useful. Some allowance from the courts in relation to procedural matters would also support the pro bono work of smaller firms. Finally, some level of payment for pro bono matters could also help practitioners in smaller firms continue to take on pro bono cases.

The following chapter draw together the different themes discussed in this report and presents the conclusions from the research.

⁵⁷ P7
⁵⁸ P6

5 Conclusion

5.1 Introduction

The previous chapters of this report have set out the information collected in relation to each of the key issues investigated by this project. This chapter provides some concluding observations about the pro bono work of practitioners in Western Sydney.

5.2 The pro bono work of Western Sydney practitioners

This research project was initiated by a desire to fill a gap in our understanding of pro bono legal services. While small law firms are responsible for a large proportion of the pro bono legal work carried out in Australia, less is known about how they resource and organise that work than is known about the pro bono efforts of larger firms. By conducting this qualitative research study with firms in Western Sydney, this project aimed to broaden our understanding of the pro bono landscape and provide some insight into the pro bono work of smaller law firms.

A theme that emerged from the interviews conducted for this project was that the pro bono work of smaller firms is not highly structured or organised within each firm. None of the firms represented in this study had established systems for dealing with requests for pro bono assistance. While most of the practitioners interviewed considered the social justice aspect of each case before accepting it, and sometimes discussed the case with their partners, the decision to accept or reject a case was generally a matter for individual partners. This was so even in the relatively large firms included in this study.

One reason for this less structured approach could be the finely balanced nature of suburban legal practice, where the capacity to take on pro bono matters can change quite quickly. As one interviewee explained, some pro bono cases can be very time-consuming and personally draining, and this will limit the practitioner's ability to take on any more such cases. Further, like other types of small businesses, small law firms are vulnerable to shifts in the business cycle, so their capacity to accept more pro bono cases will depend on the overall health of their business. Finally, several practitioners mentioned that their capacity to accept pro bono work had been significantly affected by recent regulatory changes and the subsequent loss of income from personal injury work. For this reason, firms may see it as important to retain a very flexible and unstructured approach to deciding whether or not to accept pro bono work.

Possibly for the same reason, the practitioners interviewed for this project seemed to prefer to remain outside formal pro bono schemes. As one practitioner commented:

[The issue of pro bono] keeps getting raised and raised, but from my own experience which is limited, pro bono work is alive and well, why do we need anybody to keep activating it, keep stirring it up. Why does everything need to be regulated and put into little packets?⁵⁹

⁵⁹ P7

Another practitioner agreed that smaller firms liked to retain some autonomy in relation to their pro bono work:

A lot of them, they're quite happy to do their own stuff without having to become part of some official framework. If they want to take on 5% of their work and they like this client and they go to partners and say look this guy needs some help and they can tailor it to their own, that's the way I see it [working].⁶⁰

The desire for autonomy may also be the reason for the lower than expected participation rate in this project. Practitioners like to undertake pro bono work on their own terms, and prefer not to be involved in any structured pro bono program.

A number of firms in this study have participated in the Law Society Pro Bono Scheme. However, this study suggests that practitioners from smaller firms will be unlikely to involve themselves in organised pro bono schemes if they perceive those schemes as imposing a large administrative burden on them. A persistent theme arising in interviews was that 'the paperwork' was a barrier to the greater use of existing programs that could support the practitioners in their pro bono work.

Nonetheless, community involvement was also an important issue for the practitioners who took part in this project. This leads to the conclusion that smaller, local pro bono networks might be an effective way to extend the pro bono work of suburban firms. A number of the practitioners interviewed for the project referred positively to the scheme recently established in Walgett to assist clients seeking interim orders in family law matters (Truswell, 2005). While that scheme matches clients in Walgett with solicitors in Sydney, the fact that the scheme was a response to an identified local need was attractive to the practitioners involved in this project. It follows from this that localised pro bono schemes, to address an identified need, could gain the support of practitioners in smaller firms. Local networks of experts could also assist practitioners in these firms to conduct pro bono matters, as could a system for working with the courts in their area.

Finally, this report shows that a great deal of pro bono work is undertaken by practitioners in smaller firms. The capacity of these firms to undertake such work appears to be very vulnerable to changes in the business and regulatory environment for law firms. However, mechanisms for supporting pro bono work, provided they have a local focus, could help sustain the pro bono work of suburban practitioners.

⁶⁰ P10

Appendix

Interview schedule

Background questions

1. Could you tell me a little bit about your firm: how many principals, how many employed solicitors, total staff numbers, location of offices, length of time established, main areas of practice.
2. Could you describe your practice: the main areas of law you work in and the types of clients you do work for.
3. Does your firm provide pro bono legal services?

For lawyers who provide pro bono legal services

4. Could you describe the areas of law in which your firm provides pro bono legal services?
5. From what sources does the firm receive requests to act in pro bono matters? *(Check: individuals approach the firm, Legal Aid refers clients, CLCs or similar organisations refer clients, courts refer clients, Law Society scheme.)*
6. What are the guidelines that the firm applies in deciding whether or not to act in a particular matter? Have these guidelines been formalised?
7. How is pro bono work organised in the firm? *(Eg. Does it have to be approved by all partners? Is it at the discretion of individual practitioners?)*
8. Why did the firm choose to organise its pro bono work in this way?
9. Do you have a system for monitoring pro bono work within the firm, both in relation to quantity and quality?
10. Does your firm work with any other organisations in providing pro bono legal services? *(Eg. Law Society, community legal centres, other practitioners, large firms.)*
11. What sort of support do these organisations provide in relation to your pro bono work?

For all interviewees

12. What factors would encourage you to take on pro bono matters?
13. What factors would discourage you from taking on pro bono matters?
14. What do you think are the positive features about the way that pro bono services are currently organised and delivered?

15. What do you think are the negative features about the way that pro bono services are currently organised and delivered?
16. Are you aware of the different pro bono schemes that currently exist in NSW (NPBRC (with its resource manual), Law Society, Bar Association, PILCH, Pro Bono Disbursement Fund)?
17. Is there any particular type of support that would assist your firm in relation to the provision of pro bono services?

References

- Allen Consulting (2001). Creating Value by Transforming Knowledge: Australia's Business and Professional Services Sector. Canberra, Department of Industry, Science and Resources.
- Australian Bureau of Statistics (2003). 8667.0 Legal Practices, Australia 2001-02. Melbourne, Australian Bureau of Statistics.
- Gleeson, B., D. Holloway, et al. (2002). Western Sydney Social Profile. Sydney, WSROC and Urban Frontiers Program (UWS).
- Independent Committee of Inquiry (1993). National Competition Policy. Canberra, AGPS.
- Law Foundation of NSW (1998). Future Directions for Pro Bono Legal Services in New South Wales. Sydney, Law Foundation of NSW.
- National Pro Bono Resource Centre (2005). The Australian Pro Bono Manual. National Pro Bono Resource Centre and the Victoria Law Foundation. <http://www.nationalprobono.org.au/probonomanual> (accessed 1 July 2005).
- Pro Bono Task Force (1992). The Legal Profession - Commitment to Pro Bono Work: A Report to the Council of the Law Society of NSW. Sydney, Law Society of NSW.
- Sarantakos, S. (1998). Social Research. Melbourne, Macmillan.
- Tarakson, S. (2005). Personal Injury: Hot Topics 51. Sydney, Library Council of NSW.
- Trade Practices Commission (1994). Study of the Professions - Legal, Final Report. Canberra, Commonwealth of Australia.
- Truswell, J. (2005). "Long distance help." Law Society Journal **43**(1): 21.