Pro bono legal services in family law and family violence

Understanding the limitations and opportunities

Final Report

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About the NATIONAL PRO BONO RESOURCE CENTRE

The **National Pro Bono Resource Centre** is an independent centre of expertise that aims to grow the capacity of the Australian legal profession to provide pro bono legal services that are focused on increasing access to justice for socially disadvantaged and/or marginalised persons, and furthering the public interest.

While the **Centre** does not provide legal advice, its policy and research work supports the provision of free legal services and informs government of the role that it can play to encourage the growth of pro bono legal services. The **Centre**'s work is guided by a board and advisory council that include representatives of community legal organisations, pro bono clearing houses, the private legal profession, universities and government.

Established in 2002 as an independent, not-for-profit organisation at the University of New South Wales, it was envisaged that the **Centre** 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 strategies that the **Centre** employs to grow pro bono capacity include:

Strengthening the place of pro bono legal work within the Australian legal profession as an integral part of legal practice by

- being a leading advocate for pro bono legal work;
- promoting the pro bono ethos and increasing the visibility of pro bono legal work;
- developing policies and advocating for measures to encourage an increase in the quality and amount of pro bono legal work; and
- producing resources and sharing information in Australia, regionally and internationally that builds pro bono culture in the Australian legal profession and participation by Australian lawyers in pro bono legal work.

Providing practical assistance to facilitate, and remove barriers to, the provision of pro bono legal services

- undertaking research on how pro bono legal assistance can best respond to unmet legal need, including the identification of best practice in its provision;
- engaging in policy development, advocacy and law reform on issues that have an impact on pro bono legal services;
- providing practical advice to lawyers and law firms to support their efforts to increase the quantity, quality and impact of their pro bono work;
- informing community organisations about the way pro bono operates in Australia; and
- leading in the development of new and innovative pro bono project and partnership models.

Promoting the pro bono legal work of the Australian legal profession to the general public by

- informing members of the public through the media and presentations about the pro bono legal work undertaken by members of the Australian legal profession.

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[1] In addition to the individuals listed here, the Centre consulted with seven stakeholders who did not wish to be named in the acknowledgements.

[2] The Family Law Council is a statutory authority established under s 115 of the *Family Law Act 1975* (Cth). It advises and makes recommendations to the Attorney-General about the workings of the *Family Law Act* and other legislation relating to family law, the working of legal aid in relation to family law any other matters relating to family law. For more information see http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/default.aspx.

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* For the purposes of this Report and the de-identification of stakeholder quotes, Justices and Registrars of the Family Court of Australia, and Judges of the Federal Circuit Court will be referred to as a 'Judicial Officer'.

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ABBREVIATIONS AND GLOSSARY

CLC	Community Legal Centre
FDR	Family Dispute Resolution
FLA	*Family Law Act 1975* (Cth)
FTE	Full-time equivalent
LAC	Legal Aid Commission

Family Dispute Resolution
Family dispute resolution is a non-judicial process in which an independent registered family dispute resolution practitioner helps people affected or likely to be affected by separation or divorce to resolve some or all of their disputes with each other.

Family law matter
For the purposes of this Project, the term family law matter refers to a legal matter arising under the *Family Law Act 1975* (Cth).

Family law practitioner
For the purposes of this Report, the term family law practitioner refers to lawyers who practice in family law. Some of these lawyers may have specialist accreditation in family law from a law society in their jurisdiction.

Family violence
For the purposes of this Report, the term family violence refers to both family violence and domestic violence. State and Territory legislation regarding family violence use both the terms "family violence" and "domestic violence" and in some legal literature the terms are used interchangeably. The term used in this Report does not refer to any specific legislative definition of family violence. Family violence refers to violent, threatening, coercive or controlling behaviour that occurs in the context of past or current intimate, domestic or family relationships. The term encompasses violence that may occur between family members, for example between siblings or parents and children, in addition to violence between partners.

Family Violence Order
For the purposes of this Report, the term Family Violence Order is used to refer to an order made by a court, under State or Territory law, for the protection of a victim of family violence. A Family Violence Order generally requires the perpetrator of violence to be of good behaviour towards the victim and to refrain from committing any further acts of violence against the victim. The Family Violence Order may also prohibit, restrict or restrain the perpetrator's behaviour in other ways, for example by prohibiting the perpetrator from

approaching the victim's home or place of employment. Family Violence orders have different names in different jurisdictions: Protection orders (QLD & ACT), Apprehended Domestic Violence Orders (NSW), Family Violence Intervention orders (Vic), Restraining Orders (NT, SA & WA) and Family Violence Orders (Tas).

Federal family courts

Federal family courts is the collective term used for those federal courts with jurisdiction in family law, namely the Federal Circuit Court and the Family Court of Australia.

Large law firm

For the purposes of this Report, a large law firm is considered to be one with between 450 and 1,000 full-time equivalent lawyers. This corresponds with the "Group A" firm grouping in the biennial National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers.

Mid-sized law firm

For the purposes of this Report, a mid-sized law firm is considered to be one with between 50 and 350 full-time equivalent lawyers. This corresponds with the "Group B" and "Group C" firm groupings in the biennial National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers.

Pro bono provider

For the purposes of this Report, any individual or organisation providing pro bono legal services, and may include law firms, in-house/corporate legal departments, government lawyers, individual solicitors and barristers.

Small law firm

For the purposes of this Report, a small law firm is considered to be one with fewer than 50 full-time equivalent lawyers.

Victims Compensation

The term Victims Compensation refers to the statutory compensation schemes established by legislation in all States and Territories: Victims of Crime Financial Assistance Act 1983 (ACT), Victims Support and Rehabilitation Act 1996 (NSW), Victims of Crime Assistance Act 2006 (NT), Victims of Crime Assistance Act 2009 (Qld), Victims of Crime Act 2001 (SA), Victims of Crime Assistance Act 1976 (Tas), Victims of Crime Assistance Act 1996 (Vic) and Criminal Injuries Compensation Act 2003 (WA). The term Victims Compensation in this Report does not refer to other ways that victims of violence may be compensated (e.g. Through an award of compensation in the civil courts, typically through a claim that a tort has been committed, and/or through an order that an offender pay restitution or reparation to the victim as a part of the offender's sentence).

EXECUTIVE SUMMARY

Despite the fact that more lawyers and law firms are becoming increasingly involved in pro bono service delivery, obtaining pro bono legal assistance in family law matters is very difficult, with many pro bono providers and referral schemes simply not accepting applications for pro bono assistance in family law. This research was undertaken to uncover why this is so.

Understanding the reasons behind the difficulties of obtaining pro bono legal assistance in family law requires an appreciation of the unique nature of family law as a practice area and the unique nature of family law clients, and how this impacts on pro bono providers.

The research indicates that on one hand family law practitioners, who are best placed to provide pro bono assistance in family law matters, have little capacity to provide more assistance than they already do. This is largely due to the way they work, in response to this unique nature.

On the other hand, while large and mid-sized law firms may potentially have more capacity to undertake pro bono legal work, they face a number of other significant constraints to providing pro bono legal services in family law that also stem from its unique nature.

Background

The provision of pro bono legal services in Australia is more structured and sophisticated than ever. Lawyers from all parts of the legal profession provide pro bono legal support across a broad range of areas of law, to provide access to justice to those who are otherwise unable to obtain legal assistance.

In the family law system which is geared towards alternative dispute resolution, publicly funded legal services provide a considerable amount of legal information and assistance to ensure that people who cannot afford to pay for a lawyer are assisted to understand their rights and obligations and reach an agreement. However, those with complex legal issues or complex circumstances for whom alternative dispute resolution is not suitable or has been unsuccessful, are unlikely to achieve a satisfactory outcome without legal representation.

> *"Only the most difficult cases end up in front of a judge - usually it's either high net worth individuals fighting over family trusts, or the complete opposite end of the spectrum: individuals experiencing sometimes severe social disadvantage, who have been unable to settle their matter, or for whom mediation has not been appropriate or has been unsuccessful because of violence in the relationship. Irrespective of which category of person you belong to – if you end up in front of a judge you really do need a lawyer to represent you."* (Judicial officer)

While legal representation is available through a grant of legal aid, many individuals of limited means do not qualify and need to look elsewhere for assistance.

Family law is a highly specialised practice area, and many practitioners choose to practice solely in the area of family law. One of the reasons for this is the size of the *Family Law Act*

(1975) (Cth) ('FLA'). The FLA has grown into very substantial piece of legislation, with a significant body of case law, and the federal family courts have unique procedural rules. Statistics on the legal profession indicate that expertise in family law in the private sector is mostly concentrated in law firms with less than ten partners. As a result, family law expertise has all but disappeared from large and mid-sized law firms.

The research suggests that family law matters often contain multiple legal problems and due to the nature of family law issues the clients' circumstances are often in a constant state of flux.

> *"Practicing family law is just different from other areas of the law even if the tasks the lawyers are doing are the same. A lot of it has to do with the nature of family law and the sometimes constant changes in circumstances. What looked like one thing can be something completely different a month later."* (Family law practitioner)

The research also suggests that family law clients can be a particularly demanding client group that need a wide range of support. This is due to the highly emotive nature of family law disputes which can result in the need for an intense lawyer-client relationship.

> *"I think all family law clients are high-needs clients in a way. The legal issues are so personal and so emotive. Some clients call several times a day and I know colleagues who take calls even late into the evening. You are not just their lawyer; you are their counsellor and confidant. Sometimes you are the only person outside their relationship that they disclose things that happened in the relationship to."* (Family law practitioner)

The capacity constraints of family law practitioners

Family law practitioners take an **ad hoc**, **individual approach** to pro bono legal work that involves unpaid work 'embedded' or 'woven' into the work they regularly undertake for clients who have a grant of legal aid, or work done for a significantly reduced fee for clients who do not qualify for legal aid but are of limited means. This work, for example, may take the form of continuing to act for a client after their grant of legal aid has run out.

> *"Being a family law practitioner is almost a lifestyle choice. It's as much about how you provide services as it is about the specialised area of law. Pro bono is woven into family law. The clients need a really high level of support and even if the client runs out of funds to pay me or reaches their* [legal aid] *funding cap you still have to help. Because what's the alternative – ditching a client and leaving them with no outcome or a poor one? That's not the kind of lawyer I want to be."* (Family law practitioner)

This form of pro bono work differs from the 'traditional' approach, where pro bono clients are distinct from fee-paying clients; pro bono matters are taken on 'pro bono' from the outset, and worked on separately from, and in addition to, other matters.

Due to their expertise, family law practitioners are best placed to assist in family law matters. However, the research suggests that these practitioners are working in a way that leaves them with little capacity to take on pro bono clients in a traditional sense.

The constraints faced by large and mid-sized law firms

In contrast to family law practitioners, many large and mid-sized law firms take an **organised, systematic approach** to pro bono work. These firms have pro bono practices that undertake increasing amounts of pro bono legal work often strategically targeting legal need in areas where no publicly funded legal services are available.

Although these firms may have the capacity to take on additional pro bono legal work, there are other issues that influence a firm's decisions about the areas of law and the type of pro bono legal work they will undertake, including legal or commercial conflicts, and means and merit considerations.

Arising from themes identified in the course of this research, the Centre developed an **Analysis Framework**, comprising five factors that are likely to be taken into account by a firm with a structured pro bono program when deciding whether to take on a matter, namely:

1) the compatibility of the unmet legal need with the legal assistance available based on the **scope of a firm's pro bono policy**,

2) whether the law firm and/or lawyer has **expertise** in the relevant area of law,

3) whether the law firm and/or lawyer has the **capacity** to take on the matter,

4) whether the matter is a **discrete task,** and

5) the **willingness and interest** from lawyers within the firm to undertake the work.

When applied in the family law context, the issues in the Framework serve to explain why it is difficult to obtain pro bono legal assistance in family law.

There is a broadly held view amongst large and mid-sized firms that the **scope of a firm's pro bono policy** should not extend into areas that are considered to be government responsibility and where legal aid funding is available.

> "*Family law especially should be government responsibility because it affects Australians across the board. So many people come in contact with the justice system through family law. Also – government should be held accountable for providing adequate access to publicly funded legal services, there are numerous examples of the government trying to shift its responsibility to the private profession – we can't let that happen in family law."* (Pro bono coordinator, mid-sized firm)

As a result of the increased specialisation in the Australian legal profession, large and mid-sized law firms rarely have **expertise** in family law. Although a lack of expertise can

sometimes be addressed by providing training, the size of the FLA and the multi-faceted nature of family law matters make it difficult to provide sufficient training.

> *"The Family Law Act is huge. Absolutely huge. And it has an equally large body of case law. And its own set of procedural rules. There's no way that amount of information can be imparted in a few days of training."* (Pro bono coordinator, large firm)

The nature of family law matters means that finding **discrete** tasks is difficult. Isolating a task from the other legal issues connected to it may mean simplifying it to the extent that it is no longer effectively responding to client's needs.

> *"Even if we could train our lawyers up to do one discrete task for clients – I am not sure that's the best way to meet unmet legal need for disadvantaged clients. We wouldn't be able to assist them with anything else except for that one little thing. I don't know if that sends the right message to society and to people who are already struggling. They are the ones who need the best possible assistance, given to them by lawyers who are experts in the relevant area of law to make sure they get the best possible outcome."* (Pro bono coordinator, mid-sized law firm)

Many large and mid-sized law firms reported that their pro bono practices were already working close to **capacity**. However, where capacity may exist, firms will choose to prioritise their limited resources taking into consideration the potential impact of the pro bono assistance. Due to the overwhelming demand for family law services, the perception exists that any additional pro bono capacity would only respond to a very small (some say negligible) part of legal need.

> *"Our pro bono program is working really well and although we are trying to increase our hours, in order to take on family law we would have to drop one of the areas we work in."* (Pro bono coordinator, mid-sized firm)

> *"There's so much unmet legal need in family law, you think: where would we even start? Would it make any difference? Even if all we* [the pro bono practice] *did was family law we'd barely scratch the surface."* (Pro bono coordinator, mid-sized firm)

Further, the nature of family law clients and the fact that they can be "relationship-intensive" may impact on the **willingness and interest** of lawyers and law firms to undertake pro bono legal work in family law. Whilst some lawyers in large and mid-sized law firms have experience in dealing with clients of this nature, most do not.

> *"Our lawyers aren't used to dealing with highly emotional, sometimes irrational and traumatised clients. It can be very confronting and is a skill learned over time. You can't just throw lawyers into those situations - they'd need to be supported in that regard as well."* (Pro bono coordinator, mid-sized firm)

No individual factor in the Framework explains why obtaining pro bono legal assistance in family law is difficult. For example, it may be possible to overcome a lack of expertise with

training, or to provide support to lawyers dealing with difficult clients. Rather, it is a combination of these factors, which are weighted differently by different firms, that explains the difficulty.

Why is pro bono legal assistance easier to obtain in family violence matters?

In contrast to family law, pro bono legal assistance in the area of family violence is easier to obtain. Many large and mid-sized law firms undertake pro bono legal work in this area, particularly in relation to seeking Family Violence Orders and acting for clients seeking Victims Compensation.

> *"In many ways a victims compensation file is the perfect pro bono file. The clients are often from a particularly disadvantaged background, which fits well with the focus of our pro bono program. The matters are never urgent and in fact some of them move quite slowly, which gives our lawyers the opportunity to work on them when they have the capacity. We arranged training for our lawyers in the relevant areas and we have expertise in administrative law within the firm. For our junior lawyers, the work actually develops their drafting skills, and they get to work more independently on files than they would in their commercial work.* (Pro bono coordinator, large law firm)

Applying the Framework in the context of family violence serves to explain why pro bono legal assistance is easier to obtain in family violence matters.

For example, despite the availability of legal aid funding in the area of family violence, many pro bono coordinators think work in the area of family violence fits within the **scope of a firm's pro bono policy. T**his may be because the factors in the Framework are weighted differently in the area of family violence.

> *"For us it's not about drawing the line at government responsibility as it is about assisting our clients in a holistic manner. Many of our* [Family Violence Order] *cases come through the Homeless Person's Legal Service. For those clients family violence may have been a major contributor to their homelessness. We wouldn't be doing our job if we chose not to assist clients to address the issues that contributed to their homelessness."* (Pro bono coordinator, mid-sized firm)

Also, despite the fact that legal issues in family violence are not within the core **expertise** of large and mid-sized law firms, the size of the legislation relating to Family Violence Orders and Victims Compensation means that a lack in expertise is easier to overcome with training.

> *"It's a discrete body of law. The Act is fairly short and straightforward, as is the court procedure. Our lawyers attended half a day of training and received a pack of materials they can refer to if they need to refresh their memory. Although the issues themselves may be contested, it's a question of fact, not a complicated question of law."* (Pro bono coordinator, large firm)

Further, the assistance provided by pro bono lawyers in matters relating to family violence is often in the form of a **discrete task**.

> *"The Act is contained in size and easy to get across. There's no complicated case law. It is impossible to have complicated, multi-faceted legal issues in matters under the Act, and the legal assistance required by clients in these cases is straightforward drafting. Some of our clients may have complicated circumstances, but that's a different issue.* (Pro bono coordinator, large law firm)

However, the interconnectedness of family law and family violence issues can make it difficult to obtain adequate pro bono legal assistance in a family violence matter, especially if the legal issues cannot be sufficiently isolated or separated.

> "*We used to send our lawyers to a women's shelter to provide legal advice to women who had escaped abusive relationships. The idea was that we would advise them on how to seek protective orders and on some other legal issues. But for so many of the clients their family violence issue was so connected with family law issues that our lawyers were unable to provide proper advice. All the questions* [the lawyers] *would get would somehow relate to family law and they just didn't have the knowledge. As a result we actually had to stop sending our lawyers down there and now only provide pro bono assistance to the shelter itself, not to its clients*." (Pro bono coordinator, large firm)

The application of the Framework to family violence matters further illustrates why pro bono assistance from large and mid-sized firms has been difficult to obtain in family law and is likely to remain so.

Conclusion

The research indicates that large and mid-sized firms are in most cases unlikely to provide pro bono legal services in family law matters.

Therefore, in responding to unmet need in family law, the focus needs to be on those practitioners who have the expertise and willingness to continue doing the work, whether in publicly-funded services or in private practice.

The issues of government funding, legal aid criteria for means and merits tests, the role of duty lawyers, legal aid early intervention schemes, community legal centres and other service providers provide the context for this research, but were matters beyond its scope.

In the pro bono context, not enough is known about the pro bono work of family law practitioners as this work is currently not visible and 'embedded' into the work they regularly undertake for clients. It is important to shed light on this work to recognise the significant pro bono contribution that these family law practitioners are making, and its resource implications (for example, if this contribution was no longer provided). A greater understanding of the **extent** and **impact** of the pro bono legal work undertaken by family

law practitioners could also inform a discussion and debate about how to respond to unmet legal need in family law, particularly the ongoing development of legal aid policy.

Given the limited capacity of family law practitioners to undertake more pro bono work, shedding light on the work they currently do is also important so they can be supported in continuing to assist clients with no or limited means in the best way possible.

Further research could provide a better understanding of:

- the factors that motivate family law practitioners to undertake this work;
- the characteristics of the clients who are receiving this assistance;
- the impact of this work on legal need and access to justice;
- the relationship between this work and work done under a grant of legal aid; and
- the ways that family law practitioners can be better supported to continue to provide family law services to clients with no or limited means.

This research is important not only because it is an area of significant unmet legal need but also because:

Family law *is the legal system's metaphor, the crucible with which so much else in law intersects…*

It is also, because it is the area of law by means of which most people will come into contact with it, the area by which the legal system will be judged by most people.[3]

[3] Justice Rosie Abella of the Supreme Court of Canada, as quoted by The Honourable Diana Bryant, Chief Justice of the Family Court of Australia in her speech, '*Walruses and the Changing Shape of Family Law in Australia*', November 2008, http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Speeches/FCOA_NZ_Speech.

KEY FINDINGS

This Report is based on information collected through stakeholder interviews and a literature review. The following seven key findings are further explained and supported by indicative quotes extracted from the interviews.

1. The demand for legal services in family law and family violence is high, particularly among people on a low income or who are experiencing disadvantage. The services currently provided by Legal Aid Commissions and Community Legal Centres, and the pro bono legal assistance offered by the legal profession, are unable to meet the legal need in family law.

> ***"To qualify for Legal Aid, you have to be poor, very poor."*** Due to the strict means tests for Legal Aid and gaps in legal aid funding guidelines, a growing number of Australians are unable to obtain Legal Aid, and yet are unable to afford the services of a private lawyer.

> ***"The real need is in representation."*** As publicly funded legal services are often only able to provide legal advice and assistance in relation to specific tasks in isolation, many clients are left unable to represent themselves in court or to draft their own documents for court proceedings.

2. Unrepresented litigants in family law matters put a strain on the family law court system and may lead to uninformed court orders being made that can have a significant and broader negative impact.

> ***"Up and down 'Struggle Street'"*** Self-represented and legally unassisted litigants in the Family Court and the Federal Circuit Court struggle to understand the process and produce relevant evidence and submissions. This has an impact on the Courts' resources, and may generate outcomes that are unsatisfactory for litigants and the administration of justice.

> ***"It's crucial, absolutely crucial, to get it right."*** Judges are concerned that they may not obtain sufficient relevant information from unrepresented litigants so as to make appropriate orders. Uninformed court orders may be difficult to vary, and can have a significant adverse impact on members of the family, especially children, as well as a broader societal impact.

3. There are significant differences in the way that pro bono legal work is perceived and undertaken by family law practitioners and the way that it is perceived and undertaken by the large and mid-size firms with structured pro bono programs.

> ***"Being a family law practitioner is almost a lifestyle choice... even if the client runs out of funds to pay me or reaches their*** **[legal aid]** ***funding cap***

you still have to help". Family law practitioners provide access to justice in a range of ways that may not necessarily fall under some strict definitions of pro bono, for example discounting fees, not charging a client for all the work undertaken, continuing to act for a client after a grant of legal aid has run out or in matters where no grant of legal aid is available.

"Our* [large] *firm does pro bono work because we believe that we can make a difference that goes beyond assisting the individual client. I don't think that's possible in family law..." Pro bono programs of large and mid-sized firms usually take a client on a pro bono basis from the outset of a matter and often have a strategic focus on areas of unmet legal need.

4. Family law practitioners are doing so much extra unpaid work for their legal aid or reduced-fee family law clients that they have little capacity to take on additional pro bono legal work.

"I honestly don't do pro bono work as such. I just can't afford to - although I do sometimes do parts of a case for free." As this form of pro bono work is 'embedded' or 'woven' into family law practice, capacity to take on additional free work is extremely limited.

5. Five factors that are likely to be taken into account by a firm with a structured pro bono program when deciding whether to take on a matter form an "Analysis Framework", which serves to explain why it is difficult to obtain pro bono legal assistance in a family law matter, namely:

a) the compatibility of the unmet legal need with the legal assistance available based on the **scope of a firm's pro bono policy**

"It's the government's job." The interviews revealed a widely held view that providing access to justice in family law is the responsibility of the government. For many, family law is beyond the scope of the firm's pro bono policy because pro bono legal assistance should not be a substitute for legal aid but rather complement publicly funded legal services.

b) whether the law firm and/or lawyer has **expertise** in the relevant area of law

"The expertise just isn't there." Many interviewees pointed out the lack of expertise in family law amongst large law firms with structured pro bono practices.

c) whether the law firm and/or lawyer has the **capacity** to take on the matter

"The extent of unmet legal need in family law – we wouldn't even scratch the surface." Many large and mid-sized law firms believe that due to the extent of unmet legal need in family law, limited pro bono resources would not be able to make a significant impact.

"The nature of family law matters – they're just different." Family law matters are often multi-faceted, and compared to other areas of law they concern a changing set of circumstances and an ongoing relationship with the client, making it difficult to estimate the resources required to assist in any one matter. They can also be comparatively lengthy.

d) whether the matter is a **discrete task**

"It's the breadth and width of family law." For corporate lawyers with no expertise or experience in family law, the size of the *Family Law Act* and the body of case law attached to it makes it difficult to find discrete tasks in family law.

e) the **willingness and interest** from lawyers within the firm to undertake the work

"The nature of family law clients – they can be difficult to deal with." Due to the trauma of relationship breakdown, family law clients may be unable to give proper instructions and have difficulties understanding advice. They may also require a close relationship with the lawyer assisting them and can be highly emotive. Whilst some lawyers in large and mid-sized law firms have experience in dealing with individuals experiencing disadvantage, most do not.

6. Obtaining pro bono legal assistance in a family violence matter is easier to obtain than in a family law matter.

"It can be done in family violence." Many large and mid-sized law firms provide pro bono legal services to victims of family violence, either assisting them through the court process of seeking a Family Violence Order or with an application for Victims Compensation.

Applying the **Analysis Framework** in the family violence context demonstrates why it is easier to obtain pro bono assistance in this area compared with family law:

a) the compatibility of the unmet legal need with the legal assistance available based on the **scope of a firm's pro bono policy**

"For us it's not about drawing the line at government responsibility as it is about assisting our clients in a holistic manner." Despite the existence of legal aid funding in the area of family violence, other factors such as the intention to assist a particularly disadvantaged group of people outweigh this factor.

b) whether the law firm and/or lawyer has **expertise** in the relevant area of law

"It's a discrete body of law." Even though Family Violence Orders or Victims Compensation are not within the core expertise of many corporate law firms, the lack of expertise can easily be overcome by training due to the generally limited number of legal issues that can arise in these matters.

c) whether the law firm and/or lawyer has the **capacity** to take on the matter

> ***"With Family Violence Orders, it's easy to estimate the time commitment required for each matter."*** Many interviewees indicated that legal tasks relating to family violence fit better with a firm's capacity because it is possible to reasonably estimate the time required to assist.

d) whether the matter is a **discrete task**

> ***"It is impossible to have complicated, multi-faceted legal issues… and the legal assistance required by clients in these cases is straightforward drafting."*** Discrete legal tasks were found to be more readily available in the area of family violence. Although many stakeholders commented on the fact that some clients in the area of family violence may have complex circumstances, the relative simplicity of legal issues makes it easier to find discrete tasks.

e) the **willingness and interest** from lawyers within the firm to undertake the work

> ***"Women escaping abusive relationships just come across as a more deserving client group than some of our other clients who may have partially contributed to their own difficult circumstances."*** Many of the stakeholders commented on the willingness/interest of lawyer and law firms to provide pro bono legal assistance in the area of family violence, and explained that it was (partially) due to the nature of the client group. Victims of family violence were perceived as particularly vulnerable and deserving of support and assistance at a difficult time in their lives.

7. When legal issues regarding family law and family violence interconnect, the difficulties relating to family law may extend so far as to make the provision of pro bono legal services in family violence difficult as well.

> ***"Where it connects with family law is where we run into trouble."*** The interconnectedness between family violence and family law issues meant that some pro bono projects had been unsuccessful as it was impossible to advise clients on one aspect of the law but not the other. In order to ensure successful pro bono projects/matters in the area of family violence, legal tasks had to be suitably 'isolated' from family law and carefully defined in scope.

WHAT'S IN THIS REPORT

PART A - BACKGROUND

Part A of this Report (pp 27-63) provides the context for the research project and this Report. It provides an overview of pro bono legal work in Australia. It also outlines the scope of legal issues in family law and family violence, and discusses the extent of legal need in family law and family violence that is currently not adequately addressed by legal services and the impact of this unmet legal need in family law and family violence. This Part examines what is currently being done to address unmet need in those areas by both pro bono service providers and the publicly funded legal sector. Finally, it discusses the different approaches to pro bono work taken by family law practitioners on the one hand, and large law firms on the other.

Chapter 1: About pro bono legal services

This Chapter contains an overview of pro bono legal work. It discusses the underpinning philosophy of pro bono legal work, including its voluntary ethic and the fact that pro bono legal work is not a substitute for publicly funded legal services. It also provides an overview of the pro bono landscape in Australia today. (pp 27-29)

Chapter 2: Legal issues in family law and family violence – what are they about?

This Chapter contains an introduction about the types of legal issues that people may encounter in family law and/or family violence, and also explains the different jurisdictions (Commonwealth/State) of family law and laws relating to family violence. The information in this Chapter provides the background information for the differences in the types of assistance needed in family law as opposed to family violence, which is discussed later in the Report, and the differences between the two areas of practice with regard to pro bono work. (pp 30-37)

Chapter 3: Unmet legal need in family law and family violence and its impact

This Chapter contains an overview of legal need in family law and family violence. Relying on the findings from the LAW Survey, it discusses the types of legal problems people may experience in family law and family violence; the ways in which people seek to resolve those problems and the co-occurrence of legal problems in other areas of the law. This Chapter also includes information gathered in interviews with stakeholders regarding types of unmet legal need and its impact on the individual and the justice system. (pp 38-45)

Chapter 4: Responding to legal need in family law - publicly funded services

This Chapter provides an overview of the publicly funded legal services that are currently available to a person with a family law or family violence issues, who cannot afford to pay for the services of a lawyer. It introduces publicly funded legal services (Legal Aid Commissions and Community Legal Centres), and the services which they provide. (pp 46-54)

Chapter 5: Responding to legal need in family law - pro bono legal services

This Chapter discusses pro bono legal work in family law and family violence. It explains the impact that the increased specialisation of the legal profession has had on the provision of legal services in different sections of the profession (small law firms and sole practitioners vs. large law firms), and explains the unique way in which legal services are provided in family law. This Chapter also discusses the different approaches to pro bono work taken by family law practitioners on the one hand, and large law firms on the other. (pp 55-63)

PART B - ANALYSIS FRAMEWORK

Chapter 6: Factors influencing the decision whether to provide pro bono legal services

This Chapter introduces the **Analysis Framework** developed by the Centre. It explains how the Framework was developed and elaborates on the factors influencing the decision to provide pro bono legal services. (pp 64-67)

PART C - FAMILY LAW

Part C (pp 68-91) reports on the findings of this research with regard to family law, bringing together the information gathered in interviews with stakeholders. It draws on external research on relevant topics and information from other sources, providing a broader context for the findings. This Part also applies the **Analysis Framework** to the findings relating to family law, providing an explanation for why it is difficult to obtain pro bono legal assistance in that area, and examines two case studies of pro bono legal service provision in family law that illustrate the issues raised by this research.

Chapter 7: Analysis of factors influencing the decision whether to provide pro bono legal services in the area of family law

This Chapter analyses the views expressed by stakeholders in interviews and the literature relating to pro bono service provision in family law using the **Analysis Framework** explained in Chapter 6. It discusses the ideological divide between pro bono providers and the government in relation to whether family law is solely the responsibility of government; lack of expertise in family law among large corporate law firms and whether that can be addressed by training; the nature of family law and the multi-faceted legal matters that may arise; the nature of family law clients as often emotive, difficult and sometimes perceived as undeserving; the 'clubby' nature of family law practitioners, and the perceived low status of family law as a practice area; and the amount of unmet legal need in family law.

The case studies of pro bono projects in family law are also analysed in this Chapter applying the Framework of factors that influence the decision whether to provide pro bono legal assistance, to highlight why pro bono projects have not been successful and also how future pro bono projects may be successful. (pp 68-91)

PART D - FAMILY VIOLENCE

Part D (pp 92-102) reports on the findings of this research with regard to family violence, bringing together the information gathered in interviews with stakeholders. It draws on external research on relevant topics and information from other sources, providing a broader context for the findings. This Part applies the **Analysis Framework** to the findings relating to family violence, providing an explanation for why it is easier to obtain pro bono legal assistance in the area of family violence.

This part also discusses the factors influencing the decision to undertake pro bono legal work, and also explains the amount and types of pro bono legal work already undertaken by large law firms in the area of family violence.

Chapter 8: Analysis of factors influencing the decision whether to provide pro bono legal services in the area of family violence

This Chapter analyses the views expressed in the consultations regarding family violence using the **Analysis Framework** explained in Chapter 6. It discusses the role of pro bono work and specifically why pro bono legal services are provided in family violence, despite the availability of legal aid funding. This Chapter also discusses the other factors influencing the decision whether to provide pro bono legal services, and the difficulties that arise out of the interconnectedness between family law and family violence, and how that may impact on pro bono service provision. (pp 94-102)

PART E - CONCLUSION

Chapter 9: Different approaches to pro bono legal work

This Chapter draws conclusions on the findings presented in this Report relating to pro bono legal work in family law and the area of family violence. It also compares and discusses the differences between pro bono legal work in these two practice areas using the Analytical Framework. Finally, the Chapter discusses the ways forward. (pp 103-107)

APPENDICES

Appendix 1 - Literature review (pp 108-118)

Appendix 2 - Consultation paper (pp 119-121)

Appendix 3 - Consultation questions for stakeholder groups (pp 122-127)

METHODOLOGY

BACKGROUND TO THIS RESEARCH

Pro bono legal assistance in the areas of family law and family violence has been traditionally difficult to obtain. Several pro bono referral schemes report difficulties in referring family law matters, and a number of pro bono schemes do not accept applications for assistance in family law.[4] National surveys of the pro bono work of large law firms in Australia showed the highest number of requests for assistance to be turned down were in family law.[5]

Some attempts have been made in the past to provide pro bono legal assistance in family law matters, with varying degrees of success. Outside of the pro bono work done by family law practitioners (who often practice in small law firms with comparatively few resources) through individual volunteering at CLCs and as part of their daily practice, and the occasional family law matter undertaken pro bono by large law firms (in exceptional circumstances), the Centre is not aware of any ongoing successful pro bono programs or projects in family law.

Since 1997, a decline in legal aid budgets for family law[6] and amendments to the *Family Law Act 1975* (FLA) have been factors in the rise of self-represented and partially represented litigants in family law matters.[7] Studies have shown that an extensive relationship exists between the unavailability of legal aid and self-representation in the federal family courts, and indicate high unmet legal need in the areas of family law and family violence. [8]

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[4] Based on consultations with Teresa Cianciosi, Manager of Law Institute of Victoria Legal Assistance Scheme, Katrina Ironside, Principal Solicitor at PILCH NSW, Dominique Hansen, Executive Manager, Community Services, Law Society of Western Australia and Debbie Sims, Coordinator of ACT Law Society Pro Bono Clearing House.

[5] National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey – Australian law firms with fifty or more lawyers - Final Report,* January 2013, 21, https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf.

[6] The legal aid funding priorities for family law which came into effect in 1997 implemented a more restrictive merits test, a cap on the amount available, imposed prerequisites of alternative dispute resolution, and limited the types of eligible family law matters. See Commonwealth of Australia, *Legal Aid and Access to Justice,* Parl Paper No 124 (2004) 43.

[7] Hunter *et al.*, 'The Changing Face of Litigation: unrepresented litigants in the Family Court of Australia', Law & Justice Foundation of NSW, August 2002. Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004) 32, and Family Court of Australia, *2010-2011 Annual Report,* 69, http://www.familycourt.gov.au/wps/wcm/resources/file/eb8a700003033f8/AR2011_complete.pdf.

[8] Hunter *et al.*, 'Legal Aid and Self-representation in the Family Court of Australia', Research Report, Socio-Legal Research Centre, Griffith University, May 2003, 33 and Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Inquiry into Access to Justice,* 2009, 30, 32 and 43.

AIM OF THIS RESEARCH

The aim of this research project was to identify, specifically in the areas of family law and family violence: 1) what pro bono work is currently being done in these areas; 2) what are the reasons for pro bono service providers not taking on matters in family law/family violence; 3) where pro bono assistance may be appropriate in responding to legal need in these areas; and 4) what the limitations of and opportunities for pro bono assistance are in these areas.

This Report is based on:

- a literature review;
- interviews with individuals and organisations with an interest in the family law system, including specialist family law practitioners, community legal centres, legal aid commissions, corporate law firms, the federal family courts, public interest law clearing houses and pro bono referral schemes, the police, government bodies and legal academics;
- written submissions from stakeholders and information collected from individuals contacting the Centre seeking legal assistance for a legal issues in family law; and
- participating in conferences and forums relating to legal need and legal service provision in family law and family violence.

The purpose of this research is to contribute to policy development in the area of family law and family violence by providing a resource that increases the understanding of stakeholders of the nature, possibilities and limitations of pro bono legal services.

LITERATURE REVIEW

The first step in this research was to identify relevant literature. Literature that focused on pro bono legal services, legal service provision in family law, self-represented litigants, unmet legal need, developments in Legal Aid funding, family violence and the court system, the overlap of family violence and family law jurisdictions, and changes to the *Family Law Act* was considered relevant. The focus was on Australian literature on these topics. However, some international literature was reviewed where it discussed similar issues of unmet legal need and related to the provision of pro bono legal services.[9]

REVIEW OF EXISTING SERVICES AND PROJECTS

The next step in the research was to identify and review the availability of existing legal services in family law and family violence. This included a review of the Commonwealth Guidelines for Legal Aid funding in family law matters, Community Legal Centres (CLCs) that provide family law services, as well as Family Violence Prevention Centres (FVPCs) and

[9] For a discussion on key literature, see Appendix 1 to this Report.

current and past pro bono projects and partnerships in the area of family law and family violence. The review also extended to the types of legal assistance available, whether it was in the form of legal advice, assistance with drafting of documents, provision of legal information on family law and family violence issues and representation.

The Centre recognises that not all pro bono work done in family law could be captured in the scope of this project. Much of the pro bono work done in family law is done through individual volunteering at CLCs and by sole practitioners and small law firms, where pro bono hours and matters may not be measured or reported.

SEMI-STRUCTURED INTERVIEWS WITH STAKEHOLDERS

A substantial part of this research project consists of semi-structured interviews conducted with a variety of stakeholders (hereinafter referred to as 'interviews'). Stakeholders were identified based on their position and experience of working in a relevant area, as well as their geographic location. Stakeholders were interviewed from all States and Territories in order to provide a national picture and to gain an understanding of any issues particular to a jurisdiction.

Interviews were conducted in person or over the phone. Each stakeholder was sent a Consultation Paper (see Appendix 2 on page 119) before the interview containing background information on the project and some consultation questions as a guideline. Interviews lasted typically between 30 minutes to two hours depending on the number of stakeholders present at the interview and the amount of information each stakeholder had to contribute regarding the consultation questions.[10]

The views provided by stakeholders have been de-identified. For the purposes of reporting findings and highlighting the different views held by different stakeholders, any comments and quotes contained in this Report have been attributed only to a general group of stakeholders, and not the organisations or individuals acknowledged in this Report.[11]

EXPERIENCES OF INDIVIDUALS WITH FAMILY LAW PROBLEMS

The scope of this project and the resources of the Centre did not allow for interviews to be conducted with individuals experiencing unmet legal need in family and family violence. Many of the family law practitioners, and lawyers in Legal Aid Commissions and Community Legal Centres consulted for this research discussed the experiences of clients who were only able to obtain assistance in the form of advice, or assistance with an individual task and who consequently had to represent themselves. The Centre also collected anecdotal evidence

[10] For consultation questions for each stakeholder group, see Appendix 3.

[11] An exception to this is where only one stakeholder has been interviewed thus making it impossible to attribute the comment to a group of stakeholders.

from individuals contacting the Centre as a last resort in seeking pro bono legal assistance in family law matters.

In order to gain an understanding of the experiences of individuals who had been unable to obtain legal assistance to address their legal needs in family law, the Centre relied on research on self-represented litigants, and on unmet legal need and its impact on an individual.

STRENGTHS AND WEAKNESSES OF THE RESEARCH

The key strengths of this research are the expertise, experience and depth of knowledge of the stakeholders that were interviewed – on pro bono legal work, family law, family violence, unmet legal need, self-represented litigants and a range of other issues. The stakeholders represent different facets of the legal profession and each brought a different perspective to the issues at hand. The Centre was then able to apply an expert analysis in the pro bono context to the views expressed by stakeholders.

However, conducting a major part of the research by stakeholder interviews does present some limitations. The first one is the self-selection of stakeholders who chose to participate in the research. Although the Centre did scope and target stakeholders in the first stages of the project in order to achieve a balanced representation of perspectives, some of the stakeholders that were contacted chose not to participate in the research. The stakeholders interviewed do not necessarily provide a representative sample of relevant legal service providers in Australia, although they do represent all jurisdictions, all identified stakeholder groups and all relevant parts of the legal profession. Information collected in the interviews is also inevitably based on the subjective experience of the interviewees. Therefore some of the findings in this Report are anecdotal in nature, although many of the findings from the consultations are confirmed by previously published empirical research.

PART A - BACKGROUND

1 ABOUT PRO BONO LEGAL SERVICES

The term 'pro bono' is derived from the Latin phrase "pro bono publico", which means "for the public good". In the legal context, pro bono work generally refers to legal services provided for free to an individual who has no other way of accessing the legal system, or legal work done for the public good, whether it be for an individual or a community organisation.

There is no universally accepted definition of what is meant by 'pro bono' although several definitions have been influential in developing pro bono practices in law firms. Most definitions focus on legal assistance provided to individuals experiencing disadvantage or on a low income who could not otherwise access legal assistance, or clients whose cases raise a wider issue of public interest. The term often includes legal services provided to organisations working for disadvantaged groups or for the public good. Many definitions include lawyers engaging in free community legal education and/or law reform. All definitions of pro bono include services that are provided without a fee being charged, and many also include work done for a substantially reduced fee.

1.1: THE UNDERPINNING PHILOSOPHY OF PRO BONO LEGAL WORK

Undertaking pro bono legal work is considered to be a lawyer's professional responsibility. This principle derives from the fact that lawyers have exclusive access to the justice system and the courts. Given that unauthorised practice of the law is prohibited, lawyers have an important role to play in facilitating access to justice.

Whilst being a professional responsibility, the provision of pro bono work in Australia is underpinned by a voluntary ethic. The provision of pro bono legal services, although recommended and encouraged by many, is not mandatory. It is widely held that the primary responsibility for ensuring that access to justice is within the reach of every Australian lies with the government. Regardless of the level of government funding, it is highly likely that unmet legal need will continue to exist. Especially given its voluntary nature, the pro bono legal work done by the profession is therefore only able to respond to a small part of this need.

There is a general consensus that pro bono work should not be seen as a substitute for publicly funded legal services and that pro bono work complements these services.[12] Pro

[12] This approach to pro bono work is not unique to Australia. Research into the organisation of pro bono work in the US recognises this approach as one of *"complementarity and augmentation"* - where pro bono legal service providers do what publicly funded legal services cannot, and provide their resources to enhance the capacity of publicly funded services. See Scott L Cummings and Rebecca L Sandefur, 'Beyond the Numbers: What We Know - and Should Know - About American Pro Bono' (2013) 7 *Harvard Law & Policy Review* 83.

bono legal assistance is usually provided as a "last resort" - where there is no other suitable service available.

There is continuing concern in the Australian pro bono community that the provision of pro bono legal services in core areas of legal aid funding will allow governments to renege on their commitment to funding free legal services. This concern is often reflected in definitions of pro bono work, and in the criteria for acceptance of applications for pro bono legal assistance.

1.2: THE PRO BONO LANDSCAPE IN AUSTRALIA TODAY

Australian lawyers have a long history of providing free legal assistance to people experiencing disadvantage and marginalisation. Pro bono legal services are provided across the legal profession by lawyers working in law firms of all sizes (ranging from the structured pro bono programs of large firms to the individual contributions of sole practitioners), barristers, in-house corporate lawyers, government lawyers and law students.

In recent years, many larger firms have significantly increased their commitment to pro bono and have expanded their pro bono programs. Most large and mid-sized firms now employ dedicated pro bono co-ordinators, and many have a dedicated pro bono partner. Their pro bono practices involve a significant number of lawyers within the firm, and work closely with Community Legal Centres and other community organisations to provide access to justice and target particular areas of legal need.

The Centre's biennial National Law Firm Pro Bono Survey of Australian firms with 50 or more lawyers shows that 32 of these firms, representing close to a fifth of the Australian legal profession, undertook 343,058 hours of pro bono work in the 2012 financial year.[13] Another group providing a significant amount of pro bono legal assistance is the individual lawyers who choose to volunteer their services at Community Legal Centres across Australia. These lawyers undertake over 8,300 hours of pro bono legal work each week.[14]

Since its beginnings in the mid-1990s, the pro bono movement in Australia has grown to encompass the diverse range of stakeholders, programs and services that exist today, namely:

- structured pro bono legal programs in all of the large and increasingly in mid-sized law firms;
- formal pro bono referral schemes and clearing houses run by legal professional associations in Tasmania, the ACT, Northern Territory and Western Australia;

[13] National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey – Final Report,* January 2013, 11, https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf.

[14] National Association of Community Legal Centres Inc., *Working Collaboratively: Community Legal Centres and Volunteers*, 2012, 1, www.naclc.org.au/resources/NACLC_VOLUNTEERS_web.pdf.

- Public Interest Law Clearing House schemes established by their law firm members in Victoria, New South Wales, Queensland and South Australia;
- legal assistance referral schemes created by rules of court;
- informal rosters of pro bono lawyers in some courts and tribunals taking on a duty lawyer's role;
- the inclusion of pro bono in the Commonwealth and Victorian Governments' policy frameworks for legal assistance services, particularly 'pro bono conditions' in government tender schemes for the purchase of legal services from the private profession;
- conferences dedicated to the discussion of pro bono legal services; and
- the National Pro Bono Resource Centre.

2 LEGAL ISSUES IN FAMILY LAW AND FAMILY VIOLENCE - WHAT ARE THEY ABOUT?

This Chapter contains information about the types of legal issues that people may encounter in family law and family violence, and explains the different jurisdictions (Commonwealth and State/Territory) involved in responses to legal issues relating to family law and family violence. It also provides information on the intersection between the different jurisdictions where family law and family violence issues overlap. This information provides a foundation for some of the findings in this Report regarding the factors affecting pro bono legal service provision in these areas.

2.1: LEGAL ISSUES IN FAMILY LAW

This research focused on legal issues in family law arising out of the *Family Law Act 1975* (Cth) (FLA). Family law falls under Commonwealth jurisdiction, and family law disputes are resolved in the Family Court and the Federal Circuit Court (the 'federal family courts'). Both the Family Court and the Federal Circuit Court have largely concurrent jurisdiction with regard to family law. The Family Court hears appeals from courts of summary jurisdiction[15] and the Federal Circuit Court.

The FLA contains provisions for resolving disputes that arise out of the breakdown of a relationship (both married and de facto[16]), or concern a child or children of a relationship. For example, a legal issue in family law can relate to:

- Divorce or the breakdown of a de facto relationship, and nullity of marriage;
- The division of property (concerning issues such as how property will be divided, how debts will be paid, how assets will be divided);
- Issues relating to children of a relationship (including who has parental responsibility, where children will live, who they spend time with, who they will communicate with and the abduction of children),[17] and the variation and enforcement of any related orders; and

[15] Proceedings for parenting orders can be instituted in State and Territory Courts of summary jurisdiction, but only when either both parties agree on the content of the orders (consent orders) or when both parties agree that the court hear and determine the matter- see *Family Law Act 1975* (Cth) s. 69N ('FLA'). State and Territory Courts that have jurisdiction over Family Violence Orders also have the power to vary a parenting order made by a federal family court when making a Family Violence Order. Under s. 68R of the *FLA*, when making a final Family Violence Order the court may vary, revive, discharge or suspend a parenting order. When making an interim Family Violence Order, the Court may vary, revive or suspend a parenting order made by a federal family court, but only for a period of 21 days, see s. 68T FLA.

[16] The exception is Western Australia, which has not referred power to the Commonwealth to legislate with regard to children born outside of marriage or the property rights of de facto couples.

[17] These issues were previously referred to as 'guardianship', 'custody', 'access' and 'residence' or 'contact' under the FLA. *T*he terms were changed with significant amendments that were introduced to the FLA in 2006, in an attempt to move away from the notions of a parent 'owning' a child or a parent 'winning' a custody battle.

- Maintenance (both spousal maintenance and child support), and the variation and enforcement of any related orders.

These legal issues may involve dispute resolution in the form of mediation or conciliation, the application of divorce or consent orders relating to the division of property, maintenance and issues relating to children. They may also involve a contested hearing at court before any orders are made. Legal issues relating to family law may also involve dealing with other government authorities, such as the Child Support Agency, Centrelink, or the Department of Immigration and Citizenship.

2.2: LEGAL ASSISTANCE IN FAMILY LAW

The family law system in Australia encourages the use of alternative dispute resolution and in disputes relating to children, the FLA requires the parties to the dispute to make a genuine effort to resolve their dispute through the use of Family Dispute Resolution.[18] A vast majority of family law disputes are either entirely or partially settled through the use of mediation, negotiation or conciliation, after which consent orders are sought from the federal family courts.

Therefore much of the legal work done by family law practitioners involves supporting clients through the processes of alternative dispute resolution by providing legal advice and in drafting of legal documents, for example the applications for consent orders.

Litigation in family law is used as a last resort when no other means of resolving a dispute is available or it is not appropriate (for example where family violence is present). Legal work relating to litigation involves the drafting of court documents, particularly affidavits, and appearing for clients in court.

Unlike in some other specialisations, a large proportion of the court work (representation) in family law is done by family law practitioners (i.e. solicitors) themselves. Barristers are instructed usually in complex matters or appeals in the Family Court of Australia, by solicitors working in-house at legal aid, or in cases where the client has adequate funds to engage counsel. Family law practitioners also sometimes seek advice from barristers on the merits of an appeal.

[18] The exceptions to the requirement of Family Dispute Resolution are set out in s 60I(9) of the FLA and include for example urgent matters and matters where the court is satisfied that there are reasonable grounds to believe that there has been child abuse or family violence or there is a risk of child abuse or family violence.

2.3: LEGAL ISSUES IN FAMILY VIOLENCE

What is meant by family violence?

A number of different definitions of family violence exist in legislation in all Australian jurisdictions.[19] All States and Territories have a legislative definition, which is contained in the legislation designed to protect individuals from family violence, and the FLA contains its own definition.[20] Although the definitions of family violence across the States and Territories vary, the laws are 'not substantially different across jurisdictions in crucial matters'.[21]

The term family violence is used to describe a situation where a person in an intimate or family type relationship uses violence or intimidating behaviour for the purposes of dominating or controlling another person. Family violence is not just physical violence, and can include: [22]

- sexual abuse;
- verbal abuse;
- stalking and intimidation;
- emotional or psychological abuse;
- social isolation;
- geographical isolation;
- intentionally damaging property;
- cruelty to family pets; and
- financial abuse.

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[19] For comparisons on the legal definitions of family violence in use in all Australian jurisdictions and in New Zealand, see Family Law Council, Submission to Federal Attorney-General, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009, Appendix 1.

[20] The FLA defines family violence as "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful" (s.4AB). The same section also includes a non-exhaustive list of behaviours that may constitute family violence. In contrast, for example, the definition of domestic violence in NSW is contained in *The Crimes (Domestic and Personal Violence) Act 2007* (NSW) and defines a domestic violence offence as 'a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.' The personal violence offences are further defined, and include an offence or an attempted offence under sections 13 and 14 of the Act as well as offences defined in over 30 sections of *The Crimes Act 1900* (NSW).

[21] The National Council to Reduce Violence Against Women and their Children, 'Domestic Violence Laws in Australia, 2009', Report, 2009, 13, as quoted in Family Law Council, above n 19, 53-54.

[22] Janet Loughman, Rebecca Frost and Natalie Neumann, 'Domestic violence', in Helen Sheridan and Redfern Legal Centre Publishing (eds), *The Law Handbook: your practical guide to the law in New South Wales*, Thomson Reuters (Professional) Australia Limited, 12th ed., 2012, 21.10.

Legal issues relating to family violence

Family violence is a crime, and the legal responses relating to family violence are dealt with under the relevant criminal legislation in the States and Territories. Legal issues can also arise out of legislation relating to Family Violence Orders[23] and Victims Compensation[24]. For example, a legal issue in family violence can relate to:

- Dealing with a crime (by way of reporting a crime to the police, giving evidence in a court hearing, or bringing a private prosecution in cases where the police have refused to act).
- Seeking protection through a Family Violence Order.
- Issues relating to tenancy and housing (for example, when a Family Violence Order is in place and the parties involved are joint tenants on a lease, or where the home of the victim is owned by the perpetrator).
- Issues relating to the protection of children (for example, dealing with the relevant government agency responsible for child protection).
- Dealing with the police or making complaints against the police.
- Amending family law contact orders to protect the victim of family violence or their children.
- Seeking Victims Compensation.

Some client groups may also face additional legal issues, for example immigration/visa issues for individuals who have been sponsored to live in Australia by their partner who is the perpetrator of family violence.

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[23] A Family Violence Order (including an interim order) is made under the laws of States and Territories. It is an order by the court made for the protection of a victim of family violence. The order generally requires the perpetrator of violence to be of good behaviour towards the victim and to refrain from committing any further acts of family violence against the victim. The order may also prohibit, restrict or restrain the perpetrator's behaviour, for example by prohibiting the perpetrator from approaching the victim's home or place of employment. Family Violence Orders have different names in different states: *Protection Orders* (QLD & ACT), *Apprehended Domestic Violence Orders* (NSW), *Family Violence Intervention Orders* (Vic), *Restraining Orders* (NT, SA & WA) and *Family Violence Orders* (Tas).

[24] The term Victims Compensation here refers to the statutory compensation schemes established by legislation in all States and Territories: *Victims of Crime Financial Assistance Act 1983* (ACT), *Victims Support and Rehabilitation Act 1996* (NSW), *Victims of Crime Assistance Act 2006* (NT), *Victims of Crime Assistance Act 2009* (Qld), *Victims of Crime Act 2001* (SA), *Victims of Crime Assistance Act 1976* (TAS), *Victims of Crime Assistance Act 1996* (Vic) and *Criminal Injuries Compensation Act 2003* (WA). In the context of this Report, the term Victims Compensation does not refer to the other two ways in which victims of family violence may also be financially compensated, namely: through an award of compensation in the civil courts, typically through a claim that a tort has been committed; and/or through an order that an offender pay restitution or reparation to the victim, as part of the offender's sentence.

2.4: WHERE FAMILY LAW AND FAMILY VIOLENCE INTERSECT

The primary responsibility for implementing the legislative framework that protects individuals from the harm of family violence lies with the State and Territory Courts. Legal issues relating to family law and family violence do not appear in isolation and family law issues can often intersect with family violence issues.[25] Where allegations of family violence are raised in connection with a parenting dispute in a federal family court, the courts have a duty to act and can take measures to protect victims of family violence. The legal issues can intersect in two different ways:

- when family violence becomes visible in the family law system (this may not be a jurisdictional overlap as family violence may not have been disclosed earlier and there may be no Family Violence Orders in place or criminal charges pending); and
- when family violence becomes visible in both the federal and state systems (for example, orders made by a State Court affect family law orders made by federal family courts or vice versa).

When family violence becomes visible in the family law system

When allegations of family violence arise in connection with disputes under the FLA, federal family courts are required to respond quickly.[26] Although issues of family violence may be raised in respect of many areas falling under the federal family courts' jurisdiction, in practice, issues of family violence are predominantly raised in connection with parenting disputes.[27] Allegations of family violence in parenting cases are frequent, with the Family Court reporting in 2003 that nearly 75% of parenting cases determined by a judge (after a contested hearing) included allegations of family violence.[28]

The FLA provides the federal family courts with the power to issue injunctions and orders for the protection of a party with regard to circumstances relating to a marital or de facto relationship. These orders cover much of the same ground as the Family Violence Orders available through the State and Territory legislation. However, the enforcement regimes of these orders vary – injunctions made under the FLA require the parties to register those orders with the relevant State or Territory Court so that the orders may then be enforced by the police as orders of that court.

The difference between the protection and enforcement regimes of the FLA and the Family Violence Orders made under State and Territory legislation lies in the distinction between

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[25] For comparisons on the legal definitions of family violence in use in all Australian jurisdictions and in New Zealand, see Family Law Council, above n 19.

[26] See FLA s. 67Z.

[27] Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009, 49.

[28] Family Court of Australia, Submission to the House of Representatives Standing Committee on Family and Community Affairs, *Inquiry into Joint Custody Arrangements in the Event of Family Separation*, September 2003.

public and private law. When exercising their jurisdiction under the FLA, the federal family courts have the task of not only determining private disputes between individuals, but also facilitating a resolution of disputes between individuals through the use of varying alternative dispute resolution mechanisms. Family Violence Orders on the other hand, have a focus on protecting victims of violence from further harm and punishing offenders, and are largely public law disputes.[29]

As opposed to Family Violence Orders made by State and Territory Courts, the breach of an injunction set by a federal family court is not a crime. While the FLA gives police the power to arrest a person (without a warrant) who is in breach of an injunction made under s 114 FLA, and the penalties for breaching injunctions can be severe (including imprisonment), in practice injunctions ordered by the federal family courts under the FLA do not provide similar access to justice and enforcement remedies to those available through the Family Violence Orders available under State and Territory legislation.[30] The speed with which a Family Violence Order can be obtained in a State or Territory jurisdiction, the criminal sanctions associated with the breach, and the enforcement of the orders by the police, cannot be replicated by the injunctions and enforcement remedies available through the FLA.[31] It is for this reason that many family law disputes with family violence aspects contain legal issues under both the Commonwealth and State or Territory jurisdictions.

When family violence becomes visible in both the federal and state systems

In matters of family separation with underlying issues of family violence, there is no single judicial forum that is able to provide a comprehensive response to people experiencing legal issues and consequently more than one court may be involved in a family law dispute.[32] When family violence becomes visible in both the State/Territory system through a Family Violence Order and in the federal family law system, the overlapping legal issues between jurisdictions may cause difficulties. Whilst the FLA contains provisions intended to address the difficulties arising from this overlap, there is still scope for inconsistency between orders made by different courts and duplication of proceedings. Difficulties arise most often in parenting cases, where both parents have contact with the children. There may be conflicting orders, or ones that are inconsistent in their practical application. For example, the federal family courts may issue a parenting order that permits one parent to spend time with a child. At the same time, there may be a State Court order in place that prevents that same parent from coming within a certain distance of the other parent.[33]

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[29] Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009, 50.

[30] Ibid.

[31] Ibid, 54.

[32] Ibid, 48.

[33] The National Council to Reduce Violence against Women and Their Children, 'Domestic Violence Laws in Australia', Report, June 2009, 217.

Generally, the orders of a federal family court override orders made by a State or Territory Court. If there is an inconsistency between a Family Violence Order and a federal family court order, the Family Violence Order will be invalid to the extent of the inconsistency.[34] In cases where a Family Violence Order was made first, the federal family courts are required to ensure that orders made by them do not expose people to family violence. However, State and Territory Courts have, subject to certain limitations set out in the FLA, the power to vary, revive, suspend or discharge a parenting order in conjunction with making a Family Violence Order.[35]

However, in practice, State and Territory Courts are often aware of the fact that people are using the public law system of Family Violence Orders to address their concerns for safety, while at the same time seeking to address their private law family disputes through the federal family courts. As a result, a Family Violence Order made by a State or Territory Court often excludes contact with children subject to a court order from a federal family court. Therefore it is not uncommon for similar proceedings (with similar allegations and evidence) to be underway, in two different courts.[36] The onus to inform federal family courts of any existing Family Violence Orders is currently on the parties themselves. If the parties do not provide this information, and as a result the court does not have evidence of violence or existing orders, it may make orders that fail to protect a person from harm.[37] There is evidence to suggest that although provisions exist to avoid inconsistent orders, they are not sufficiently effective. Both researchers and practitioners in family law continue to report that conflict between orders can create traumatic and unsafe situations.[38]

Difficulties may also arise in situations where the Family Violence Order sought through a State or Territory Court is the first judicial response to family violence. If the victim of family violence has sought the protection of a Family Violence Order prior to separation or instigating family law proceedings, the State or Territory Court deciding on the terms of the Family Violence Order can make parenting orders under the FLA. However, evidence suggests that judges from a State or Territory Court are reluctant to deal with parenting orders, as this is viewed to be the jurisdiction of the federal family courts.[39]

Further difficulties may also arise from the fact that protection orders are often sought in situations of crisis, and they can be granted in fairly summary proceedings. The purpose of

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[34] See FLA s. 68Q(1).

[35] Under FLA s. 68R, the State or Territory Court has the power to vary, discharge, revive or suspend parenting orders made by a federal family court, when making final Family Violence Orders. In the case of an interim Family Violence Order, the Court can vary, suspend or revive a parenting order, but only for a period of 21 days (s. 68T). The right to vary, discharge, suspend or revive parenting orders is dependent on the Court having 'before it material that was not before the court that made that [parenting] order or injunction' (s. 68R(3)(b)).

[36] Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, December 2009, 56.

[37] Ibid, 57.

[38] The National Council to Reduce Violence against Women and Their Children, 'Domestic Violence Laws in Australia', Report, June 2009, 224.

[39] Victorian Law Reform Commission, 'Review of Family Violence Laws', Report, February 2006, 336-7.

Family Violence Orders is to protect victims from further violence by posing restrictions and limitations on the behaviour of the perpetrator of violence and by making the breach of those orders an offence. In contrast, the purpose of parenting orders is to ensure the best interests of the child, including 'ensuring that children have the benefit of both their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child',[40] that 'children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents...'[41] and that 'children have the right to know and be cared for by both their parents...'.[42] The underlying objectives of the different Acts may be difficult for judicial officers in State and Territory Courts to reconcile.

[40] FLA s 60B(1)(a).

[41] FLA s 60B(2)(b).

[42] FLA s 60B(2)(a).

3 UNMET LEGAL NEED IN FAMILY LAW AND FAMILY VIOLENCE AND ITS IMPACT

3.1: LEGAL AUSTRALIA-WIDE SURVEY ('LAW SURVEY') AND FAMILY LAW

The results of the NSW Law and Justice Foundation's Legal Australia-Wide Survey ('LAW-Survey') were released in 2012. The survey results are contained in a comprehensive series of reports aimed at improving access to justice by providing information about legal needs across Australia. Based on a representative sample of the population from each State and Territory, these reports cover the nature and number of legal problems, their relationship to other issues and their impact on those affected, taking into account influential demographic factors.[43]

According to the LAW Survey, legal problems and the ways in which people attempt to resolve them are heavily influenced by their demographics. This idea is not new, but when combined with information about the interaction that may occur between various legal problems, the results of the LAW Survey may assist in determining where legal problems occur and how they can best be resolved.

The survey results highlight the significance of family law problems and the (potentially) significant implications for those who engage with the family law system. The LAW Survey report recognises the way in which family law problems can be interconnected with other legal and socioeconomic issues, and helps to shed light on some of the underlying causes of difficulties in undertaking pro bono work in this area.

The LAW Survey results also show that legal problems do not occur in isolation. Rather, one legal issue may breed others. Alternatively, the socioeconomic circumstances of a person or group may be conducive to certain sets of legal problems. In particular, the LAW Survey reveals that family and economic issues can be heavily intertwined. Legal problems concerning family, money and debt often appeared to be connected. It may be that these issues have a cyclical effect, with family issues triggering debt or employment issues or vice versa. This potential difficulty in untangling related legal issues may also be one factor which accounts for the reluctance of lawyers to engage in pro bono work in this area. Other relevant factors may include the fact that family law problems have lower levels of finalisation.

The LAW Survey results show that relationship breakdown, divorce and domestic violence can all result in multiple and severe adverse consequences for respondents. Physical illness, stress-related illness and debt were all identified by respondents experiencing family law issues as having been a consequence of their legal problem. The number of adverse consequences experienced by these respondents was also consistently high. For example,

[43] Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012.

21.8% of respondents had experienced four or more adverse consequences as a result of their family related legal problem. Correspondingly, a relatively high percentage of people experiencing a family law problem sought advice from a health professional (e.g. a doctor or psychologist), compared to other legal areas. This further highlights the detrimental impact that family law problems may have on a person's physical and mental health, a factor which may add to the complexity of their relationship with their legal advisor, and impact on the willingness of lawyers to undertake pro bono work in this area.

The significance attached to family law issues, and the potential for severe consequences manifested in the way that respondents approached seeking help. Family law related problems consistently had the highest incidence of respondents taking action and seeking advice. The advice is divided into five different categories, including: formal legal advice, consultation with friends and relatives, websites/self-help guides, courts/tribunals, and formal dispute resolution. In each of these categories, respondents experiencing a family law problem made up the highest percentage utilising each particular mechanism. In particular, an extremely high rate of people experiencing a family law problem sought advice from legal professionals, compared with other legal problems. They were more likely to seek assistance from multiple advisors, and more likely to go to a legal advisor first as compared to people with legal problems in other areas of the law. It is clear from these results that family law is an area where demand for legal professional advice is particularly high, especially considering that legal matters in family law proceeded to court or tribunal proceedings and to formal dispute resolution more often than legal problems in other areas of the law.

The consultations conducted for this research indicated that publicly funded legal services are unable to meet the demand for family law services. The comments made by those consulted echoed the findings in the LAW Survey and indicated that the impact of unmet legal need in family law can be severe. Stakeholders commented on the means tests for legal aid grants, gaps in the types of services offered by publicly funded legal assistance services, the difficulties faced by self-represented or partially represented litigants and the impact and consequences of unmet legal need in family law.

3.2: IMPACT OF PEOPLE BEING UNABLE TO OBTAIN LEGAL ASSISTANCE IN FAMILY LAW

The impact of unmet legal need in society is broad, and difficult to measure. Research on legal need in Australia indicates that family law issues can result in multiple and severe adverse consequences for those who experience them. [44] Physical illness, stress-related illness and debt were some of the issues identified as a consequence of having a legal problem in family law.[45] The adverse consequences of legal issues can be severe, especially if those issues remain unresolved or are resolved incorrectly.

[44] Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012, xix.

[45] Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012.

The impact of unmet legal need (and particularly the lack of representation) was a theme repeatedly raised in interviews with stakeholders. The comments made ranged from the impact of self-represented litigants on judicial officers and the court's resources, to the impact that uninformed or incorrect court orders have on the individual, a family unit and through it, society more broadly.

Studies show that self-represented litigants have an impact on the Courts' resources, with an increase in the time taken for a hearing, and more mentions, return dates, and administrative tasks included in cases with self-represented litigants.[46] In addition to the impact on the court, dealing with self-represented litigants creates additional, sometimes onerous obligations on judicial officers[47] with reported consequences of stress, frustration and concern that there may be inappropriate outcomes.[48]

Comments made in interviews with stakeholders echo these findings. Many judicial officers commented on the additional strain placed on the court by self-represented litigants.

> *"People going through the court process without any help often have no understanding of the process, rules, what's relevant and what is irrelevant. They struggle to put sentences together, let alone file written submissions. Some have a poor grasp of the English language. An affidavit drafted by any lawyer would be better than some of the things we see now, and in some cases would save hours of the court's time."* (Judicial officer)

> *"Dealing with some litigants in person is simply very time consuming. A hearing that should last for half a day or even two hours can sometimes take days, because you have to instruct them on everything - to take notes, to ask questions, when to talk and when not to talk - and the matter is often adjourned so that they can seek advice on the next issue that comes up."* (Judicial officer)

> *"Sometimes having self-represented litigants in court means litigating in bite-size. We go through one of the issues, and then I have to instruct them to go see the duty lawyer or to go seek advice on the next little bit and we adjourn. It can go on like this for quite some time. It's difficult to strike a balance between getting the right orders based on the right information, and not delaying justice for too long. Justice delayed is justice denied."* (Judicial officer)

Studies also show the impacts of dealing with self-represented litigants on family law practitioners representing the other party range from reduced chances of settlement, waste

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[46] John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia', Research Report, No 20, Family Court of Australia, 2000, 48-49.

[47] Elizabeth Richardson, *Self-represented parties: A trial management guide for the judiciary*, County Court of Victoria, 2004.

[48] Dewar, Smith and Banks, above n 46.

of time and inconvenience and increase in costs to their client.[49] Family law practitioners consulted for this research commented on the difficulties of representing their client when the opposing party is unrepresented.

> *"In a lot of cases I run, the other party appears unrepresented. Sometimes it's because they can't afford a lawyer, sometimes it's because they don't want one and sometimes it's because no lawyer will act for them. Acting against a self-represented litigant takes up much more time, and as a result my client ends up with more costs."* (Family law practitioner)

> *"I have a client whose ex-partner appears unrepresented, and in my opinion he is abusing the system, but gets away with it purely because he doesn't have legal representation. The judge we landed for the case has far too much patience for his stunts in court. The case should have settled in the first place but this fellow wants to use the courtroom to get one over on his ex."* (Family law practitioner)

> *"It is much more difficult to act when the other party is not represented. You end up doing much more work. You have to try to extract the relevant legal issues form the affidavits they file and respond to them. Sometimes it feels like you are doing their work as well – articulating things they couldn't just so you can respond."* (Family law practitioner)

Research on self-represented litigants has also focused on the impact of self-representation on the litigants themselves.[50] Due to the great variance in the confidence and actual abilities of self-represented litigants, and the differences in the complexities of their case and nature of the matter, there are no conclusive findings regarding the judicial outcomes for self-represented litigants. Some may have suffered objective injustices as a result of being self-represented, while others may have received preferential treatment due to being self-represented to the detriment of the other party.[51]

Many of the judicial officers consulted for this research expressed their concern regarding the outcomes for self-represented litigants.

> *"I have a grave concern that unrepresented litigants end up with poor outcomes. I can only make a judgement based on the facts presented to me, and most of the evidence brought forward by people who are unrepresented is either inadmissible or completely irrelevant. Sometimes I can't be sure I am making the right orders for the circumstances."* (Judicial officer)

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[49] Dewar, Smith and Banks, above n 46.

[50] John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia', Research Report, No 20, Family Court of Australia, 2000, 48-49. The study examined both the legal outcomes of the cases tried by self represented litigants as well as the effects of self-representation of the litigants themselves. The majority of litigants reported experiencing mild to acute stress, lack of sleep and/or health problems (53).

[51] Dewar, Smith and Banks, above n 46, 57.

> *"It's crucial, absolutely crucial, to get it right. Especially in children's cases. The ripple effect of incorrect orders can be huge, and it's felt on all three levels of government. And the orders can be incorrect if they are uninformed of all the circumstances. "* (Judicial officer)

Other stakeholders also commented on the effect of self-representation on the outcomes of a family law matter.

> *"We all know that people get the best outcomes from court when both parties are adequately represented. It is how the adversarial system works. But that will only happen in a perfect world. What we need to focus on is trying to ensure that people who are already experiencing disadvantage don't end up with the worst outcomes."* (Family law academic)

3.3: HIDDEN LEGAL NEED IN FAMILY LAW – THE RELEVANCE OF THE FAMILY LAW SYSTEM IN CULTURAL GROUPS

In addition to 'traditional' forms of unmet legal need, many of which manifest in the form of self-represented litigants, several of the stakeholders consulted for this research commented on the 'hidden' legal need in family law in the form of individuals experiencing what can be classified as a family law problem (e.g. relationship breakdown, children's custody issues) choosing not to engage with the family law system at all.

The extent of this form of unmet legal need is difficult to quantify. Recent research by the Family Law Council examined the barriers and impediments for Aboriginal and Torres Strait Islander clients and clients from culturally and linguistically diverse backgrounds in engaging with the family law system and the ways in which to address them.[52]

The most common reasons for disengagement were lack of knowledge about the law and a lack of awareness of available services; lack of understanding about the family law system among members of the Aboriginal and Torres Strait Islander communities and a resistance to engagement with, and even fear of, family law system services; language and literacy barriers; cultural and religious barriers that inhibit help-seeking outside the community; negative perceptions of the courts and family relationships services; social isolation; a lack of collaboration between migrant services and the family law system; a fear of government agencies; a lack of culturally responsive services and bicultural personnel; legislative factors; and cost and resource issues. [53]

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[52] See Family Law Council of Australia, 'Improving the family law system for Aboriginal and Torres Strait Islander clients', Report, February 2012 and , 'Improving the family law system for clients from culturally and linguistically diverse background', Report, February 2012. The reports consider the extent to which the family law system meets the needs of clients from Aboriginal and Torres Strait Islander backgrounds and from culturally and linguistically diverse backgrounds and examine strategies for improvement.

[53] Family Law Council: *Improving the family law system for clients from Aboriginal and Torres Strait Islander backgrounds*, February 2012, 3-4, and *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, February 2012, 4-5.

Comments provided by the stakeholders for this research provide some additional evidence on the issue. The issues reported by the stakeholders were varied and many reported that different cultural groups have different reasons for their disengagement. One CLC lawyer spoke about deeply held misconceptions about the legal system.

> *"Some of our clients have bad misconceptions about the legal system in Australia, and particularly about their rights. Their partners may have told them that they will be deported if they get a divorce, or that custody will automatically be awarded to the partner if our client files for divorce. We try to address the issue with community legal education and by providing legal information in community languages, but it doesn't always get through. Sometimes I think it's a miracle the clients come to see us at all – they are so convinced they have no rights."* (CLC lawyer)

Other stakeholders commented on a distrust of the 'white' legal system and consequences faced by individuals in their community for engaging with it.

> *"Some of the Aboriginal communities have a very deep distrust of what is seen as 'white fella' law. It stems from the fact that Aboriginal people are overrepresented in the criminal law and the child protection system. Many of our clients do not know the difference between 'family law' and 'child protection' for example, for them all of it has to do with family, it's all family law to them. Sometimes we see clients whose partner has taken the kids over a year ago and they have not seen them – they just don't think that the legal system can help."* (CLC lawyer)

> *"There's a real hesitation among some clients to seek remedies though courts or to even turn to lawyers. It's viewed as betraying the community when you seek a resolution from outside."* (CLC lawyer)

> *"I had a woman present in front of me whose cultural background meant that issues to do with family separation are dealt with in the community – they have their own dispute resolution mechanisms. But these cultural mechanisms often favour the husband – so the woman sought to settle the family disputes through the courts. This meant that even though the outcome of the dispute was more favourable to her, she lost all of the support she would have had otherwise, and became almost ostracised. She paid a very high price for it."* (Judicial officer)

Other stakeholders commented on the barriers that exist for people to access the family law system.

> *"Although they've tried to make the court process more user-friendly, and there's a lot of advice and information available, navigating the system still requires you to have good literacy and numeracy skills, and to access a lot of the information available you need to be computer literate. Simply filling out an application for legal aid – even if all the information is in a community language – is too much for some. They just give up."* (CLC lawyer)

> *"The Court has tried to make accessing it simple, and we do focus on being 'user-friendly', as much as that is possible in a judicial environment. However, our way of being accessible does assume the user to have a certain set of skills and familiarity with bureaucracy or dealing with government entities in their most basic forms. People from different cultural backgrounds, particularly if they are disadvantaged, may not have those skills that the system assumes everyone to have. Accessing the court may appear insurmountable* [to them]." (Judicial officer)

These comments made by the stakeholders are supported by the literature on the topic. The Family Law Council's reports found that the reasons for disengagement with the family law system are varied and differ markedly between cultural groups. While efforts are being made to address these barriers, the studies also found that significant unmet need still exists.[54]

3.4: PREVALENCE OF FAMILY VIOLENCE IN AUSTRALIA AND LEGAL NEED

Family violence is prevalent in Australia. The *Personal Safety Survey*, conducted by the Australian Bureau of Statistics (ABS) in 2005 found that 15% of Australian women had experienced physical or sexual violence from a previous partner and 2.1% had experienced physical or sexual violence from a current partner since the age of 15. In contrast, 4.9% of Australian men had experienced physical or sexual violence from a previous partner and 0.9% had experienced physical or sexual violence from a current partner since the age of 15.[55]

It is widely recognised that women experience family violence at far greater rates than men do, although the exact extent of this overrepresentation is difficult to quantify as most incidences of family violence go unreported.[56]

Certain groups of women are particularly vulnerable to family violence. For example, Indigenous women are significantly over-represented in family violence victimisation statistics, and are up to 45 times more likely to experience family violence in Australia than their non-indigenous counterparts. Indigenous women make up 50 per cent of family violence victims in Australia. Due to the frequency of family violence against Indigenous women, Indigenous children are also exposed to family violence at an increased rate, with some research indicating that up to 42 per cent of indigenous children witness family

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[54] Family Law Council: *Improving the family law system for clients from Aboriginal and Torres Strait Islander backgrounds*, February 2012, 3-4, and *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, February 2012, 4-5.

[55] Australian Bureau of Statistics, *Personal Safety Survey 2005,* 17th June 2013, http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0.

[56] Ibid.

violence in their home.[57] Other groups who are more vulnerable to family violence are young women, women with a disability, women from a culturally and linguistically diverse background, and people of diverse sexuality and gender.[58]

Legal need in family violence is difficult to quantify, as only a part of the legal need experienced by victims or perpetrators of family violence can be directly attributed to the violence, for example reporting the crime to the police, possible criminal proceedings and the seeking of a Family Violence Order. Approximately 1.2% of LAW Survey respondents reported experiencing a legal problem relating to family violence as either a victim or as a perpetrator.[59] Less than one percent (0.8%) of the respondents were a victim of actual or threatened assault or sexual assault by a family or household member, while 0.5% of the respondents were the subject of domestic violence allegations made either to the police or in court.[60] However, as noted in 2.3: Legal issues in family violence (page 32), legal needs relating to family violence are broader than issues directly connected to the violence.

[57] David Indermaur, 'Young Australians and Domestic Violence', Trends and Issues in Crime and Criminal Justice, Report, No 195, Australian Institute of Criminology, Canberra.

[58] Australian Bureau of Statistics, above n 56.

[59] The term used in the LAW Survey was 'domestic violence'. The questions asked of survey respondents sought data from the 12 months preceding the Survey and were: 'Were you a victim of threatened or actual assault or sexual assault by a family or household member?' and 'Have you had allegations of domestic violence made against you either to the police, or in court?' See Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012, specifically survey questions P33.4 and P35.

[60] Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012. Specific figures based on a special request for data breakdown from the Law and Justice Foundation.

4 RESPONDING TO LEGAL NEED IN FAMILY LAW - PUBLICLY FUNDED SERVICES

This Chapter provides an overview of the options that are currently available to a person with a family law or family violence issue, who cannot afford to pay for the services of a lawyer. The Chapter introduces publicly funded legal services (Legal Aid Commissions and Community Legal Centres) and the services they provide in family law and family violence. Also included are findings from interviews with stakeholders, which highlight the limitations publicly funded services face in responding to legal need.

This Chapter also discusses how pro bono legal services are currently responding to legal need in family law and family violence, and the unique way in which legal services are provided in family law, incorporating findings from interviews with stakeholders with empirical research on legal service provision in family law.

Finally, this Chapter discusses the different approaches to pro bono work taken by family law practitioners and large law firms, explaining (in part) why obtaining pro bono legal assistance in family law is difficult.

4.1: SERVICES OFFERED BY LEGAL AID COMMISSIONS IN FAMILY LAW

Legal Aid Commissions in all States and Territories provide assistance in family law related matters (specifically matters arising under the *Family Law Act 1975* (Cth)) in accordance with the Commonwealth Family Law Guidelines[61] and the National Partnership Agreement on Legal Assistance Services.[62] The types of services offered include:

- information and referral, including by telephone or at the reception counter of the Legal Aid Commission;
- community legal education and publication;
- legal advice and minor assistance, including preparation of simple documents;
- duty lawyer services at courts;[63]

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[61] Attorney-General's Department, *Commonwealth Legal Aid Service Priorities and Guidelines*, Legal Services Commission of South Australia, http://www.lsc.sa.gov.au/cb_pages/commonwealth_guidelines.php .

[62] The National Partnership Agreement on Legal Assistance Services is an agreement between the Commonwealth and all States and Territories in Australia. It aims to facilitate reform in the legal assistance sector and to provide disadvantaged Australian's with access to justice, through the delivery of legal assistance services. See, Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services*, June 2010, Standing Council on Federal Financial Relations, http://www.ag.gov.au/LegalSystem/Legalaidprograms/Documents/National%20Partnership%20Agreement%20on%20Legal%20Assistance%20Services.pdf .

[63] See, for example, the NSW Legal Aid Commission's Family Law Early Intervention Unit. For more information on this service and an evaluation of this service, see Appendix 1 - Literature Review, on page 108.

- family dispute resolution – where at least one of the parties to a family law dispute has received a grant of legal assistance; and
- grants of legal assistance for legal representation before a court or tribunal.

Assistance is provided to individuals who satisfy the relevant means test,[64] merit test[65] and availability of funds test,[66] in accordance with priority guidelines and strategic priorities. However, in addition to meeting the means and merit tests mentioned above, several types of matters also require that the person applying for legal aid is at a 'significant disadvantage', suffers 'particular hardship', or where 'special circumstances exist'.[67]

In practical terms, applying the relevant tests means that only those experiencing poverty or significant disadvantage will qualify for legal aid.[68] Depending on the State or Territory, in order to satisfy the means tests, an applicant's net assessable income[69] has to fall between $255 and $380 per week. Additionally, an applicant's assets cannot exceed between $740 and $1500, depending on the jurisdiction.[70] This means that a growing number of Australians are falling into the 'justice gap', not qualifying for legal aid but being unable to afford to pay for legal advice or representation.

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[64] In general, means tests are used to assess if a person's income and assets make them eligible for a grant of legal aid and if so, the amount of any contribution a person will have to make towards the costs of legal aid.

[65] To satisfy the merit test, the legal matter must have reasonable prospects of success, be one in which a prudent self-funded litigant would risk their own funds in pursuit of it and be an appropriate way to spend limited public funds.

[66] In the availability of funds test, the legal aid commissions looks at available funds and competing priorities in deciding on an application for legal aid.

[67] See, for example NSW Legal Aid policy on when Legal Aid is available in family law matters: http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available?SQ_DESIGN_NAME=print-chapter.

[68] According to the Melbourne Institute of Applied Economic and Social Research, a single person is considered to be living below the poverty line if he or she receives income of less than $325 a week excluding housing costs (data as at the September quarter 2012). See Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia*, 25 January 2013, http://melbourneinstitute.com/downloads/publications/Poverty%20Lines/Poverty-lines-Australia-Sept2012.pdf. This means that in NSW, Victoria and Western Australia, a person must be living below the poverty line to receive a full grant of legal aid.

[69] The net assessable income is calculated by taking the applicants gross assessable income (including for example pensions, benefits and allowances, income from paid work, payments from investments, interest earned, maintenance received and superannuation) less allowable deductions (for example housing costs, childcare costs child support payment, income tax and a dependent allowance).

[70] Based on information on means tests gathered from the websites of all Legal Aid Commissions in Australia.

LEGAL AID THRESHOLD AND RESULTING UNMET LEGAL NEED

Many of the stakeholders interviewed for this research commented on the income and asset thresholds for grants of legal aid, and the resulting unmet legal need in a group of Australians who do not qualify for legal aid but are not able to afford a lawyer. Comments were also made on the gaps in legal aid funding guidelines, and the resulting unmet legal need.

> *"To qualify for legal aid you have to be very, very poor. The working poor don't usually qualify. That doesn't mean that they are in a position to pay for legal services. For some people, buying school uniforms or books for their children equates to a financial disaster – how would they ever be able to pay for legal assistance? They simply have to go without, and* [as a result] *may not get a good outcome."* (Judicial officer)

> *"We see a lot of clients who have been knocked back from legal aid because they have a little bit of equity in their property or assets in their name that they don't even have control over. Often they have no income at all; they're not even on Centrelink benefits because their ex-partner has been providing for them. These are clients with no bank account in their name, and sometimes no money to even buy food if their ex-partner has cut them off. I don't think the strict funding guidelines take individual circumstances into account enough."*(CLC lawyer)

> *"My clients have multi-faceted legal problems, and yet I can't assist them with property disputes or contravention orders, as the guidelines don't permit it. Clients sometimes have a hard time understanding why I can be their lawyer for one thing but not the other – to them it's just one family law matter. And they're totally unprepared to go at it alone for the things I can't assist with."* (Legal Aid lawyer)

These comments are supported by findings from the LAW Survey, which found that a common barrier to access to advice was cost. Although it was not the most significant barrier identified for advice in general (comprising legal advice, dispute/complaint handling and government advice), when barriers to access focused purely on legal advisors, the percentage of those who found advice prohibitively expensive increased. The finding is particularly significant for people experiencing family law problems, as they were the most likely to seek advice for their legal problem, particularly formal legal advice (compared with people experiencing other types of legal problems).[71]

[71] Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012, 113, 122-123.

Based on the legal fees that can be awarded under the *Federal Circuit Court Rules (2001),*[72] a family law financial matter in the Federal Circuit Court (formerly the Federal Magistrate's Court), consisting of:

- an application of final orders;
- the filing of an application of interim orders;
- the issuing of five subpoenas;
- a conciliation conference;
- a two-day final hearing; and
- a judgement,

will cost a litigant at least $16,753 in legal fees (excluding court fees).[73] When taking into account the fact that any additional stages (such as applications for various orders) will add to costs and that lawyers representing a party in proceedings are likely to charge higher fees than the costs awarded under the Rules or may charge fees for work for which no provision is made under the rules, the illustrative sum of $16,753 (excluding court fees) is likely to be a conservative one.

4.2: SERVICES OFFERED BY LEGAL AID COMMISSIONS IN FAMILY VIOLENCE

All legal aid commissions offer services to both victims and perpetrators of family violence. These services range from specialist family violence services for victims of family violence to legal assistance available to perpetrators of family violence who satisfy the relevant means and merits tests. In some states, Legal Aid Commissions have targeted services for women who are victims of family violence. For example, the NSW Legal Aid Commission runs a Domestic Violence Practitioner Service (DVPS) and the Women's Domestic Violence Court Advocacy Service (WDVCAS), assisting women and children experiencing domestic violence through court proceedings when seeking protection through a Family Violence Order.

The specialist services offered to victims of family violence often encompass a broader range of support and referrals to other service providers than the services offered to perpetrators of family violence, who may only be eligible for legal advice and/or representation through a court process. Services to victims of family violence may not apply the standard means test.

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[72] See Commonwealth of Australia, *Federal Circuit Court Rules 2001*, 22 Apr 2013, ComLaw, http://www.comlaw.gov.au/Details/F2013C00203/Html/Volume_2#_Toc355019582.

[73] See Australian Government Attorney-General's Department submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the impact of federal court fee increases since 2010, 2013,4. Available at: Commonwealth of Australia, Senate Committees, *Impact of federal court fee increases since 2010 on access to justice in Australia,* Parliament of Australia, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/courtfees/submissions.

4.3: SERVICES OFFERED BY COMMUNITY LEGAL CENTRES IN FAMILY LAW

Community Legal Centres (CLCs) are a key component of Australia's legal aid system. CLCs are independent, not-for profit organisations that provide legal services that focus on the needs of people experiencing disadvantage or hardship. Some CLCs provide general legal services to clients in a specific geographic area, while others specialise in a particular client group (for example, indigenous people, children and youth, women) or in a particular area of the law (for example disability discrimination, consumer credit, mental health, welfare rights, the arts).

The services offered by approximately 200 CLCs across Australia both complement and extend the services offered by Legal Aid Commissions. However, only approximately half of CLCs provide legal services in family law.[74] Due to limited resources, CLCs generally focus on providing legal advice, assistance with the drafting of relevant documents and filling in court forms, and on community legal education with many CLCs being unable to provide legal representation. For example, Caxton Legal Centre in Brisbane provides three advice sessions per week in family law, and offers some limited assistance with the drafting of documents. IN addition, Caxton offers a Family Law Duty Lawyer Service for its clients on the day of their appearance in the Family Court or the Federal Circuit Court. Kingsford Legal Centre (KLC) in Sydney does not provide advice in family law, but through a student clinic provides community legal education modules in family law. Women's Legal Service (WLS) in Victoria offers legal advice and assistance in family law, and is able to provide access to a barrister in some family law matters provided the client is able to pay a (reduced) counsel's fee.

CLCs increase their capacity to deliver services by utilising volunteer lawyers, generally to staff advice services held outside of business hours. Many CLCs also work in partnership with law firms in order to increase their capacity for service delivery. This may mean the establishment of a specialised clinic utilising the lawyers and resources of a law firm, a law firm providing a secondee lawyer to a CLC for a set period of time, or a CLC working in partnership with a law firm on an issue of law reform. However, any legal work done by volunteer lawyers or partnerships with law firms generally needs to correspond with the expertise and skills base of that lawyer or law firm, unless additional training is provided. This means that volunteer lawyers may not always be able to increase a CLC's capacity to deliver services in some areas of the law.[75]

Many of the CLCs consulted for this project indicated that they were working to capacity and still unable to meet the demand for their services in family law.

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[74] Information based on a review of CLC Directories and websites. The extent of legal services offered in family law varies greatly between CLCs, and some exclude certain aspects of family law from the services they provide.

[75] For more information on volunteering at CLCs and partnerships between law firms and CLCs, see the National Pro Bono Resource Centre's publication, *Pro Bono Partnerships and Models: A Practical Guide to What Works,* May 2013, http://www.nationalprobono.org.au/page.asp?from=4&id=106.

> *"Our telephone advice line can't meet the demand and is working to capacity, many clients say they have spent hours or days just trying to get through to the service. And sometimes we have to turn clients away just because we don't have the capacity to assist them beyond giving advice, even though they may really need it. Sometimes that keeps me awake at night* – [the thought of] *what happened to that client that even we had to turn away."* (CLC lawyer)

4.4: SERVICES OFFERED BY COMMUNITY LEGAL CENTRES IN FAMILY VIOLENCE

CLCs also provide services to victims of family violence. The range of services offered by CLCs in family violence range from providing legal information and advice, to undertaking casework, legal representation, advocacy and court support, providing community legal education and training, and engaging in policy and law reform. For example, many women's legal services across Australia run a dedicated service for victims of family violence.

As with family law issues, many of the CLCs consulted for this project indicated they had difficulties in meeting the demand for their services in family violence. Some stakeholders also commented on the fact that most services focus on the legal needs of victims of family violence, leaving the perpetrators of family violence without assistance.

> *"Most of the specialised family violence services focus on victims, and most of the victims services focus on women. There's very little assistance and support available for perpetrators of family violence. Many of them do not appear in court with legal representation, and often it feels they haven't even sought advice as to what their rights are. I've witnessed many instances where it would have been in the victim's best interests for the perpetrator to have legal representation. Family violence is often about power and control and you see perpetrators using the courtroom to try to exercise more power and control over the victim, especially if they* [the victim] *need to give evidence. That wouldn't happen if they* [the perpetrator] *had a lawyer.* (CLC lawyer)

Family Violence Prevention Legal Services

Family Violence Prevention Legal Services (FVPLS) are CLCs that specialise in providing legal services to Indigenous women, men and children who are victims of family violence or sexual assault, or are at a risk of family violence or sexual assault. They also assist non-Indigenous carers or guardians of Indigenous children who have been victims of family violence or sexual assault. FVPLS's provide a range of services to their clients, including providing legal advice and casework, court support, counselling, information and referral services to other service providers, community engagement and community legal education, as well as early intervention and violence prevention services. Some of the services are stand-alone services, while others are co-located with another Aboriginal or Indigenous legal service provider.

4.5: THE SERVICES THAT LEGAL AID AND CLCS DON'T PROVIDE

People who do not qualify for a grant of legal aid, or who have exhausted their grant of legal aid often turn to other free legal services for assistance. As other publically funded legal services, namely CLCs and duty lawyer services in the federal family courts, are often only able to provide legal advice and assistance with limited tasks, many clients are left unable to represent themselves.

Studies show that in addition to the cost of legal services and the limited availability of legal aid, a number of factors may influence a person's decision to represent themselves in family law proceedings. These include a disenchantment with lawyers; a perception that family law is not 'real law' and therefore does not require the skills of a lawyer; the intention to use the Family Court process to air grievances, seek revenge or as an instrument of harassment; or the simplification of court procedures. In fact, the availability of other sources of legal assistance, including CLCs and duty lawyer schemes, self-help and internet resources, together with an emerging 'do-it-yourself' culture, have also been shown to be factors in the rise in self-representation.[76]

However, many of the stakeholders consulted for this research commented on the fact that there is a distinct difference in the types of services that publicly funded legal services are able to offer, and that the greatest gap in the services provided is the lack of representation.

> *"We are publicly funded just like legal aid is – so in principle there should be no difference to where a disadvantaged client gets assistance from. But the services we are able to provide are different - the benefit of clients getting a grant of legal aid is that they have someone representing them in court. We just don't have the capacity to do that. Our service is a specialist service, and we are very much focused on meeting clients' needs, but compared to the range of support available through legal aid grants, we just can't compete."* (CLC lawyer)

> *"Many of our clients who can't get legal aid can somehow navigate themselves through the process as we assist them with the drafting of documents and affidavits and explain the court process to them. It's those clients that are completely unable to represent themselves who miss out – the support we offer just isn't enough for them."* (CLC lawyer)

Judicial officers consulted for this research also commented on the difficulties faced by self-represented litigants and the importance of available representation.

[76] John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia', Research Report, No 20, Family Court of Australia, 2000, 11-12; Murray Hawkins, 'Emerging Trends in the Provision of Legal Services: Some Australian Experiences', Speech delivered at the Commonwealth Law Association Conference, Nairobi, 7 September 2007, as quoted in Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review', Australian Centre for Justice Innovation, 24 May 2012, 17.

> *"As much information as we provide to the public, many find the court process very intimidating, especially if they are self-represented and the relationship was one with abuse. For others simply the relationship breakdown has been very traumatic and they are not functioning properly. In those cases I think anyone with a practicing certificate sitting next to the parties at court would be helpful – just to guide them through the issues from their perspective and help communicate what they want to say to the court. I can guide litigants through the process, but I can't give them advice and I can't articulate their argument for them." (Judicial officer)*

The importance of available representation is highlighted by the fact that due to provisions in the FLA encouraging alternative dispute resolution only a small percentage of family law matters are contested matters that end up before a judge. For example, in all the matters that were finalised in the Family Court during the 2011-2012 financial year, only 12.9% required a judge to make a final determination in the matter, and almost 60% of all matters in the court were applications for consent orders.[77]

> *"Only the most difficult cases end up in front of a judge - usually it's either high net worth individuals fighting over family trusts, or the complete opposite end of the spectrum: individuals experiencing sometimes severe social disadvantage, who have been unable to settle their matter, or for whom mediation has not been appropriate or has been unsuccessful because of violence in the relationship. Irrespective of which category of person you belong to – if you end up in front of a judge you really do need a lawyer to represent you."* (Judicial officer)

> *"The policies behind the FLA and especially the more recent amendments to it are intended to encourage alternative dispute resolution and to discourage litigation. The vast majority of people do manage to settle their matters without full-blown litigation. For those people that do need to go to trial, their matter is usually legally very complex or their circumstances are complex, which means they need legal assistance."* (CLC lawyer)

4.6: OTHER PUBLICLY FUNDED SERVICES

In addition to Legal Aid Commissions and Community Legal Centres, there are a number of other publicly funded services designed to assist families going through separation to resolve disputes without going to court.[78] Generally, these other services are not providers of legal

[77] Commonwealth of Australia, *Annual Report 2011-2012,* Family Court of Australia, 49, http://www.familycourt.gov.au/wps/wcm/resources/file/ebd4d80901c31bd/AR2012_FINAL%28280pp_cov%29.pdf.

[78] For more information on federally funded services available to separation couples and families, see www.familyrelationships.gov.au.

services, but do facilitate the resolution of legal issues through alternative dispute resolution.

Family dispute resolution

Family dispute resolution (FDR) is the legal term for services (for example, mediation) that are designed to assist people experiencing relationship breakdown to solve their family law disputes. Most legal issues arising out of a relationship breakdown, for example property, maintenance and parenting, can be resolved through FDR.

The FLA requires families going through a separation to undergo FDR prior to applying to the federal family courts for parenting orders to be made, or for existing parenting orders to be varied.[79]

A number of organisations provide FDR services, for example Family Relationship Centres, Legal Aid Commissions and some community organisations. An individual accredited as a FDR practitioner[80] (not necessarily associated with a family dispute resolution service, for example a lawyer) can provide FDR, and issue certificates under the FLA.

Although FDR is intended to facilitate the resolution of disputes without going to court, it does not replace legal advice. FDR services do not provide legal advice or assistance to clients, and some service providers may not allow lawyers to be present during mediation.

Parenting Orders Program

The Parenting Orders Program (POP) (formerly known as the Contact Orders Program) is offered by a number of community organisations. The POP offers mediation and other support services (counselling, group work) to separating families in order to facilitate the making of parenting arrangements without going to court. Whilst the aim of the program is to facilitate the making of parenting orders without going to court, the service does not offer, nor replace legal advice.

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[79] There are a number of exceptions to the requirement to undergo family dispute resolution. They include where an application for consent orders is made; where a person is responding to an application; where the matter is urgent; in cases involving family violence or child abuse or the risk of family violence or child abuse; where one party to the dispute is unable to participate in family dispute resolution in an effective manner (for example due to a disability or remote location); or where a party involved in the family law dispute has contravened and shown a serious disregard for a court order made in the last 12 months.

[80] To become an accredited FDR practitioner, an individual must meet specific criteria set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), specifically: i) having completed appropriate qualifications (such as a degree in law, social work, counseling etc.), ii) having completed training in family dispute resolution (for example the Vocational Graduate Diploma of Family Dispute Resolution or an equivalent by a higher education provider), iii) not being prohibited from working with children under a State or Territory law, iv) having access to a suitable complaints mechanism, v) being suitable to perform the duties and functions of an FDR practitioner, vi) not being disqualified from accreditation (for which a National Police Check is required). A condition of accreditation is also to hold professional indemnity insurance.

5 RESPONDING TO LEGAL NEED IN FAMILY LAW - PRO BONO LEGAL SERVICES

5.1: THE DIFFICULTY IN OBTAINING PRO BONO ASSISTANCE IN FAMILY LAW

There is clear evidence to indicate that obtaining pro bono assistance in family law is difficult. Many pro bono referral schemes and public interest clearing houses report difficulties in placing family law matters and some do not refer family law matters at all. The increased specialisation of the Australian legal profession has led to the disappearance of family law expertise from large and mid-sized law firms, with most family law practices being small or very small firms and sole practitioners.[81] Accordingly many of the law firms with structured pro bono practices and 'economies of scale' do not have expertise in family law.

Without being able to seek help through a pro bono referral scheme, obtaining pro bono legal assistance becomes reliant on personal contacts.

> *"I know a few local high street solicitors who take on pro bono work – sometimes I have to ask clients to approach them when they have reached their legal aid funding cap or in matters that there's no legal aid funding for. But if it's a complex matter I know the client's chances of getting someone to assist them are really slim – a high street solicitor can't afford to take on a matter that will take up countless hours."* (Legal Aid lawyer)

Some attempts have been made in the past to engage lawyers from large and mid-sized law firms in providing pro bono legal assistance in family law matters, with varying degrees of success. Outside of the pro bono work done by family law practitioners in a variety of ways, the Centre is not aware of any ongoing successful pro bono programs in family law.

In contrast to family law, the area of family violence has traditionally lent itself more easily to pro bono assistance. In addition to individual volunteering by lawyers at family violence services and CLCs, many large and mid-sized law firms provide pro bono assistance in family violence, for example, by providing assistance at court to women seeking Family Violence Orders, or in a related area, such as Victims Compensation for victims of family violence (see introduction to Part D on page 92).

[81] No national data on areas of practice and firm size is available. In NSW (which hosts 41.4% of Australia's lawyers) 33% of law firms with 1 to 4 partners reported family law as being one of their areas of practice, compared with just 0.4% of law firms with 40 or more partners. See The Law Society of New South Wales, *2012 Profile of Solicitors in NSW – Final Report*, January 2013, http://www.lawsociety.com.au/resources/surveysandstatistics/index.htm.

5.2: FAMILY LAW PRACTITIONERS AND THEIR APPROACH TO PRO BONO LEGAL WORK

The vast majority of legal services in family law is provided by lawyers who practice in the area of family law ('family law practitioners'). Some of these lawyers may have specialist accreditation from a law society in their State or Territory.[82] Family law practitioners provide services to full fee-paying clients, work for clients with a grant of legal aid, and take on pro bono work. Family law practitioners do much of their own representation work, engaging counsel in more complex matters and for appeals.

As the focus of this research project is the provision of pro bono legal services in family law and family violence, one of the first steps taken was to identify the types of pro bono legal work undertaken by family law practitioners, and any issues affecting the provision of pro bono legal work by family law practitioners.

Since the introduction of the FLA in 1975, family law has developed into a highly specialised area of practice, with many lawyers and law firms providing legal services solely in the area of family law. Although no national statistics were available, research conducted on behalf of the Law Society of New South Wales suggests that family law was ranked 6th (out of 25) most common area of practice undertaken by NSW legal practitioners in 2012-2013,[83] with its prevalence varying greatly depending on the geographical area and size of firm.

Thirty-three percent of firms with less than five partners reported providing legal services in family law in the 2012/2013 year. This dropped to 14.9% for firms with between five and ten partners, 5.1% for firms with 11-20 partners and 0.4% of firms with 40+ partners. [84]

For firms with less than five partners, family law was ranked third in main areas of practice only behind conveyancing and wills and estates. In firms with between five and ten partners, family law had dropped to 7th (out of 11) as a main area of practice and was ranked last as a main area of practice amongst firms with 40+ partners.

This seems to indicate that most family law work in NSW is done in firms with up to ten partners and a considerable amount undertaken by firms with less than five partners. Further, the majority of those practising family law tend to work in suburban or country areas.

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[82] Family Law Specialist Accreditation schemes are administered by the professional bodies of several States. The Law Institute of Victoria, and the respective Law Societies of NSW, WA, Queensland and South Australia all operate specialist accreditation schemes that offer family law accreditation. The Northern Territory, Tasmania and the ACT have no official specialist accreditation schemes in place. Specialist accreditation is an additional qualification that practitioners can undertake to demonstrate and therefore advertise particular proficiency in a certain area. For example, in NSW applicants must pass a written examination as well as two other assessments, have the support of three referees, have been practicing for at least 5 years full-time, and have had 25% of their work devoted to family law matters in the past 3 year period.

[83] Urbis Keys Young, *2012 Profile of the Solicitors of NSW*, January 2013, The Law Society of New South Wales, 27, tables 21 and 23 http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/687930.pdf.

[84] This trend is evident in data gathered from the Law Society of NSW Practicing Certificate Survey 2012-2013, Ibid, 29, Table 23.

Given the small size of many family law practices, any 'traditional' pro bono legal work done by smaller firms is likely to be provided based on personal contacts and ad hoc requests, with little of the work being referred through pro bono clearing houses or referral schemes. Whilst some of the larger specialist family law practices participate in organised family law clinics with CLCs, and there are some pro bono services that are able to undertake family law matters[85], the structured approach to pro bono (i.e. providing free legal services from the outset, for people experiencing disadvantage), characteristic of the large and mid-sized law firms' pro bono practices, seems rare.

In fact, research into legal services in family law[86] suggests that pro bono work in family law is understood by many family law practitioners to mean charging the client (or receiving from legal aid) less than what the lawyer would normally charge. Family law practitioners are likely to 'discount the bill, undercharge, give free advice, or charge at a legal aid rate rather than charge nothing at all'. [87] Much of pro bono work is done within individual files, particularly on legal aid files.[88]

This unfunded work may be done prior to a grant of legal aid, or on work not covered by the grant, for example by advising their clients in property matters when the value of the matrimonial property is low, or by continuing to act for a client after the grant has run out.[89]

Stakeholders consulted for this research project expressed views that support these findings.

> *"Being a family law practitioner is almost a lifestyle choice. It's as much about how you provide services as it is about the specialised area of law. Pro bono is woven into family law. The clients need a really high level of support and even if the client runs out of funds to pay me or reaches their* [legal aid] *funding cap you still have to help. Because what's the alternative – ditching a client and leaving them with no outcome or a poor one? That's not the kind of lawyer I want to be."* (Family law practitioner)

Comments expressed by stakeholders also highlighted some grey areas in what is considered to be pro bono legal work, especially regarding the discounting of legal bills, as it is not always done in response to a client's disadvantage or inability to pay, but appears to be a general way of running a legal practice.

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[85] For example, Salvos Legal Humanitarian takes on some family law matters in its Sydney and Brisbane practices.

[86] Hunter *et al.*, *Legal Services in Family Law,* Justice Research Centre, Law Foundation of New South Wales, December 2000, and Rosemary Hunter, *Family Law Case Profiles*, Justice Research Centre, Law Foundation of New South Wales, June 1999.

[87] Hunter *et al.*, *Legal Services in Family Law,* Justice Research Centre, Law Foundation of New South Wales, December 2000, 207, 209.

[88] Rosemary Hunter, *Family Law Case Profiles*, Justice Research Centre, Law Foundation of New South Wales, June 1999, xiv.

[89] Hunter, et al. above n 86, 204-205.

> *"I know the family law practitioners in our firm frequently strike items off bills and don't always record every call or discussion with the client on their time sheets, otherwise the legal bills would be enormous. These lawyers also take calls from clients well outside normal business hours and are always on call. That's the nature of the support that family law clients need. The same doesn't happen in our other practice areas."* (Pro bono coordinator, mid-sized firm)

> *"I think it's safe to say that I never charge a client for all the work I do. You just can't charge a client for every call they make in a family law matter. ... Every one of my clients gets some of my time for free"* (Family law practitioner)

One family law practitioner commented on the differences between pro bono legal work and running a legal practice and managing a legal practice.

> *"If you are going to do pro bono work then that is the decision you make right from the start, and do work for a client who otherwise couldn't get legal assistance. To me pro bono is not taking someone on as a full-fee paying client and then deciding not to charge them for all of your time for whatever reason. That's a business decision you make – it's not about access to justice."* (Family law practitioner)

Pro bono work and legal aid

Some stakeholders also commented on the inadequacy of legal aid grants and expressed the view that the discrepancy between charge out rates and legal aid rates is pro bono legal work.

> *"When I started out as a family law lawyer, the legal aid rate was about 90% of the rate we charged from self-funded clients. The costs for running a practice have since gone up astronomically, which is reflected in our charge out rates, but grants of legal aid haven't. With today's legal aid rates* [we] *don't even cover our costs. That to me is pro bono work."* (Family law practitioner)

> *"Legal Aid grants are woefully inadequate. When I was still at the Bar I was often briefed by Legal Aid to run appeals in the Family Court. The discrepancy between the fee paid to me by Legal Aid and what I would normally charge as an SC was quite significant. To be honest, I considered that to be the pro bono component of my practice."* (Judicial officer)

This discrepancy between the normal charge-out rate of family law practitioners and the fees paid by legal aid has also been is also acknowledged by Legal Aid Commissions. For example, in his speech to the 4th Annual Colloquium of the Judicial Conference of Australia, Richard Coates, then Director of Legal Aid in the Northern Territory commented: "The fees paid by Legal Aid Commissions to private practitioners accepting family law referrals are now

approximate half the scale rate. We are massively dependent on the goodwill of the profession to keep the system afloat."[90]

Other ways of providing access to justice

Some of those consulted commented on providing access to justice in other ways, for example by deferring payment until a matter is finalised, especially in matters concerning matrimonial property.

> *"I honestly don't do pro bono work as such. I just can't afford to – although I do sometimes do parts of a case for free. However, my practice often carries a matter through before charging anything for it – especially if a client has matrimonial property but no cash flow or funds to pay. I view that as providing a form of access to justice. Some matters take almost two years to settle before I see a cent of my fees. Sometimes it's a difficult thing to juggle but what do you do if that's the only way a client can pay?"* (Family law practitioner)

One CLC lawyer commented that family law lawyers accepting more deferred payment cases would be a good way of increasing access to justice as legal aid is not available for property disputes and some family law practitioners might find it hard to provide 'straight up' pro bono services.

> *"A lot of my clients would benefit from law firms taking on family law matters on a deferred fee basis. The clients may have a bit of equity in their property or a bit of money coming from their ex-partner but are not on a big income and don't have the cash to pay for a lawyer up front. A deferred fee arrangement provides a good outcome for the client and is a way for the lawyer to provide access to justice and still get paid."*(CLC lawyer)

5.3: BARRISTERS AND PRO BONO WORK IN FAMILY LAW

The research suggests that obtaining pro bono legal assistance from a barrister is also difficult. The difficulties are compounded where the matter is one that requires an instructing solicitor or in jurisdictions where barristers can act uninstructed in very limited circumstances only. Some pro bono referral schemes report that referring matters in a family law matter is more difficult than in other areas of the law.

> *"Family law is one of the more difficult areas of law for us to refer. One of the reasons is that barristers can't be involved in a matter from 'go to woe'; their involvement has to be 'bite-sized'. Our best chance of making a referral is for a single appearance, not ongoing representation. It gets more difficult*

[90] Richard Coates, Director, Northern Territory Legal Aid Commission, 'A History of Legal Aid in Australia', speech delivered at the 4th Annual Colloquium of the Judicial Conference of Australia, The 20th Century - a Century of Change, November 1999.

in those cases where an instructing solicitor is needed, although we do work closely with the [solicitor referral scheme]. T*he easiest referrals to make in family law are for an appeal before the full bench of the Family Court"* (Pro bono referral scheme manager)

"We really don't have any family law barristers on our books. I expect any pro bono work that family law barristers do filters through personal contacts with CLCs and family law practitioners. But given the difficulties of getting a pro bono solicitor in family law, it must be equally as difficult to get a pro bono barrister." (Pro bono referral scheme manager)

It appears that family law barristers - much like family law solicitors - do pro bono work that often goes unrecorded. Some of this work is done in the form of merits assessment or advice for lawyers in community legal centres or pro bono lawyers. Access to this type of pro bono assistance is often dependent on personal connections.

"Just through personal contacts from working in the private profession I know a few barristers I can call if I need some advice on the merits of a case. They won't represent our clients pro bono but I can always get them on the phone if I need them."(CLC lawyer)

"We don't do litigious pro bono matters in family law, but if we did I don't think we would have trouble engaging counsel if it was necessary. I think we would be able to lean on the ones we give our commercial work to for a little bit of pro bono work." (Pro bono coordinator, mid-sized firm)

Some stakeholders also commented on barristers undertaking pro bono work in family law for a reduced fee, rather than work completely free of charge.

"Our Centre works with a few barristers who are willing to act for our clients by charging them a lower rate, usually the legal aid rate. It is very helpful in matters that we do not have the capacity to litigate ourselves but it does still mean that the client needs to have some funds. Not all of our clients can come up with the money." (CLC lawyer)

"It's often easier to make a referral if a client has some funds to pay. Some of our barristers will appear for a nominal fee, for example $200 per day. A client will get the assistance they need and the barrister will be able to cover some of their costs." (Pro bono referral scheme manager)

5.4: LARGE LAW FIRMS HAVE A DIFFERENT APPROACH TO FAMILY LAW PRACTITIONERS

Despite the development of an organised approach to pro bono legal work, particularly in large and mid-sized firms in recent years, there are great differences in what is understood to be pro bono work and what constitutes pro bono work in different parts of the legal profession. These differences are evident when examining the approach to pro bono legal

work undertaken by family law practitioners on the one hand, and large corporate law firms on the other.

Research into pro bono legal work in Australia has largely concentrated on the provision of pro bono legal services by large and mid-sized law firms, with some exceptions.[91] Much of this research focuses on the amount of pro bono work undertaken, the areas of law in which services are provided, how pro bono work is sourced and the level of sophistication and organisation of a pro bono practice.[92] What we therefore know about pro bono legal work in Australia is focused on the policies and practices that facilitate and encourage pro bono legal work, the resulting amount of hours of pro bono legal work and the numbers of participating lawyers. Thus far, little has been written about the more theoretical aspects about pro bono legal work, namely why pro bono is embedded into the daily practice of lawyers (as opposed to another form of professional service), how and why pro bono legal work is organised or distributed right across the legal profession (how much pro bono work is being done in or by different parts of the legal profession and in what way), and the impact of pro bono legal work (on the pro bono clients themselves, on society more broadly, and on the legal profession in Australia).

Some of these issues have been considered in the US context, which also has a well-developed pro bono culture.[93] Termed as research into "the institutionalisation of pro bono", the literature focuses on questions of pro bono work developing as professional practice, the distribution of pro bono activities across the legal profession and the impact of pro bono work.[94] A recent article by Scott L Cummings and Rebecca L Sandefur in the Harvard Law & Policy Review[95] draws together the issues that affect pro bono service delivery beyond the metrics of how much pro bono work is being undertaken by the legal profession, and the questions that should be asked in order to gain a deeper understanding of both the "content and impact of pro bono" work.[96]

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[91] For example, the National Pro Bono Resource Centre conducted surveys into the pro bono legal work of individual Australian solicitors and barristers in 2006 and 2008, respectively (research reports available at http://www.nationalprobono.org.au/page.asp?from=4&id=36). Other research into the provision of legal services has touched upon the topic on pro bono legal services, for example see Hunter et al., above n 86.

[92] See for example the National Law Firm Pro Bono Survey, conducted every two years by the National Pro Bono Resource Centre, which surveys all Australian law firms with 50 or more full-time equivalent (FTE) lawyers. More information and survey reports are available at http://www.nationalprobono.org.au/page.asp?from=4&id=36.

[93] Although there are many similarities between the Australian and American pro bono cultures, they have developed in largely different policy environments with regard to publicly funded legal services. Consequently, the role pro bono legal assistance has played in the US, both in the public debate over the Legal Services Commissions and civil legal assistance, and in 'bridging the justice gap', differs greatly from its Australian counterpart. For more information see for example, John Kilwein, 'The Decline of the Legal Services Corporation; 'It's Ideological, Stupid!' in Francis Regan (ed.), *The Transformation of Legal Aid: Comparative and Historical Studies*, Oxford University Press, 1999, 41 and Legal Services Corporation, 'Report of the Pro Bono Taskforce', October 2012.

[94] See for example, Deborah L Rhode, *Pro Bono in Principle and Practice: Public Service and the Professions,* Stanford University, 2005 or Robert Granfield, 'The Meaning of Pro Bono' (2007) 41 *Law & Society Review* 113.

[95] Scott L Cummings and Rebecca L Sandefur, 'Beyond the Numbers: What We Know - and Should Know - About American Pro Bono' (2013) 7 *Harvard Law & Policy Review* 83.

[96] Ibid, 85.

The article identifies two approaches to the organisation of pro bono legal work across the legal profession. The first is an **ad hoc, individual approach**, where lawyers provide pro bono services out of a sense of duty or as a response to a deserving client. This approach – characteristic of sole practitioners and small law firms – often sees lawyers write off their fees or discount them after the services have been provided, due to a client's inability to pay (a practice which in the US is called "low bono").[97]

The second approach to pro bono work identified in the article is an **organised, systematic approach**, which has an infrastructure for matching clients with legal needs with pro bono lawyers. The infrastructure can take a number of different forms ranging from a centralised clearinghouse for the referral of pro bono matters, to law firms employing dedicated pro bono lawyers to organise, distribute, encourage and supervise pro bono work undertaken by the firm.[98]

Although developed in the US context, this framework of how pro bono legal work is organised across the profession is very similar to the Australian context. The identified approaches to pro bono legal work reflect the differences between the practices and the pro bono work of family law practitioners on one hand, and large law firms on the other.

At one end of the spectrum is the approach taken by family law practitioners, most of whom practice in small law firms or are sole practitioners. Their approach to pro bono legal work is the **ad hoc, individual approach**. The practice of striking items off bills, or not charging the client for all the work undertaken, is a discrete way of assisting clients experiencing disadvantage or with an inability to pay. Based on the comments made by stakeholders in interviews, it is clear that family law practitioners engage in this practice out of a sense of obligation or duty to assist their client, or when the client's case is compelling.[99]

At the other end of the spectrum is the **organised, systematic approach** to pro bono work taken by large and mid-sized law firms. Many of these firms have dedicated pro bono lawyers, are members of pro bono clearinghouses, and have sophisticated systems for measuring the amount of pro bono work undertaken, assessing the interest and availability of lawyers, keeping track of and reporting on outcomes of pro bono work, and developing pro bono partnerships and projects for sourcing pro bono legal work.

The differences between these two approaches may assist (in part) in explaining why pro bono legal assistance in family law has been traditionally difficult to obtain. The ad hoc, individual approach to pro bono taken by many family law practitioners means that pro bono legal work is a component woven into the fabric of practice in family law. As opposed

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[97] Ibid, 88-89.

[98] Ibid, 83.

[99] This practice of pro bono may not only be limited to family law practitioners, but may be characteristic of small law firms and sole practitioners more generally. Considering that the majority of Australia's lawyers practice in small law firms are sole practitioners, this form of providing access to justice is significant. However, much of this work goes unrecorded and unreported, making its impact on the justice system and on access to justice impossible to measure.

to large law firms (with the systematic, organised approach to pro bono work), where pro bono clients are always distinct from fee-paying clients and pro bono matters are worked on separately from billable work, pro bono legal work in a family law practice is an inseparable, and sometimes indistinguishable part of providing legal services. In family law, a fee-paying client may also be a pro bono client and vice versa. This means that family law practitioners may have little capacity to undertake more pro bono work.

Having identified the difference in potential capacity attached to these different approaches, the focus of this research is on what role (if any), the systematic, organised pro bono providers which have greater potential capacity could play in the areas of family law and family violence. These findings are reported in Part C - Family Law and Part D - Family Violence.

PART B - ANALYSIS FRAMEWORK

Based on information gathered in the interviews with stakeholders, literature relevant to the provision of legal services in family law and the Centre's own research on pro bono legal work in Australia, a framework of factors influencing the decision of whether and how pro bono legal services are provided was identified.

Pro bono legal work has unique limitations: for example, the areas of law in which lawyers volunteering to do pro bono work have expertise and the limited amount of time they have available to dedicate to pro bono legal work. However, it also presents with opportunities and flexibility: for example, the flexibility of being able to assist clients without being tied to strict means tests, particular areas of the law or only certain types of legal assistance. Taking into account these unique characteristics of pro bono legal work, this Report applies the **Analysis Framework** to family law and family violence to demonstrate the reasons for the difficulty in obtaining pro bono legal assistance in family law.

6 FACTORS INFLUENCING THE DECISION WHETHER TO PROVIDE PRO BONO LEGAL SERVICES

The five factors covered by the Centre's **Analysis Framework** that influence decisions on whether to provide pro bono legal services are:

1) the compatibility of the unmet legal need with the legal assistance available based on the **scope of a firm's pro bono policy**;

2) whether the law firm and/or lawyer has **expertise** in the relevant area of law;

3) whether the law firm and/or lawyer has the **capacity** to take on the matter;

4) whether the matter is a **discrete task**; and

5) the **willingness and interest** from lawyers within the firm to undertake the work.

In addition to the factors in the Framework, there are a number of other matters that influence decisions about the areas of law and the type of pro bono legal work a law firm will undertake. These are the practical matters that are taken into account in all pro bono matters, for example legal or commercial conflicts, and means and merit considerations.

Each of the factors in the Framework is explained below.

Compatibility of the legal need with the scope of a firm's pro bono policy

Many pro bono service providers hold the view that it is not appropriate to do pro bono work in an area of law where publicly funded legal services are available. They view areas of law that are fundamental to individuals' rights or society (for example criminal and family law), as primarily being the responsibility of government and are concerned that providing pro bono services in these areas will allow the government to shift its responsibility to

provide access to justice onto the private profession. While pro bono legal work is not, and by its nature cannot be, a substitute for legal aid, pro bono providers do work with publicly funded legal services and complement the range of services offered to people experiencing disadvantage. Pro bono legal assistance is generally seen as a 'last resort', when no other appropriate service is available. The availability of government funding and publicly funded service providers in a particular area of law can therefore have an impact on the decision to undertake pro bono legal work in that area.

Expertise in the relevant area of law

The Australian legal profession has become highly specialised, with many lawyers practicing in only one or few areas of law throughout their career. This increased specialisation is particularly evident in large and mid-sized corporate law firms, where lawyers are organised into practice groups according to their area of expertise (for example workplace relations, insurance, tax, litigation). As a result, an increasing amount of lawyers have a depth of expertise in a specific area of the law, as opposed to a broad knowledge of the law generally.

Lawyers have a duty to act for their client with 'due skill and competence'.[100] Potential pro bono clients often present with legal needs in an area of law outside the expertise of corporate law firms. This is particularly so in the case of individuals experiencing disadvantage. This gap in expertise may make it difficult or impossible for lawyers to provide pro bono legal assistance in certain areas of the law. Whilst the gap in expertise can sometimes be addressed by providing training, this is usually so only in discrete areas of law or with regard to discrete legal tasks.

Capacity to undertake pro bono work

Many lawyers undertake pro bono legal work in addition to their everyday commercial practice. In most large and mid-sized corporate law firms lawyers are highly accountable for their time, and have set targets of billable hours they must meet (these generally vary between five and 7.5 hours per day depending on the seniority of the lawyer). Although many corporate law firms facilitate their staff undertaking pro bono work by equating any pro bono work with commercial work for the purposes of meeting billable hours targets, the commercial workload fluctuates according to clients' needs. This may mean that, at certain times, lawyers wishing to do pro bono legal work may not be able to do so due to the demands of their commercial practice.

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[100] See for example, Rule 1 of the Solicitor's Rules (*Revised Professional Conduct and Practice Rules 1995)*, deemed to be made under the *Legal Profession Act 2004* (NSW), and the *Australian Solicitors' Conduct Rules 2012.* (The *Australian Solicitor Conduct Rules* are a set of uniform model professional conduct rules, adopted by the Law Council in 2011. Only Queensland and South Australia have adopted the rules, but various State and Territory law societies are currently in the process of doing so. A full copy of the rules can be found at can be found at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AustralianSolicitorsConductRules.pdf).

The level of pro bono work undertaken by a lawyer or law firm may also have an impact on the capacity to take on any further pro bono work. This capacity issue may manifest in requests for pro bono assistance being turned down. A firm's pro bono practice may also be working to its capacity, meaning that in order to take on any new pro bono matters or projects, others would have to be discontinued.

Related to a law firm's capacity to undertake pro bono legal work is the issue of social impact. As the capacity of any law firm to undertake pro bono legal work is limited, pro bono providers may want to use their resources to undertake work that maximises social impact, and therefore choose to allocate their resources to areas of law where they consider it will make the greatest impact. This may mean that a law firm will prefer pro bono matters with an aspect of law reform or public interest over assisting individual clients with individual legal needs.

The availability of discrete tasks

Due to the voluntary nature of pro bono legal work and the fact that most lawyers undertake pro bono legal work in addition to their commercial work, the resources available to undertake pro bono legal work are limited. Therefore pro bono service providers are unlikely to take on matters that are open-ended, or provide assistance to pro bono clients without defining the scope of the assistance.

Tasks which are limited in the scope of legal assistance required are sometimes referred to as 'unbundled' legal tasks or 'discrete' tasks, and the availability of such tasks can influence the decision whether to provide pro bono assistance. There are a number of reasons for this. For example, pro bono service providers must be able to evaluate the time required to assist in any one matter and the costs involved (both in terms of internal and external disbursements and the cost of the lawyers' time to the firm) in order to determine whether they will be able to assist. Pro bono legal assistance must also be limited in scope to an area of law that the lawyer in question has expertise in, or alternatively to an area of law where the gap in expertise can be overcome by training.

The type of legal assistance required is also a relevant issue, as some types of legal tasks are more discrete than others. For example, legal tasks that a lawyer can undertake from his/her office (for example the drafting of written advice or legal documents, or providing advice over the phone) lend themselves to pro bono legal assistance more easily than tasks requiring, for example, lengthy court appearances, frequent travel outside of the office or for long distances, and frequent client contact.

Willingness/interest to do pro bono legal work

Due to the voluntary nature of pro bono work, in order for a law firm or an individual lawyer to undertake pro bono work they must have a willingness/interest in undertaking the work (See 1.1 The underpinning philosophy of pro bono work on page 27). Several factors may influence the willingness/interest of law firms and lawyers to take on pro bono clients.

Many pro bono programs in law firms have a specific focus, either determined by areas of law, or particularly vulnerable client groups for whom pro bono legal assistance would have

the most impact, that will influence a decision to accept or reject a request for pro bono legal assistance. Some client groups may appear more appealing or morally deserving than others, which may also affect this decision. Also, the nature of the legal work involved and the types of tasks lawyers would perform may be relevant when deciding to take on a matter - some types of cases and/or legal tasks may be more interesting to lawyers than others.

Limitations of the Framework and other factors influencing the decision whether to provide pro bono legal assistance

The Centre acknowledges that this Framework of factors is a construct. Many of the identified factors are interconnected, and generally an evaluation of whether to provide pro bono legal assistance to a client is dependent on an evaluation of the circumstances as a whole, including the facts of the case and the potential client. Pro bono legal work may be undertaken despite these factors, for example to prevent (or correct) a miscarriage of justice. However, these factors (identified through the interviews conducted for this research) provide a framework for understanding the limitations, challenges and opportunities for obtaining pro bono legal assistance in family law matters.

In addition to the factors covered by the Framework, there are other factors influencing decisions that are more commonly understood and often used explicitly in the written checklists contained in the documentation accompanying formal assessments of matters for pro bono legal assistance, for example, pro bono clearing house referral and assessment forms. These include conflicts of interest, associated disbursements and the availability of disbursement assistance, the client's financial position and a general assessment of merit.

PART C - FAMILY LAW

This Part applies the **Analysis Framework** (See Part B on page 64) to the family law context. When applied to the findings of the research and to case studies, the Framework illustrates the difficulties of obtaining pro bono legal assistance in family law.

This Part also brings together the information gathered in the interviews with stakeholders and draws on external research on relevant topics and information from other sources providing a broader context for the findings.

7 ANALYSIS OF FACTORS INFLUENCING THE DECISION WHETHER TO PROVIDE PRO BONO LEGAL SERVICES IN THE AREA OF FAMILY LAW

As set out in Part B, the **Analysis Framework** comprises five factors that influence decisions by large and mid-sized law firms on whether to provide pro bono legal services, namely:

1) the compatibility of the unmet legal need with the legal assistance available based on the **scope of a firm's pro bono policy**;

2) whether the law firm and/or lawyer has **expertise** in the relevant area of law;

3) whether the law firm and/or lawyer has the **capacity** to take on the matter;

4) whether the matter is a **discrete task**; and

5) the **willingness and interest** from lawyers within the firm to undertake the work.

7.1: THE COMPATIBILITY OF LEGAL NEED IN FAMILY LAW WITH THE SCOPE OF A FIRM'S PRO BONO POLICY

FAMILY LAW IS THE GOVERNMENT'S RESPONSIBILITY

There is a general consensus within the pro bono community in Australia that pro bono legal work cannot, and should not, be a substitute for adequately funded public legal services. Therefore pro bono legal assistance to individuals is generally available only in areas of law where no legal aid funding is available (or in some cases to individuals experiencing disadvantage who do not qualify for legal aid). There is continuing concern within the pro bono community in Australia that the provision of pro bono legal services in core areas of legal aid funding will allow governments to renege on their commitment to adequately fund free legal services.

These views were clearly reflected in the comments made by stakeholders in interviews. Many pro bono service providers consulted for this research indicated that they were not willing to consider undertaking pro bono legal work in family law. This was due to a belief that providing access to justice in the area of family law is the responsibility of government.

Therefore many considered that the provision of pro bono legal services in family law was not appropriate.

Some of the reasons for why stakeholders considered providing access to justice in family law to be a government responsibility were:

> "*Picking up matters that are traditionally government responsibility carries with it the risk of sending the wrong message to government*." (Pro bono coordinator, large law firm)

> "*Family law especially should be government responsibility because it affects Australians across the board. So many people come in contact with the justice system through family law. Also – government should be held accountable for providing adequate access to publicly funded legal services, there are numerous examples of the government trying to shift its responsibility to the private profession – we can't let that happen in family law."* (Pro bono coordinator, mid-sized firm)

> "*Family law is so linked to society and the way society works, the importance of the family unit. Because the government has chosen to regulate people's relationships it therefore has the responsibility to provide access to justice when issues regarding those relationships come into dispute – the issues are so important they need to be run well by expert lawyers – not through funding the facilitation of pro bono work*." (Pro bono coordinator, large firm)

> *"A breakdown in family relationships has a huge impact; it's not just a stand-alone legal issue. Unmet legal need in family law has a ripple effect in society – I think that's why there's a community expectation that government will provide access to justice in family law. It's about the importance of the social nature of family law. It's not the same as regulating other types of private disputes between individuals."* (Pro bono coordinator, mid-sized firm)

Many other pro bono service providers believed that family law was no more the responsibility of government than every other area of law, but the fact that family law was one of the few areas of law where legal aid funding was available, meant that the provision of pro bono legal services in family law was not appropriate.

> *"I really can't answer that question* [why family law is perceived to be more of a government responsibility than other areas of law] *except to say that that's the way it's always been. I think we need to be careful if starting to provide pro bono services in areas of law where legal aid funding is available. The more pro bono is a substitute for legal aid the more government has the opportunity to shift the responsibility of providing access to justice onto the private profession. Any pro bono work in this area would have to be done in tandem with lobbying the government to see that we are picking up their slack."* (Pro bono coordinator, large firm)

> "*Historically and traditionally family law has been government responsibility – the origins of the legal aid system stem from legal assistance in family law and criminal law. This historical background has conditioned pro bono practices and lawyers to think that their efforts are best placed elsewhere – and with the specialisation development of the legal profession family law does not fit into the skills base of 'big end pro bono'. Also there is thinking of not wanting to take on government responsibility – if we start doing that where will it end?"* (Pro bono coordinator, mid-sized firm)

In contrast to the views presented by pro bono coordinators, the Commonwealth Government defines government responsibility differently. Providing legal assistance in family law has been recognised as a Commonwealth funding priority since the establishment of the Australian Legal Aid Office (ALAO) in 1973, when the Attorney-General, Senator Lionel Murphy cited the "need to provide legal aid in divorce cases and in proceedings ancillary to divorce"[101] as one of the reasons behind the government's decision to establish the ALAO.[102] Ensuring adequate funding for legal aid in family law matters was also one of the factors behind the Commonwealth Government's decision in 1997 to cut federal outlays on legal aid in matters not under Commonwealth law.[103] One of the main reasons for the change in policy was to ensure that priority was given to Commonwealth funding to assist people with matters arising under Commonwealth law, particularly in family law.[104]

The Commonwealth Government's views reflect a different approach to defining government's responsibility and the division of public law[105] and private law,[106] and the function of family law as a dispute resolution mechanism.

> "*It is surprising that family law is thought of so much as government responsibility. Obviously the Commonwealth considers access to justice in family law important as it has chosen to allocate funding to it. From a policy perspective there is a sharp distinction between the public law aspects of*

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[101] Commonwealth, *Parliamentary Debates,* Senate, 13 December 1973, 2802, Attorney-General as cited in Richard Coates, Director, Northern Territory Legal Aid Commission, 'A History of Legal Aid in Australia', speech delivered at the 4th Annual Colloquium of the Judicial Conference of Australia, The 20th Century - a Century of Change, November 1999.

[102] The ALAO was established administratively but never by legislation as an independent Federal statutory authority.

[103] Following the election of a Coalition Government in June 1996, the Commonwealth Attorney-General announced the Commonwealth's intention to terminate existing legal aid agreements from 30 June 1997. After the announcement Commonwealth outlays for legal aid were cut by more than $33 million for the following financial year.

[104] Government's Response to the Senate Legal And Constitutional Reference Committee's inquiry report Legal Aid and Access to Justice 2004, and the Minority report by Government Senators, tabled in the Senate 7 February 2006.

[105] Public law is the law that governs the relationships between individuals and the government, for example constitutional law, criminal law, tax law and administrative law.

[106] Private law is the law that governs relationships between individuals, for example contract law, employment law, family law, the law of torts.

family law, such as the child protection mechanisms under State legislation, and Commonwealth family law which is basically a mechanism to resolve disputes between individuals." (Commonwealth Attorney-General's Department).

The funding priorities the Commonwealth has set for family law matters reflect both the importance it places on family law, and the distinction between public and private law. The funding priorities for family law matters are for complex issues and fundamental matters necessary for the wellbeing of children and/or people who have experienced, are experiencing or are at risk of experiencing, family violence. These priorities, set out in the Commonwealth Legal Aid Service Priorities and Guidelines,[107] are not intended to include grants of legal aid for matters such as matrimonial divorce proceedings, applications for passport, and/or change of name, unless special circumstances apply.

The following family law priorities are set out in the Guidelines:

- matters relating to children, including the appointment of a court appointed independent children's lawyer;[108]
- matters where people who have experienced, are experiencing or are at risk of experiencing, family violence;
- matters relating to the resolution of complex issues relating to the living arrangements, relationships and financial support of their children.
- State law matters in which a child's safety or welfare is at risk and there are other connected family law priorities for which a grant of legal assistance could be made; and
- State law matters where the applicant's safety is at risk and there are other connected family law priorities for which a grant of legal assistance could be made.

Even with these priorities, evidence shows that many people with a family law problem are being refused legal aid.[109] Reasons for the refusal of a grant of legal assistance can be varied and differences may exist between different jurisdictions. The reasons include not satisfying the means test, having a legal problem that is outside the guidelines set by the State or Commonwealth Government, the Legal Aid Commission not having sufficient funds available, and having previously held a grant of legal aid for the matter and reaching the funding cap.[110]

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[107] The Commonwealth Legal Aid Service priorities are set out in Schedule A of the National Partnership Agreement on Legal Assistance Services, above n 62.

[108] The Family Court has played a part in establishing funding guidelines in relation to this matter, see *Re K* (1994) 17 Fam LR 537, where the Court established Guidelines and Criteria for the appointment of and Independent Children's Representative.

[109] For example, the NSW Legal Aid Commission reported that 26% of applications for legal aid in family law matters were refused in the 2011-2012 financial year. See the NSW Legal Aid Commission, 'Annual Report 2011-2012', 134).

[110] See for example the Legal Aid Commission of Western Australia, *FAQs about legal aid,* 14/06/2013, Legal Aid Western Australia, http://www.legalaid.wa.gov.au/LegalAidServices/applyingforLegalAid/Pages/frequently.aspx.

7.2: EXPERTISE IN THE RELEVANT AREA OF LAW

The specialisation of the Australian legal profession has undergone significant changes in recent decades. Statistics on the legal profession indicate that whilst the amount of family law practitioners has steadily increased, the expertise in family law in the private sector of the legal profession is mostly concentrated in law firms with less than ten partners[111]. As a result, expertise in family law has all but disappeared from large and mid-sized law firms, with only 0.4% of all firms with more than 40 partners listing family law as a common area of practice.[112]

The increased specialisation is also reflected in the type of pro bono legal work undertaken by large and mid-sized corporate law firms. According to the National Law Firm Pro Bono Survey in 2012, more than 60% of all pro bono work undertaken by law firms with 50 or more full-time equivalent (FTE) lawyers was for organisations. The areas of law in which most pro bono services were provided are consistent with the client base (governance, deductible gift recipient (DGR) applications, employment law, commercial agreements and incorporations) and fits within the existing expertise and skills base of large and mid-sized law firms.[113]

Only four per cent of the surveyed law firms had provided pro bono legal assistance in family law in the 2011/2012 financial year. Conversely, the highest number of rejected requests for assistance, for reasons other than the means of the client to pay for legal service or the merit of the case, was in family law.[114]

Family law is a highly specialised area of practice that requires knowledge of the statutory framework, a significant body of case law, and the way in which the federal family courts and alternative dispute resolution mechanisms operate.

All pro bono service providers consulted for this research highlighted the lack of expertise in family law as an issue influencing the decision whether to provide pro bono legal services in this area of practice.

> *"Our firm has not had a partner with family law expertise for almost 30 years, and our expertise lies completely in the corporate area. How could we offer quality services to pro bono clients in an area of law we know nothing about? It's like going to the dentist to get treatment for a sore foot."* (Pro bono coordinator, mid-sized firm)

> *"The expertise just isn't there – and because it's not there none of the resources normally available to lawyers are there either. No library*

[111] Urbis Keys Young, above n 83.

[112] Ibid.

[113] National Pro Bono Resource Centre, 'National Law Firm Pro Bono Survey - Australian firms with fifty or more lawyers - Final Report', January 2013, 19, 29.

[114] Ibid, 21.

resources, no knowledge management, training updates, none of it. (Pro bono coordinator, mid-sized firm)

Many pro bono service providers also mentioned the risks associated with a lack of expertise in family law.

> *"Running a legal practice is about risk management. We look at managing risk by maintaining well-trained highly skilled lawyers and adequate partner supervision. We couldn't do that in family law. No lawyer worth their wage would start advising clients in an area of law they're not familiar with. Pro bono or otherwise."* (Pro bono coordinator, large firm)

The lack of expertise in family law by lawyers working in corporate law firms was also noted by those working in CLCs, with some experiencing difficulties supporting their volunteers in dealing with family law issues.

> *"Whilst we don't run a specialist family law clinic, we provide family law advice, and try to place clients with a volunteer lawyer with the requisite expertise. Some of our volunteers who are corporate lawyers run into difficulties when other areas of law intersect with family law. They may be well equipped to advise with credit and debt issues, or property issues, but not where there's a family law issue involved."* (CLC lawyer)

> *"We used to have secondees from large firms who dealt with family law issues. Whilst they had great skills and were smart and engaged people, for some of them it took almost half of their secondment to get across the family law stuff. Most of them hadn't even studied family law at university, so you have to start with the basics when it comes to training. As far as I know family law is still an elective subject* [in a law degree]*."* (CLC lawyer)

Whilst the lack of expertise was highlighted as an issue influencing the decision whether to provide pro bono legal services in family law, pro bono practices in law firms have a history of providing pro bono legal services outside the firm's core areas of expertise, for example in assisting clients with Family Violence Orders and in Victims Compensation matters (see the introduction to Part D on page 92). This lack of expertise has been addressed by providing lawyers with training regarding the relevant area of law, carefully defining the scope of assistance provided, and if necessary, partnering with CLCs that have expertise in the relevant area of law to assist with the supervision of matters. (See 7.4 Availability of discrete tasks on page 76 and 7.6 Case Studies on page 87 for more information on addressing a lack of expertise).

7.3: CAPACITY TO UNDERTAKE PRO BONO WORK

A law firm's capacity to undertake pro bono work can be influenced by a number of factors. The amount of commercial and pro bono work undertaken by the firm (i.e. how busy the firm's staff is), levels of staffing and the type of pro bono legal assistance required (for example, assistance in a matter requiring litigation versus assistance in a matter requiring

the giving of one-off written legal advice) are relevant factors when assessing a firm's capacity to take on new pro bono matters.

According to the National Law Firm Pro Bono Survey Final Report for 2012, respondent law firms with 50 or more FTE lawyers reported undertaking a combined total of 343,058 hours of pro bono work in the 2011-2012 financial year.[115] The total represents an average of 6,597 hours of pro bono work each week,[116] or the equivalent of 191 lawyers undertaking pro bono work full-time for a year.[117]

Many of the stakeholders consulted for this research indicated that their pro bono practice was already working to capacity, and taking on family law matters would mean dropping a successful project or program that was already responding to unmet legal need and the impact of those services on the clients. One pro bono coordinator commented on the misconception that large law firms can undertake "an endless amount" of pro bono work.

> *"Our pro bono program is working really well and although we are trying to increase our hours, in order to take on family law we would have to drop one of the areas we work in."* (Pro bono coordinator, mid-sized firm)

> *"We couldn't take on family law without giving up another part of our program. That just leaves more unmet need. And why would we stop doing something that is providing real outcomes just to take on an area of law which should be the responsibility of government anyway?"* (Pro bono coordinator, large firm)

> *"I feel there is a misconception in the community sector about the capacity that law firms have for pro bono work. Just because we are a well resourced, large law firm doesn't mean that we can do an endless amount of pro bono work. Large law firms already do a lot, it's not like there's a whole lot of unused capacity there."* (Pro bono coordinator, large law firm)

Other stakeholders commented on capacity being an issue in family law due to the nature of the legal matters (see also 7.4 Availability of discrete tasks, on page 76). Not being able to estimate the resources required, or legal matters requiring too many resources, were highlighted by pro bono coordinators and family law practitioners alike as issues making it difficult to provide pro bono legal services in family law.

> *"We do take on some pro bono cases in family law but most of the requests we have to knock back simply because they're too big – we can't afford to handle a case that involves contact orders, maintenance, divorce, residence, splitting the superannuation, contravention applications, the lot. It would just be too time consuming."* (Family law practitioner)

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[115] National Pro Bono Resource Centre, 'National Law Firm Pro Bono Survey - Final Report', January 2013, 11.

[116] Based on 52 weeks.

[117] Based on 37.5 hour working week for 48 weeks out of the year.

> *"There's issues with custody and contact with the children, the marital home, superannuation, all these different aspects of the law. Some of them may be resolved quickly and with others it may be a drawn-out court process. From our* [firm's] *perspective it's impossible to estimate the resources required to assist, and I wouldn't be able to get a pro bono matter through the committee if I didn't have any idea as to the size of the commitment required from us."* (Pro bono coordinator, mid-sized firm)

EXTENT OF LEGAL NEED IN FAMILY LAW

Many of the structured pro bono practices in law firms develop strategic ways to respond to legal need for a particular client group or in a specific area of law. Pro bono work is coordinated to ensure that limited resources are used effectively to make a real impact on access to justice or in matters that are in the public interest. Some pro bono programs specifically choose projects that not only improve access to justice for their clients but also have an objective of law reform in the public interest.[118]

There is a connection between the underlying philosophy of pro bono legal work and the strategic focus of many pro bono practices (See 1.1 The underpinning philosophy of pro bono legal work on page 27). The role of pro bono legal work is to provide access to justice for clients who would not otherwise have such access, thus responding to a need and 'plugging the gaps' in the publicly funded legal assistance sector. Therefore many pro bono service providers evaluate the impact any pro bono assistance would have, both on the client and more broadly.

The comments made by stakeholders in interviews reflected this. Many felt that it was not appropriate to respond to legal need in family law by undertaking pro bono work due to the overwhelming demand for such services and the perception that any additional pro bono capacity would only respond to a very small (some say negligible) part of legal need.

> *"There's so much unmet legal need in family law, you think: where would we even start? Would it make any difference? Even if all we* [the pro bono practice] *did was family law we'd barely scratch the surface."* (Pro bono coordinator, mid-sized firm)

> *"I don't know how we'd even choose which clients to assist? Who is more worthy than the other – there's so much unmet need there. We couldn't make a difference in family law."* (Pro bono coordinator, large firm)

[118] For an example of a pro bono project with an objective of law reform, see the Case Study on the Sexual Assault Communications Privilege (SACP) Pilot Project, a partnership between Women's Legal Service NSW and law firms Herbert Smith Freehills, Ashurst and Clayton Utz, featured in National Pro Bono Resource Centre, 'Pro Bono Partnerships and Models: A Practical Guide to What Works', 2013. Available at http://www.nationalprobono.org.au/page.asp?from=4&id=106.

> *"Our firm does pro bono work because we believe that we can make an impact that goes beyond assisting the individual client. I don't think that's possible in family law, there's just too much legal need."* (Pro bono coordinator, large law firm)

These views were reflected in the comments made by one CLC lawyer, who explained that pro bono legal assistance in family law would not have a benefit beyond the individual client, and would not address the underlying problems.

> *"Of course it would be great if there were more pro bono lawyers out there that our centre could refer family law matters to so as to increase our capacity. But there are so many deserving clients who only get a limited amount of assistance already or no assistance at all. The real issue is that publicly funded legal services are unable to meet the demand* [for their services]*. Any pro bono assistance would be beneficial for the client involved, but it would do nothing to fix the problem. That can only be done at a government level."* (CLC lawyer)

7.4: AVAILABILITY OF DISCRETE TASKS

A task that is well suited to pro bono work is generally one which is within a lawyer's area of expertise and is defined in scope, making it easy for pro bono service providers to assess the resources that are required to provide assistance. In some cases the lack of expertise in a specific area of the law can be overcome by providing assistance in a clearly defined, 'discrete' task. This can narrow the scope of training required, and also provide a lawyer with a clearly defined responsibility.

Discrete task assistance can be for example preparing a document, or providing advice to a client in accordance with their instructions, without agreeing to do more. However, many stakeholders consulted for this research were sceptical about the possibility of finding genuinely discrete tasks in family law, due to the size of the *Family Law Act*, the multi-faceted nature of family law cases, and the need of many family law clients for ongoing assistance.

SIZE OF THE FAMILY LAW ACT

The *Family Law Act* 1975 (Cth) (FLA) has 26 parts, 71 divisions and 66 sub-divisions containing 684 sections. It covers topics ranging from divorce and nullity of marriage, children and parenting orders to maintenance, superannuation, property, evidence, injunctions, procedure, contempt and international conventions. Since it was first passed in Parliament in 1975 it has been amended 97 times. Many pro bono service providers mentioned the size of the *Family Law Act* as a significant issue influencing the decision whether to provide pro bono services in family law.

> *"The Family Law Act is huge. Absolutely huge. And it has an equally large body of case law. And it's own set of procedural rules. There's no way that*

amount of information can be imparted in a few days of training." (Pro bono coordinator, large firm)

Due to the size of the FLA, many of the pro bono service providers expressed concern that family law may not be suitable for discrete tasks due to the risk of not providing the best assistance (or even incorrect advice), despite any training provided.

> *"It's not about not being able to attend training and learn the relevant issues to do with some discrete task in family law. It's the fact that we have nothing to do with that area of law in our daily practice, and the Family Law Act is a large piece of legislation. Not knowing what you don't know is the problem".* (Pro bono coordinator, mid-sized firm)

> *"So many family law matters concern a complex set of circumstances and the sections in the Act are interconnected. I don't think it's possible to adequately perform a task on one aspect of the law without really having an understanding on how the rest of it works."* (Pro bono coordinator, large firm)

> *"I would love it if I had some pro bono assistance, especially in the drafting of affidavits, as it can be so time consuming. But every time I try to look at the issues and package a request for assistance neatly so it's not too complicated and not too time-consuming, I end up realising that just giving enough background information would take me just as long as writing the thing myself. Maybe with family law it's just in the 'too hard basket'".* (CLC lawyer)

However, others believed that despite the size of the FLA, it is possible to find discrete tasks within it to provide meaningful assistance to clients, based on the general skill-set of lawyers and the ability to "think like a lawyer".

> *"I can understand a corporate lawyer's apprehension in embarking on a family law matter. But lawyers have skills that are applicable in law in general. They understand the rules of evidence, they understand drafting, and many are damn good writers. Those things can get you a long way, combined with adequate training."* (Judicial officer)

> *"To be honest I think it's more about the ability to think like a lawyer. When you have that analytical and critical mind, you're able to spot legal issues, or at least potential ones, even if you're not an expert in that area of law. I can think of a number of things that would be helpful either to me or to clients if performed by a* [pro bono] *lawyer."* (CLC lawyer)

Some stakeholders felt that even if it was possible to find discrete tasks within family law it would not be an appropriate way of responding to legal need in family law. Stakeholders expressed concerns as to the quality and suitability of discrete task assistance for clients experiencing disadvantage.

> *"Even if we could train our lawyers up to do one discrete task for clients – I am not sure that's the best way to meet unmet legal need for disadvantaged clients. We wouldn't be able to assist them with anything else except for that one little thing. I don't know if that sends the right message to society and to people who are already struggling. They are the ones who need the best possible assistance, given to them by lawyers who are experts in the relevant area of law to make sure they get the best possible outcome."* (Pro bono coordinator, mid-sized law firm)

Adding further to the complexity of providing discrete task assistance is the fact that it will not necessarily be of benefit to all self-represented litigants, and for some clients it may in fact be counter-productive. Recent Canadian research into the needs of self represented litigants[119] found that many self-represented litigants were dissatisfied with the limited legal assistance or advice they received, and that while some litigants benefit from discrete task assistance and are able to represent themselves successfully, others find that the legal information and advice they receive leaves them even more confused and even panicked.[120] Research by Dewar, Smith and Banks in the Family Court of Australia further highlights the diversity of abilities and the wide range of differing needs experienced by self-represented litigants.[121]

Comments made by stakeholders for this research reflect these findings. Many stakeholders noted that discrete task assistance may not always be appropriate for the clients and that some clients come away from receiving advice feeling intimidated and unconfident about representing themselves.

> *"We provide 30-minute advice sessions to clients in family law matters, which really isn't a lot of time. Sometimes clients start to panic when they realise the complexities of the issues involved and feel that the whole process is really intimidating. The more information they have about the process, the more concerned they are about making a mistake to their detriment."* (CLC lawyer)

> *"The duty lawyers at this court provide an invaluable service, not just for clients but for this Court. There are many occasions when I have sent a self-represented litigant out of my court so they could talk to the duty lawyer and they come back with knowledge on what to do, which questions to ask on cross-examination and how to conduct themselves in court. But there are still litigants for whom that type of assistance simply isn't enough. If anything, they come back more confused which adds to their inability to conduct their case in a proper fashion."* (Judicial officer)

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[119] Julie Macfarlane, 'The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants - Final Report', May 2013.

[120] Ibid, 122.

[121] Dewar, Smith and Banks, above n 46, 62-77.

NATURE OF FAMILY LAW MATTERS

In addition to the size of the FLA, information gathered in the interviews suggests that it may be difficult to find discrete tasks for pro bono legal work in family law due to the nature of family law matters. Both the multi-faceted nature of legal matters in family law and the dynamic or constantly changing context of family law matters were highlighted as factors influencing the decision whether to provide pro bono legal services.

Research into the profiles of family law cases handled by Legal Aid Commissions, private solicitors and Community Legal Centres shows that the average case in the family court involves 2.5 matters (including at least one of residence, contact or property), and includes an average of 3.6 court appearances.[122] A high proportion of these matters (approximately 40%) are further complicated by allegations of child abuse and/or domestic violence by one or both partners.[123] Three quarters of these cases included evidence of a history of family violence between the parties, and nearly 70% included a family violence protection order.[124] The prevalence of family violence and/or child abuse allegations is higher with litigants who were experiencing disadvantage, receiving social security benefits or on a low income.[125]

These research findings were supported by comments made in interviews, with many stakeholders commenting on the difficulties of finding discrete tasks in the area of family law due to their multi-faceted nature. The difficulties of not being able to find discrete tasks within family law matters was noted by both family law practitioners and lawyers from large and mid-sized law firms.

> "*First you think, maybe we have the skills to assist with some property matters, especially if it's about superannuation or about debt, and if there's no conflict with our commercial clients. But then the property matter is linked to the maintenance, and to the residence orders, and to the contact orders if there are children involved. In order to assist clients in a meaningful way we would have to work hand-in-hand with a family lawyer from a CLC or effectively become family lawyers ourselves.* (Pro bono coordinator, mid-sized firm)

> *"Our practice works on over 600 pro bono matters a year. If we started doing nothing but family law, we'd be lucky to reach 10% of that. We would be assisting considerably fewer clients – the matters are just that lengthy and complex."* (Pro bono coordinator, large law firm)

In addition to the multi-faceted nature of family law matters, many of those consulted highlighted the context of family law matters as an issue making it difficult to provide pro

[122] Rosemary Hunter, above n 87.

[123] Ibid, 28.

[124] Ibid, 29.

[125] Ibid, 28 and 80.

bono services in family law. An ongoing relationship between ex-partners and changes in circumstances make it difficult not only to estimate the time required to provide assistance, but also to clearly define the scope of assistance. (See also 7.3 Capacity to undertake pro bono work on page 73)

> *"Family law cases, especially ones that involve children, differ from other areas of the law. In family law there is an underlying relationship and a constantly changing set of circumstances. It's often not just about an event that happened in the past. An affidavit you drafted one week may no longer be accurate or sufficient the next. That's hard for a pro bono lawyer to take on – the uncertainty and constant changes."* (CLC lawyer)

> *"It's the history of the relationship and the constant changes to circumstances by the other partner not adhering to an agreed schedule or interim orders, irregularities in maintenance payments. Throw in a* [Family Violence Order] *because somebody made threats to the other or threatened to harm the kids – it's just constantly changing. It's hard to assist a client in any real and meaningful way unless you are in constant contact with them and stay abreast of the developments in the relationship and the events that take place.* (CLC lawyer)

> *"Practicing family law is just different from other areas of the law even if the tasks the lawyers are doing are the same. A lot of it has to do with the nature of family law and the sometimes constant changes in circumstances. What looked like one thing can be something completely different a month later."* (Family law practitioner)

Research into legal services in family law[126] has found that while family law practitioners provide discrete task assistance in one form or another, they do this in order to reduce costs, or to 'extend' a grant of legal aid to cover some work that has to be done.[127] However, family law practitioners who used discrete task assistance to provide legal services were aware of the fact that this assistance may not always be appropriate, and that it requires the client to have the capability to manage some tasks themselves. Some family law practitioners found discrete task assistance to be dangerous or inappropriate, or wrought with professional risk.[128]

These findings were reflected in the consultations, with both family law practitioners and CLC lawyers who practice in family law commenting on the problematic nature of discrete task assistance.

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[126] Rosemary Hunter, et al., '*Legal Services in Family Law*', Report, Justice Research Centre, Law Foundation of NSW, December 2000, and Rosemary Hunter, '*Family Law Case Profiles*', Report, Justice Research Centre, Law Foundation of New South Wales, June 1999.

[127] Hunter, et al. above n 86, 201.

[128] Hunter, et al. above n 86, 209.

"As a CLC we can't represent clients unless there are exceptionally compelling circumstances to do so. Most of our clients come to our family law clinic for advice on some parts in their matter. Some may have paid for some advice before and others try to navigate the system themselves and come to us for advice and assistance with documents when they need it. As a lawyer I sometimes find it hard to jump in and out of a matter like that. I have no control over what has been done before and no control over what will come after. It's like building a roof on a house without knowing if the house is structurally safe to support it. It's risky." (CLC lawyer)

"I don't know when it became fashionable to talk about discrete tasks or unbundling – I think it's a bad idea and wrought with risk. There are a lot of issues in family law that just can't be separated. Even if you're trying to help out a client to keep their costs down, you may end up doing more work fixing what the client has messed up. It's ok for clients to do some of the legwork [e.g. obtaining market appraisals for property] *to save money, but nothing legal."* (Family law practitioner)

7.5: WILLINGNESS/INTEREST TO UNDERTAKE PRO BONO LEGAL WORK IN FAMILY LAW

The issues that impact pro bono service providers' willingness/interest to undertake pro bono legal work in family law ranged from the nature of family law clients and the emotive subject matter of family law disputes, to a concern that discrete tasks in family law would not be interesting to lawyers.

NATURE OF FAMILY LAW CLIENTS

Due to the voluntary nature of pro bono legal work, the lawyers involved show a genuine interest in assisting individuals experiencing disadvantage. One of the factors that may have an impact on lawyers' interest in doing pro bono work in family law is the nature of the potential clients and the skills needed to deal with a difficult client. The fact that some clients may not appear 'morally deserving' of legal assistance may also have an impact.

Studies show that a link exists between family separation or relationship breakdown and mental illness.[129] People experiencing divorce or relationship breakdown suffer from higher rates of anxiety, depression and substance abuse.[130] Recent research on legal needs and access to justice in Australia showed that a relatively high proportion of people experiencing

[129] See Elly Robinson, 'Mental Health and Changing Families', Paper presented at Australian Institute of Family Studies Conference: Steps Forward for Families: Research, Practice and Policy, Melbourne, 2003; Bryan Rodgers et al., 'Mental Health and the Family Law System' (2004) 10 (1) *Journal of Family Studies* 50 and Karras, M. et al., 'On the edge of justice, The legal needs of people with a mental illness in NSW', Report, Vol. 4, The Law and Justice Foundation of New South Wales, May 2006.

[130] Ibid.

a family law problem sought advice from a health professional (e.g. a doctor or a psychologist), further highlighting the detrimental impact that a relationship breakdown may have on a person's mental and physical health.[131]

An issue repeatedly expressed by stakeholders in interviews as possibly having an impact on lawyers' interest in doing pro bono work in family law was the nature of clients with family law issues. The difficulties of dealing with "emotive, irrational and unstable clients" who needed a wealth of support, especially for lawyers who "aren't exposed to high-needs clients in their normal practice" were highlighted by many.

> *"Dealing with clients with family law issues can sometimes be very difficult. They are almost in a state of trauma resulting from the relationship breakdown and some act completely irrationally, sometimes to the extent that they're unable to give you proper instructions."* (CLC lawyer)
>
> *"I see so many litigants who are, if not mentally ill, then certainly exhibiting symptoms of a mental illness. The trauma caused by relationship breakdown that sometimes involves abuse or betrayal can cause an ordinary, educated, successful person to simply go off the deep end. It's much worse for people who are otherwise experiencing hardship."* (Judicial officer)
>
> *"I think all family law clients are high-needs clients in a way. The legal issues are so personal and so emotive. Some clients call several times a day and I know colleagues who take calls even late into the evening. You are not just their lawyer; you are their counsellor and confidant. Sometimes you are the only person outside their relationship that they disclose things that happened in the relationship to."* (Family law practitioner)
>
> *"Any protracted litigation or legal battle can take a toll on a person's mental faculties, but the road from sane to crazy is in my opinion faster in family law."* (Pro bono coordinator, mid-sized firm)
>
> *"Our lawyers aren't used to dealing with highly emotional, sometimes irrational and traumatised clients. It can be very confronting and is a skill learned over time. You can't just throw lawyers into those situations – they'd need to be supported in that regard as well."* (Pro bono coordinator, mid-sized firm)
>
> *"Simply put, family law clients are demanding. The relationship breakdown is 'the thing' that is happening in their life at the time, and the court process is probably the most significant experience they will ever have with the justice system. They ring a lot. They want to have conversations with you that are much wider that the legal issues involved, and if you cut them off they get upset. The issue that for you is just another family law dispute is the*

[131] Coumarelos et al., above n 43, xix.

most important thing that is happening to the client." (Family law practitioner)

"Experienced family law practitioners have 'unwritten degrees' in counselling and child psychology. They are skills you need every day in this court." (Judicial officer)

EMOTIVE SUBJECT MATTER OF FAMILY LAW DISPUTES

The highly emotive nature of family law and the sometimes irrational thinking by clients is highlighted by the fact that family law practitioners are more likely to find themselves the subject of a complaint made to a relevant legal services body. In all States and Territories, family law has the highest (or second highest) complaint rate among legal practitioners.[132] Some legal services commissions also report that family law is a matter raised in most inquiries to their client services phone line, and also the matter most commonly dealt with in written complaints.[133] Many of these complaints about misconduct are made by opposing clients, for example making allegations that a lawyer has encouraged an ex-partner to make false or defamatory statements in court documents.

The Office of the Legal Services Commissioner NSW (OLSC), the Queensland Legal Services Commission (QLSC) and Victorian Legal Service Commissioner (VLSC) all note,[134] that whilst complaints in family law remain high, it is not due to the fact that lawyers in family law would somehow be "more unethical" than their colleagues working in other areas of the law. The high number of complaints is attributed to the fact that family law is an "emotionally charged jurisdiction", where disputes are fuelled by emotion.

"Family law is emotional, and it can get a bit dirty sometimes. Clients are really keen to make a complaint about you if they don't get exactly the outcome they wanted or if you advise them that the orders they are looking for are unrealistic. I even had a complaint made against me by the opposing side once. He was self-represented and didn't understand that I did not have a duty to act in his best interests. It adds a level of stress to your working life having to respond to complaints made about you – even if you know they are completely unfounded. (Family law practitioner)

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[132] Queensland Legal Services Commission, 'Annual Report 2011-2012', 12. Victoria Legal Services Commission, 'Annual report 2011-2012', 8, South Australian Legal Practitioners Conduct Board, 'Annual Report 2011-2012', 17, Legal Profession Complaints Committee of Western Australia, 'Annual Report 2011-2012', 15, Law Society of the Northern Territory, 'Annual Report 2011-2012', 23, The Law Society of the ACT, 'Annual Report 2011-2012', 14, Legal Profession Board of Tasmania, 'Annual Report 2011-2012', 9, 12 and NSW Office of the Legal Services Commissioner, 'Annual report 2011-2012', 40 and 43.

[133] See, for example the NSW Office of the Legal Services Commissioner Annual report 2011-2012, 40 and 43.

[134] See NSW Office of the Legal Services Commissioner, 'Annual Report 2010-2011', 14, Queensland Legal Services Commission, 'Annual Report 2010-2011' and Victorian Legal Services Commission, 'Annual Report 2012'.

> *"Clients can make a complaint against you just for telling them the truth. Nobody wants to hear that they don't come across as a good parent or that what they want as an outcome may not be realistic because of their particular characteristics or the lifestyle they have. They don't see that it's in their best interests to hear it from me, and that I have an obligation to advise them on their prospects of success. They think a lawyer will just go into court and fight for whatever it is that the client wants. Some clients have a hard time understanding that I can't do that."* (Family law practitioner)

Some of the stakeholders consulted for this research also expressed the view that there are moral judgements associated with assessing requests for assistance in family law matters which may be problematic for pro bono service providers.

> *"I think the first complexity about pro bono in family law is the exercise of moral judgement about who you take on as a client. Family law is a lot about 'he said-she said', and that's not attractive. So how do you decide who is more worthy to take on as a client?"* (Legal academic)

> *"Even if our firm would be able to take on family law matters, one of the problems we'd run into would be who do we choose to assist? Is one party to the dispute more morally deserving than the other? Or, who do you pick from all the deserving clients when you can only assist a few?"* (Pro bono coordinator, large law firm)

One pro bono coordinator questioned whether it was possible to find discrete tasks in family law that would still be interesting enough to motivate pro bono lawyers to do that work.

> *"Family law is such a huge area of law and one we don't have expertise in. In order for our lawyers to be able to assist, any tasks would have to be so unbundled and so 'dumbed-down' that I think I'd have trouble finding lawyers who would be interested in performing those tasks. We employ smart, highly skilled people who like to be challenged and to use their skills and I don't think it's possible to do that in family law".* (Pro bono coordinator, large firm)

CULTURAL GAP BETWEEN FAMILY LAW PRACTITIONERS AND CORPORATE LAWYERS

Some (older) research suggests that family law practice has a low status as perceived by the legal profession in Australia.[135] This has been attributed to the fact that family law has traditionally ranked lower in the areas of legal practice with regard to remuneration,[136] as

[135] For example, see John Wade, 'The Professional Status of Family Law Practice in Australia' (1985) 8 *UNSW Law Journal* 183.

[136] While no recent statistics were available, data published by the NSW Law Society in 2001 and 2002 shows family law to be a dominant area of practice for the two lowest income brackets (<$20,000 and $20,001-$35,000)

well as many of the factors that stakeholders mentioned as barriers for pro bono provision, namely the multi-faceted nature of family law matters, the nature of family law clients and the emotive substance area of the law.[137] While there is no recent research available on the topic, one stakeholder suggested that the low status of the practice area in the eyes of the legal profession more broadly may explain why family law practitioners appear to be a closed group, or come across as 'clubby'.

> *"There can be this sense among other lawyers that family law is not 'real law' or that lawyers who choose to practice in family law are somehow less skilled or smart than lawyers who go into other areas of law. As a result of being looked down upon I think family lawyers close ranks. It's an 'us against them' mentality."* (Family law academic)

One stakeholder also commented that the cultural gap between corporate law and family law and the fact that practitioners rarely mix because of their specialised areas of practice contributes to misconceptions that may affect the interest of lawyers to undertake pro bono work in family law.

> *"I think a lot of corporate lawyers have this idea that family law lawyers are poor lawyers or that they act unprofessionally. I don't know if it stems from the fact that so many complaints are made about family lawyers or if it's just because the whole practice area is so different. But that misconception is a barrier to venturing into family law – our lawyers think they don't want to be up against somebody who is unethical or just a poorly skilled lawyer."* (Pro bono coordinator, mid-sized firm)

Many stakeholders commented on family law practitioners being a 'club' and the lack of collegiality that family law practitioners extend to those colleagues who aren't exclusively family lawyers or who do not practice family law on a daily basis.

> *"The practitioners that attend this court often certainly have their own little 'club', and I'd imagine it would be quite hard for someone from outside to break in to. Corporate lawyers may be used to a level of collegiality, even when acting on opposite sides of the fence."* (Judicial officer)

> *"Only a part of my practice is in family law. We no longer litigate in family law because of some really negative experiences some of our lawyers had in the Federal Magistrate's Court and the Family Court. It's one thing being a lawyer in the adversarial system and another to feel like the lawyer on the*

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reported by solicitors in the annual practicing certificate survey. By contrast, the proportion of solicitors nominating commercial law as their dominant area of practice peaked in the highest income bracket (>$150,000). Law Society of NSW, *2001 Profile of Solicitors in New South Wales* and *2002 Profile of Solicitors in New South Wales*, both available at: http://www.lawsociety.com.au/resources/surveysandstatistics/index.htm.

[137] Wade, above n 135, 184-190.

other side will stab you in the back. The family court system is not a very supportive environment for lawyers." (Family law practitioner)

"When I first joined the firm we actually had a small family law practice and we acted in family law matters for our existing commercial clients. I have a very distinct memory of representing a client in the Family Court and having the rug pulled out from underneath me by the family law practitioner acting for the other side. That experience taught me two things – the depth of expertise you need in family law comes only from practising it daily, and that the culture of collegiality in that area of law is just different to what I was used to." (Pro bono coordinator, mid-sized firm)

"There's a community of practice in family law, and I think it's different from other areas of law. It's an odd mixture as the family law reforms have introduced a culture suited to alternative dispute resolution. But there's a nastiness in the world of family law practice – an underlying adversarial nature that flies in the face of what the Family Law Act is supposed to be about." (Family law practitioner)

7.6: CASE STUDIES

The following two case studies of pro bono projects in family law highlight the factors discussed in this Chapter relating to the factors influencing the decision whether to provide pro bono legal assistance in family law. The case studies illustrate the difficulties faced by both family law practitioners and lawyers working in corporate law firms with regard to the provision of pro bono legal services.

CASE STUDY 1 - PRO BONO PROJECT FOR FAMILY LAW LAWYERS

In 2011, the ACT Legal Assistance Forum (ACTLAF) Family Law Working Group developed a proposal for a pro bono project for family law practitioners in the ACT. [138] The project was developed as a response to a trend observed by ACTLAF members, which showed a growing number of simple, small property pool cases – debts and superannuation only, or a house and superannuation to divide – where there was not enough equity to warrant the cost of a private solicitor, but neither party qualified for Legal Aid. The consequences for individuals of not being able to access legal advice and/or services meant that a party to the dispute may simply forgo their entitlement or that debt issues were left unresolved.

The Working Group considered mediation to be a very useful tool in these cases. The mediation process would be most effective when the parties receive independent legal advice on prospects prior to the mediation and legal assistance to draft Consent Orders upon reaching a mediated agreement. If superannuation was agreed to be split, for example, a Court Order would be required for the Trustee to action any agreement about splitting superannuation entitlements.

The project proposal

The Working Group proposed that the Pro Bono Clearing House (operated by the ACT Law Society) develop a referral list of family practitioners who were willing to provide initial advice to a party in such small property pool matters (limited to two hours) and were then willing to provide that same client with a further two hours of time to draft or finalise Consent Orders upon the parties reaching a mediated agreement.

The Working Group also proposed giving referral clients a checklist of information/documents to take to the initial appointment so as to maximise efficacy of the pro bono solicitor's time, and developed draft intake documents to be used in referrals. It was thought that private solicitors would be more likely to join the referral list if it was clear that they will be asked to undertake a discrete piece of work in support of mediated agreements, rather than committing to ongoing casework.

[138] Members of ACTLAF are all five CLCs in ACT, the Aboriginal Legal Service, ACT Legal Aid and the ACT Law Society.

The Working Group also proposed to work together with the Pro Bono Clearing House to develop simpler referral pathways from ACTLAF member organisations to agreed family law practitioners through the Pro Bono Committee of the Clearing House.

Project outcome

The project failed to attract interest among family law practitioners in the ACT. Lawyers who were approached with the proposal expressed concern about the 'discrete' nature of the task and questioned whether four hours of assistance would be enough to provide adequate assistance to clients in these matters. Lawyers also expressed concern about issues of professional liability and continued obligations if a matter couldn't be resolved through mediation. Many family law practitioners also said that they already do a considerable amount of pro bono work as a part of their daily practice and as a result do not have capacity to take on many 'new' pro bono matters.[139]

ANALYSIS OF CASE STUDY 1

The ACTLAF Case study demonstrates the significance of the factors influencing the decision whether to provide pro bono legal services in family law, and reflects the findings in this Report. Because the project was directed at family law practitioners, one of the biggest factors influencing the decision whether to provide pro bono services – expertise in the relevant area of law – was not an issue. However, factors relating to capacity, willingness/interest and the availability of discrete tasks still affected the project's outcome.

The facts of the case study reflect the comments made by stakeholders in interviews, and confirm that the difficulties of finding discrete tasks in family law is not only limited to cases where the lawyers in question lack expertise in family law. Rather, it is an issue to do with the nature of family law matters and the extent of the FLA.

CASE STUDY 2 - FAMILY LAW PRO BONO PROJECT FOR CORPORATE LAWYERS

The Family Law Affidavit Pilot Project was conducted in 2006 as a partnership between the Law Society of NSW, Women's Legal Services NSW, the Law and Justice Foundation of NSW and several law firms in NSW, the vast majority of which were large and mid-sized law firms located in the Sydney CBD. The aim of the project was to address a perceived need for affidavit drafting for family law matters for Aboriginal women in the Walgett

[139] Information regarding the outcome of the project proposal received from Rhonda Payget, Principal Solicitor, Women's Legal Service ACT and member of the ACTLAF Family Law Working Group.

region in NSW, by providing training to solicitors working in corporate law firms in Sydney in family law and making use of their general legal skills in drafting.[140]

Project overview

The project aimed to improve access to justice for Aboriginal women in rural and regional areas of NSW by providing remote access (by telephone) to lawyers in Sydney. The gap in corporate lawyers' expertise in family law matters was addressed by providing training for the lawyers involved in family law issues and on cultural awareness in dealing with Aboriginal women. A follow-up training session was organised after changes to the FLA that took effect on 1 July 2006.[141]

Referrals to participating solicitors were made through client inquiries to Women's Legal Services NSW and other CLCs operating in the region. These matters were further referred on to a Project Coordinator at the Law Society of NSW, who would place a matter with a private solicitor. Referrals were made only for Aboriginal women who had a family law children's matter, and only if the client was not eligible for Legal Aid and no other appropriate service was available.[142]

Project outcome

In all, 19 inquiries were made regarding the availability of the service during the 12 months of the project, and only eight of these matters resulted in a referral being made to a private solicitor. Although the number of matters referred through the project did not meet the expected demand, the project provided some important information on pro bono legal service provision in family law.[143]

Importantly, the project highlighted the complexity of family law matters and the difficulties of 'unbundling' family law matters. Those clients that were referred through the project were found to have much more complex family law legal needs than those within the scope of the project and the training that had been provided to participating lawyers. As a result, referring solicitors in CLCs lacked confidence in the pro bono lawyers' capabilities of drafting an affidavit in a complex family law matter, as it was not possible to separate one component of a family law matter from all other components.[144]

Another important factor influencing the outcome of the project was related to the way

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[140] The Law and Justice Foundation has conducted an evaluation of the Family Law Affidavit Writing Pilot Project. The report is available at http://www.lawfoundation.net.au/ljf/app/96A5E275C9519729CA257544000FFA9C.html.

[141] Law and Justice Foundation, 'Family Law Affidavit Pilot Project Evaluation Report', 20 January 2009, 4.3.

[142] Ibid, 4.4.

[143] Ibid, 7.4.

[144] Ibid, 7.5.

of providing services and its appropriateness to the client group. The intended way of communicating with clients (by telephone) did not assist in developing a relationship of trust with the Aboriginal community. A solicitor from Women's Legal Services working with the community suggested that the clients would feel apprehensive about disclosing sensitive family issues to a lawyer they had never even met.[145] Adding further complexity to the situation was the fact that it was not intended that the lawyer in question would continue to act for the client beyond the drafting of the affidavit. This meant that there was no opportunity to establish a relationship of trust.

The project also highlighted the need to consider the type of pro bono legal assistance provided and its appropriateness meeting the needs of the client group. The evaluation of the pilot project found that simply drafting an affidavit may not have been an appropriate way of providing assistance to clients, as many were found to require a broader range of support and to be unable to represent themselves even with the assistance of an affidavit.[146]

The pro bono perspective

One of the stakeholders interviewed for this research project had been involved in the Family Law Affidavit Pilot Project, and provided the following comments:

> "*From our perspective it was a great pro bono project – meeting unmet need for Aboriginal clients in remote areas. Training and supervision was provided by Women's Legal Service and our lawyers were acting as volunteers of Women's Legal Service so we didn't have issues with PI Insurance. Also, the work was something that our lawyers could do from their desk, which eliminated time for travel and more complex arrangements. It was a shame only few referrals came through, it was a waste of the training and many lawyers who went along didn't get to use the skills they had learned.*" (Pro bono coordinator, mid-sized firm)

ANALYSIS OF CASE STUDY 2

The Family Law Affidavit Pilot Project again demonstrates the significance of the factors influencing the decision whether to provide pro bono services in family law, and reflects the findings in this Report. It is interesting to note that the project attracted interest among large and mid-sized corporate law firms with no expertise in family law. This can perhaps be attributed to the fact that from the outset the project appeared to address many of the factors influencing the decision whether to provide assistance in family law:

[145] Ibid, 7.6.

[146] Law and Justice Foundation, 'Family Law Affidavit Pilot Project Evaluation Report', 20 January 2009, 6.2.

- Although the project was in family law (and therefore arguably outside the scope of most firm's pro bono policies), law firms expressed willingness to participate due to a deserving, disadvantaged client group and a demonstrated unmet legal need. Importantly, pro bono solicitors would only assist if no other, more appropriate service was available.
- The lack of expertise in family law was addressed by providing training for the lawyers involved, and having an experienced family law practitioner at Women's Legal Service to supervise the work.
- The issue of a lack of appropriate professional indemnity insurance (relating to the lack of expertise in family law) was addressed by having the lawyers involved work as volunteers of Women's Legal Service.
- The legal tasks involved were designed to be sufficiently discrete in scope, and would involve taking instructions from clients over the phone and the drafting of an affidavit.
- Lawyers could undertake the pro bono work from their desks by using their drafting skills, thus eliminating the need for more time-consuming arrangements, such as travel to remote locations.

However, the project was ultimately unsuccessful, due in part to the complexity and multi-faceted nature of the legal matters and clients, and the resulting impossibility of finding a genuinely discrete task or providing a sufficient amount of training to overcome the lack in expertise. The lack of expertise in this case study was broader than the lack of expertise in the substance of family law. The broader issues of community and Aboriginal culture, how to build trust and respect with clients as well as understanding their legal needs were also relevant. This project also highlighted the fact that discrete task assistance may not always be an appropriate way of providing assistance to clients who are experiencing disadvantage, as it may not sufficiently address the clients' legal needs.

PART D - FAMILY VIOLENCE

Part D reports on the findings of this research with regard to family violence, bringing together the information gathered in interviews with stakeholders. It draws on external research on relevant topics and information from other sources, providing a broader context for the findings. This Part applies the **Analysis Framework** (see Part B on page 64) to the findings relating to family violence, providing an explanation for why it is easier to obtain pro bono legal assistance in the area of family violence.

Family violence is a crime, and the legal responses to family violence are dealt with under the relevant criminal legislation in the States and Territories. Usually the first, and most obvious legal response (from the victim's perspective) to family violence is the seeking of a Family Violence Order.[147] However, legal need relating to family violence can manifest in different ways, and can be inextricably entangled with legal issues in several different areas of the law, for example criminal law, housing and tenancy law, consumer credit law, social security law and most obviously, family law. (For more information see 2.3 Legal issues in family violence on page 32)

Pro bono legal work in the area of family violence is more prevalent than pro bono legal work in family law. According to the Centre's National Law Firm Pro Bono Survey in 2012,[148] 17% of law firms reported undertaking pro bono legal work in the area of domestic violence,[149] and a further 39% reported undertaking pro bono work in the area of Victims Compensation.[150] Although the scope of Victims Compensation Schemes extend to all victims of crime (not just to victims of family violence), much of the work done on a pro bono basis is undertaken for victims of family violence.

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[147] A Family Violence Order (including an interim order) is made under the laws of States and Territories. It is an order by the court made for the protection of a victim of family violence. The order generally requires the perpetrator of violence to be of good behaviour towards the victim and to refrain from committing any further acts of family violence against the victim. The order may also prohibit, restrict or restrain the perpetrator's behaviour, for example by prohibiting the perpetrator from approaching the victim's home or place of employment. Family Violence Orders have different names in different states: *Protection Orders* (QLD & ACT), *Apprehended Domestic Violence Orders* (NSW), *Family Violence Intervention Orders* (Vic), *Restraining Orders* (NT, SA & WA) and *Family Violence Orders* (Tas).

[148] See, National Pro Bono Resource Centre, 'National Law Firm Pro Bono Survey - Australian firms with fifty or more lawyers - Final Report', January 2013.

[149] Domestic violence was the term used in the survey questionnaire, as opposed to 'family violence'. For the definition of these terms, see Abbreviations and glossary on page 7.

[150] The term Victims Compensation here refers to the statutory compensation schemes established by legislation in all States and Territories: *Victims of Crime Financial Assistance Act 1983* (ACT), *Victims Support and Rehabilitation Act 1996* (NSW), *Victims of Crime Assistance Act 2006* (NT), *Victims of Crime Assistance Act 2009* (Qld), *Victims of Crime Act 2001* (SA), *Victims of Crime Assistance Act 1976* (TAS), *Victims of Crime Assistance Act 1996* (Vic) and *Criminal Injuries Compensation Act 2003* (WA). In the context of this report, the term Victims Compensation does **not** refer to the other ways in which Victims of family violence may also be financially compensated, namely through an award of compensation in the civil courts, typically through a claim that a tort has been committed; and/or through an order that an offender pay restitution or reparation to the victim, as part of the offender's sentence.

The factors influencing the decision whether to provide pro bono legal services, explained in Part B - Analysis Framework on page 64, apply to the provision of pro bono legal services generally (irrespective of the area of law in which the services are provided), and are therefore equally relevant in the context of family violence. Thus when considering whether to respond to legal need in family violence by undertaking pro bono legal work, regard is had to: 1) the compatibility of legal need in the area of family violence with the **scope of a firm's pro bono policy**, 2) **expertise** in the relevant area of law, 3) the **capacity** to provide legal assistance, 4) the availability of **discrete tasks**, and 4) the **willingness and interest** of lawyers to undertake pro bono legal work.

In the following Chapter, the analysis of these factors focuses on two specific areas of legal need relating to family violence: legal issues relating to the application of Family Violence Orders and legal assistance with Victims Compensation claims. Although legal need relating to family violence is broader, the Centre has chosen to focus on these two areas of legal need because they are the two areas relating to family violence where large and mid-sized law firms have reported undertaking pro bono work.

8 ANALYSIS OF FACTORS INFLUENCING THE DECISION WHETHER TO PROVIDE PRO BONO LEGAL SERVICES IN THE AREA OF FAMILY VIOLENCE

This Chapter analyses the findings from interviews with stakeholders and relevant literature relating to pro bono service provision in the area of family violence. The analysis is conducted by applying the views expressed by stakeholders to the **Analysis Framework** of factors influencing the decision to provide pro bono legal assistance in the area of family violence (see Part B on page 64), and by providing examples of successful pro bono projects in the area of family violence.

8.1: THE COMPATIBILITY OF LEGAL NEED IN FAMILY VIOLENCE WITH THE SCOPE OF A FIRM'S PRO BONO POLICY

FAMILY VIOLENCE AND GOVERNMENT RESPONSIBILITY

Publicly funded legal services, and particularly legal aid, are available in the area of family violence. Both Legal Aid Commissions and CLCs provide services to victims (and to a certain extent to perpetrators) of family violence with regard to Family Violence Orders. Specialist family violence services often provide a broad level of support to victims of family violence, and many of these services provide referrals and information about other forms of professional support available to victims. In some jurisdictions it may also be possible to obtain legal assistance for the application of Victims Compensation through a Legal Aid Commission.

As discussed in 5. Responding to legal need in family law - Pro bono legal services (page 55), there is a general consensus within the pro bono community in Australia that pro bono legal work cannot, and should not, be a substitute for adequately funded public legal services. Therefore pro bono legal assistance to individuals is generally available only in areas of law where no legal aid funding is available (or in some cases to individuals experiencing disadvantage who do not qualify for legal aid).

Despite continuing concern that the provision of pro bono legal services in core areas of legal aid funding will allow governments to renege on their commitment to funding free legal services, and the availability legal aid in family violence, most of the stakeholders consulted for this research did not feel that providing pro bono legal assistance in this area would be inappropriate. This is in stark contrast to the views expressed by stakeholders with regard to family law, which many believed to be the responsibility of government, thus making the provision of pro bono legal services inappropriate. Some pro bono providers even partner with specialist programs set up by a Legal Aid Commission when delivering pro bono legal services to victims of family violence.[151]

[151] For example, some law firms provide lawyers to represent clients through the Women's Domestic Violence Court Assistance Service run by Legal Aid NSW.

Reasons provided for why pro bono legal services were provided in the area of family violence varied greatly. Comments focused on assessing the needs of the client group, the focus of a pro bono program and the impact of the assistance provided. These comments also highlight the flexibility of pro bono legal assistance, and that pro bono projects and legal matters are assessed as a whole prior to undertaking pro bono work.

> *"For us it's not about drawing the line at government responsibility as it is about assisting our clients in a holistic manner. Many of our* [Family Violence Order] *cases come through the Homeless Person's Legal Service. For those clients family violence may have been a major contributor to their homelessness. We wouldn't be doing our job if we chose not to assist clients to address the issues that contributed to their homelessness."* (Pro bono coordinator, mid-sized firm)

> *"It's about the focus of our program. One of our focus areas is Aboriginal people and family violence issues are prevalent in those communities. We choose to assist because we believe that providing assistance to a vulnerable client group when they need it will make an impact on a systemic level."* (Pro bono coordinator, large firm)

> *"One of the considerations in providing assistance with regard to Family Violence Orders was the client group – we think it is important to provide assistance for women escaping family violence, especially at a time of high conflict and vulnerability."* (Pro bono coordinator, large firm)

Some stakeholders still considered the availability of publicly funded services in the area of family violence as a reason not to provide pro bono legal assistance.

> *"Our practice only works on some Personal Violence Orders as opposed to Family Violence Orders. We chose to exclude Family Violence Orders from our program because the applicants almost always have access to a lawyer from legal aid. That's not the case with* [Personal Violence Orders]*"* (Pro bono coordinator, large law firm)

8.2: EXPERTISE IN RELEVANT AREAS OF THE LAW

Whilst expertise in relevant areas of the law is an important issue influencing decisions whether to provide pro bono legal services,[152] pro bono practices do provide pro bono legal

[152] As discussed in connection with pro bono service provision in family law (see Responding to legal need in family law - Pro bono legal services on page 55), the increased specialisation of the Australian legal profession is reflected in the types of pro bono legal work undertaken by large and mid-sized corporate law firms. The National Pro Bono Resource Centre's 'National Law Firm Pro Bono Survey - Australia firms with fifty or more lawyers - Final Report', January 2013, 19, 29 found that the majority of pro bono clients are organisations, and the areas of law in which most pro bono services are provided are consistent with the client base (governance, deductible gift recipient (DGR) applications, employment law, commercial agreements and incorporations). This fits within the existing expertise and skills base of corporate law firms.

services outside the firms' core areas of expertise. This has been the case with regard to Family Violence Orders and in Victims Compensation matters. A lack of expertise in these areas has been addressed by providing lawyers with training in relevant areas of the law, carefully defining the scope of assistance provided and, where necessary, partnering with other legal service providers with expertise in the relevant area of law to assist in the supervision of matters. (See also 8.4 Availability of discrete tasks below on page 98)

EXPERTISE AND FAMILY VIOLENCE ORDERS

Many of the stakeholders consulted for this research commented on the fact that it was possible to overcome a lack of expertise with regard to assisting clients with Family Violence Orders. The views expressed highlighted that training was possible in area of law that were 'discrete' or 'contained', and that didn't have a 'body of complicated case law' attached to it.

> *"It's a discrete body of law. The Act is fairly short and straightforward, as is the court procedure. Our lawyers attended half a day of training and received a pack of materials they can refer to if they need to refresh their memory. Although the issues themselves may be contested, it's a question of fact, not a complicated question of law."* (Pro bono coordinator, large firm)

> *"Almost everything you need to know about the area of law is contained in the Act. It doesn't have a complicated body of case law or anything. Our lawyers can easily learn what they need to know with some training."* (Pro bono coordinator, mid-sized firm)

> *"We sometimes use pro bono lawyers for our court support program even on short notice. Most of them have come to our training sessions but even the ones that haven't can be briefed in what they need to know in a fairly short amount of time. It's not a complex piece of legislation, and its primary objective is to protect people from violence. That's why the procedure is simple too."* (CLC lawyer)

EXPERTISE AND VICTIMS COMPENSATION MATTERS

Comments made by stakeholders with regard to expertise in Victims Compensation matters echoed the comments made by stakeholders with regard to Family Violence Orders. Many felt that any lack of expertise could be overcome by training due to the size of the legislation and the lack of complex legal issues associated with most Victims Compensation applications.

> *"It's easy to train our lawyers to handle Victims Compensation applications. It's not a huge piece of legislation, and the procedure is basically administrative. Our firm already has expertise in administrative law. The matters are just a good fit* [for our pro bono program]*".* (Pro bono coordinator, large firm)

> *"Although the circumstances of the clients may be complicated, the legal issues relating to victims' comp applications are usually quite*

straightforward. The training we provide our lawyer is enough for them to be able to competently handle the files." (Pro bono coordinator, large firm)

8.3: CAPACITY TO UNDERTAKE PRO BONO LEGAL WORK

As discussed in connection with pro bono service provision in family law (see 5. Responding to legal need in family law - Pro bono legal services on page 55), the factors influencing a law firm's capacity to undertake pro bono work are varied. However many of the stakeholders consulted for this research explained that providing pro bono legal assistance in Family Violence Orders and Victims Compensation was possible because it was easy to estimate the time and resources required to assist in each matter.

> *"With Family Violence Orders, it's easy to estimate the time commitment required for each matter. Any court assistance we provide is done on a clinic basis on a set day of the week, making it easier to budget for the time. I know how many lawyers are going to be there and for how long."* (Pro bono coordinator, large firm)

> *"Because of the administrative nature of the* [Victims Compensation application] *process, it fits really well within our capacity. It's rare for the files to be urgent, so our lawyers can choose to work on them when they have the time."* (Pro bono coordinator, large firm)

One CLC lawyer explained that obtaining pro bono legal assistance in the area of family violence was easier because requests for assistance were easy to "package" into a manageable amount of work.

> *"It's always easier to refer a family violence file to a pro bono solicitor, especially in matters that are not urgent. The request for assistance can quite easily be packaged to contain just some client contact and the drafting of a few documents. It's easy for them* [pro bono solicitors] *to say 'yes' to a manageable amount of work when they know how much time it will take.* (CLC lawyer)

However, another CLC lawyer explained that the urgent nature of some matters relating to family violence, especially the application of interim Family Violence Orders, might impact the capacity of pro bono lawyers to provide assistance.

> *"Interim Family Violence Orders are sought at a time of high conflict between the parties and when one party is in need of protection, and the time frame between an instance of violence prompting the application and the hearing for an interim order is short. I can't call someone up and say "a client needs you in court tomorrow morning". None of our volunteers could respond on such a short notice – they just can't ditch their day job. The only way pro bono assistance can work in that context is in a clinic – pro bono lawyers have to be able to schedule their attendance beforehand.* (CLC lawyer)

8.4: AVAILABILITY OF DISCRETE TASKS

A task that is well suited to pro bono work is generally one which is within a lawyer's area of expertise, and is defined in scope making it easy for pro bono service providers to assess the resources that are required to provide assistance. In some cases the lack of expertise in a specific area of the law can be overcome by providing assistance in a clearly defined, 'discrete' task. This can narrow the scope of training required, and also provides lawyers with clearly defined responsibilities.

Discrete task assistance can be for example preparing a document, or providing advice to a client in accordance with their instructions, without agreeing to do more. Many of the stakeholders consulted for this research commented on the availability of discrete tasks well suited to pro bono work in the area of family violence. The reasons cited for this ranged from the 'contained' context and the nature of legal matters relating to family violence to the size of the legislation relevant to the seeking of Family Violence Orders and Victims Compensation. However, many stakeholders also commented on the difficulties caused by the overlap of family law and family violence matters, and the challenges of isolating legal tasks in family violence from family law issues.

NATURE OF LEGAL MATTERS RELATING TO FAMILY VIOLENCE AND THE SIZE OF THE ACTS RELATING TO FAMILY VIOLENCE ORDERS AND VICTIMS COMPENSATION

Many stakeholders consulted for this research commented on the nature of legal matters relating to family violence as an issue making it possible/easier to provide pro bono legal services in the area. One pro bono coordinator explained that one of the reasons why providing pro bono legal assistance in the area of Victims Compensation was possible was because of a contained set of circumstances and the unchanging facts of the case.

> *"The files are about an instance or instances of violence that happened in the past. The facts of the case remain unchanged, and it's more manageable that way. Especially in contrast to family law, where the ongoing relationship with ex-partners makes for a changing set of circumstances."* (Pro bono coordinator, large law firm)

Legal matters relating to Family Violence Orders and Victims Compensation are under the legislative competence of the States and Territories. There are therefore 16 separate pieces of legislation governing the circumstances under which Family Violence Orders can be made and what the orders can contain, as well as the eligibility, conditions and process for applying for Victims Compensation and the amount of any compensation awarded.[153]

[153] See *Family Violence Protection Act 2008* (Vic), *Domestic and Family Violence Protection Act 1989* (Qld), *Acts Amendment (Family and Domestic Violence Act) 2004* (WA), *The Crimes Amendment (Apprehended Violence) Act 2006* (NSW), *Domestic Violence Act 1994* (SA), *Family Violence Act 2004* (TAS), *Domestic Violence and Protection Orders Act 2008* (ACT) and *Domestic ad Family Violence Act* 2007 (NT). See also: *Victims of Crime Financial Assistance Act 1983* (ACT), *Victims Rights and Support Act 2013* (NSW), *Victims of Crime Assistance Act 2006* (NT), *Victims of Crime Assistance Act 2009* (Qld), *Victims of Crime Act 2001* (SA), *Victims of Crime Assistance Act 1976* (TAS), *Victims of Crime Assistance Act 1996* (Vic) and *Criminal Injuries Compensation Act 2003* (WA).

Inevitably, there are differences between jurisdictions. However, the objectives of the different acts are the same: in the case of Family Violence Orders to protect victims of family violence and to restrict the behaviour of perpetrators of family violence, and in the case of Victims Compensation to provide counselling, support, financial assistance and recognition of the trauma suffered as a result of a crime. All of the acts are also limited in their size and scope.[154]

Many of the stakeholders consulted for this research commented on the size of the acts as an issue making it possible/easier to provide pro bono legal services in the area of family violence.

> *"The Act is contained in size and easy to get across. There's no complicated case law. It is impossible to have complicated, multi-faceted legal issues in matters under the Act, and the legal assistance required by clients in these cases is straightforward drafting. Some of our clients may have complicated circumstances, but that's a different issue.* (Pro bono coordinator, large law firm)

Another pro bono coordinator explained that the uncomplicated nature of legal issues in matters relating to family violence influenced the decision whether to provide pro bono legal assistance.

> *"The legal matters that relate family violence are usually about the one thing only - getting a Family Violence Order - or about victims' comp. There may be more than one instance of violence, but usually just the one legal issue."* (Pro bono coordinator, mid-sized firm)

WHERE LEGAL ISSUES RELATING TO FAMILY VIOLENCE ORDERS OVERLAP WITH FAMILY LAW

Legal issues relating to family law and family violence do not appear in isolation and family law issues can often overlap family violence issues[155], as discussed in 2.4 Where family law and family violence intersect on page 34. In matters of family separation with underlying issues of family violence, there is no single judicial forum that is able to provide a comprehensive response to people experiencing legal issues. Proceedings may be underfoot in two different jurisdictions. Although the FLA contains provisions to address the difficulties arising from this overlap of two jurisdictions, there is still scope for inconsistent orders to be made.[156]

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[154] For example, the *Victims Rights and Support Act 2013* (NSW) is divided into 9 parts 119 sections, and the *Domestic Violence and Protection Orders Act 2008* (ACT) is divided into 14 parts containing 118 sections. In addition both Acts have two schedules.

[155] The risk of family violence increases significantly at time of separation, even in relationships where there has been no prior instances of family violence.

[156] The National Council to Reduce Violence against Women and Their Children, 'Domestic Violence Laws in Australia', Report, June 2009, 221.

In some cases, seeking a Family Violence Order may be the first judicial response to family violence, prior to instigating family law proceedings in the federal family courts. If the victim of family violence has sought the protection of a Family Violence Order prior to separation or instigating family law proceedings, the State or Territory Court deciding on the terms of the Family Violence Order can make parenting orders under the FLA. One judicial officer explained typical situations of overlap between the two jurisdictions and how the matters proceed in practice.

> *"One … needs to take into consideration the circumstances surrounding the making of these protective orders. The workload in State … Courts is substantial and ensuring that all parties are safe must be a priority. Interim protection orders are often made in difficult circumstances – at times of high conflict between parties and often final orders are made by consent. I have not sourced the data, but I would expect that the number of contested hearings is very small compared to the number of orders made. There are of course cases where the parties choose to litigate all matters - at least initially, in the State Court so that there are* [Family Violence Order] *proceedings and family law proceedings on foot. In my experience there are often interim parenting orders made, together with an order transferring the proceeding to the Federal Circuit Court. In the majority of cases, one of the parties will initiate parenting proceedings in FCC, or in those cases where there the issues are more complex, in the Family Court.* (Judicial officer)

The overlap of legal issues relating to family violence and family law may make it difficult to isolate the legal issues from one another. As a result it may be difficult to provide legal assistance on just one aspect of the law. Due to a lack of expertise in family law, the issue of overlap was repeatedly mentioned by stakeholders in interviews as influential in decisions whether to provide pro bono assistance in the area of family violence.

> *"Sometimes the family violence issues are just so connected to the family law issues. It's fine for a pro bono lawyer to assist a client with regard to seeking a* [Family Violence Order]*, but the violence obviously has relevance in any family law proceedings as well, especially if the court making the* [Family Violence Order] *also makes parenting orders. That's why the pro bono assistance has to be defined to assistance with the family violence matter. They can't advise clients on their options with regard to family law."* (CLC lawyer)

> *"We used to send our lawyers to a women's shelter to provide legal advice to women who had escaped abusive relationships. The idea was that we would advise them on how to seek protective orders and on other legal issues. But for so many of the clients their family violence issue was so connected with family law issues that our lawyers were unable to provide proper advice. All the questions they* [the lawyers] *would get would somehow relate to family law and they just didn't have the knowledge. As a result we actually had to stop sending our lawyers down there and now only provide pro bono*

assistance to the shelter itself, not to its clients." (Pro bono coordinator, large firm)

"We can only provide assistance to clients with regard to the Family Violence Orders. If issues of family law come up, we refer them to duty solicitors, legal aid or a CLC. It is a limited scope of assistance, but I believe the clients will benefit from having the family violence issues handled well when the violence becomes relevant in their family law proceedings." (Pro bono coordinator, mid-sized firm)

In addition to pro bono providers, the issue of overlap of family violence and family law issues proved difficult to the police. This was especially so in cases where police prosecutors are seeking a Family Violence Order and the court hearing the application makes a parenting order in conjunction with the Family Violence Order.

"It's an issue our prosecutors deal with all the time. The magistrate just announces that they will make parenting orders at the same time and sends the parties outside to work out what arrangements they want or to negotiate a solution. The victims of violence are often feeling distressed, and our prosecutors have no knowledge of family law, so they can't advise the victims as to their rights or what would be realistic to request or to expect. It's difficult for everyone involved." (Police employee)

8.5: WILLINGNESS/INTEREST TO UNDERTAKE PRO BONO LEGAL WORK IN THE AREA OF FAMILY VIOLENCE

The issues that affect pro bono service providers' willingness/interest to undertake pro bono work are varied. Some client groups may appear more deserving, appealing or vulnerable than others. The nature of the legal work involved and the types of tasks lawyers would perform may also be relevant when deciding whether to undertake pro bono legal work. Some types of tasks may be more interesting or challenging to lawyers than others, or may be of benefit to the lawyer by developing new skills or enhancing existing ones.

Based on comments made by stakeholders in interviews, the issues that affect pro bono service providers' willingness/interest to undertake pro bono legal work in the area of family violence ranged from the vulnerability of the client group to the confronting subject matter of the legal issues.

"We believe that by assisting clients at a time in their lives when they are particularly vulnerable and in need of protection is important. Some of the women we assist have suffered years of abuse, often at the hands of multiple partners. They are trying to change their lives and we can support them in doing that." (Pro bono coordinator, mid-sized firm)

One CLC lawyer explained that obtaining pro bono legal assistance in the area of family violence was easier because victims of family violence were viewed as a deserving client group.

> *"Women escaping abusive relationships just come across as a more deserving client group than some of our other clients who may have partially contributed to their own difficult circumstances. No-one likes to say "no" to someone who has undergone horrific violence and abuse and has gotten up the courage to leave that situation and try and make life better for themselves and their children."* (CLC lawyer)

Another CLC lawyer explained that the interest to do pro bono work in the area of family violence was usually limited to clients who were victims of family violence, as they were perceived as more 'deserving of legal assistance'.

> *"I usually have no trouble finding* [pro bono] *lawyers to work with victims of family violence, as they are seen as more deserving of legal assistance. My guess is that for perpetrators of violence, I wouldn't get the same response."* (CLC lawyer)

However, one pro bono coordinator explained that not all lawyers were interested in working on family violence matters because of the confronting subject matter in some cases.

> *"Not all of our lawyers want to deal with that side of things, and find the work really confronting. Some of our clients have absolutely horrific accounts of violence and victimisation. It can be difficult for some lawyers to describe the details of the violence and the impact it has had on the client. Some of the stories are just heartbreaking."* (Pro bono coordinator, large firm)

PART E - CONCLUSION

The family law system provides a framework for settling disputes between individuals arising out of the breakdown of a relationship or concerning a child or children of a relationship. The outcome of family law disputes can have significant impacts on individuals' lives and as a result on society more broadly.

Family law is a highly specialised practice area, with many family law practitioners providing legal services almost exclusively in family law. In addition to requiring knowledge of a complex piece of legislation with considerable case law, the legal matters are often multi-faceted and inter-related, and parties' circumstances can be in a constant state of flux. Due to the emotive subject matter of family law disputes, clients can be "demanding", "intense" and sometimes even "traumatised", requiring a high level of support from their lawyer.

Expertise in family law is concentrated in small law firms, with statistics from NSW indicating that the majority of law firms providing legal services in family law were firms with ten partners or less.

Publicly funded legal services are unable to meet the legal needs of people who are experiencing family law problems, but who cannot afford to pay for the services of a lawyer. Due to limited funding, the means test for legal aid in many jurisdictions is at a level where only those who can be considered to be very poor qualify for legal assistance, and funding priorities mean that legal aid is available for only certain types of family law problems.

As a result, both community legal centres (CLCs) and pro bono referral schemes and service providers receive numerous requests from individuals seeking legal assistance in family law. The services CLCs provide are limited to giving legal advice, providing assistance with the drafting of documents, negotiating on the client's behalf or generally guiding clients through the various dispute resolution processes but rarely appearing on their behalf in the federal family courts.

The family law system encourages (and in some cases requires) the use of alternative dispute resolution and a vast majority of family law disputes are settled this way. Litigation in family law is used as a last resort when no other means of resolving a dispute is available or appropriate. This means that many people who are unable to settle their matter through the use of alternative dispute resolution, are left to represent themselves through the court proceedings. In many cases, they are individuals with complex legal problems or complex circumstances. The research indicates that they are unlikely to achieve a satisfactory outcome without legal representation.

The role of pro bono legal work is often to provide assistance in situations where no other service is available to assist. However, despite clear evidence of unmet legal need, obtaining pro bono legal assistance in family law is difficult.

9 DIFFERENT APPROACHES TO PRO BONO LEGAL WORK

Pro bono legal service provision is a complex phenomenon. It is driven by an underlying philosophy of professional responsibility to provide access to justice, and yet affected by the interests and skills and expertise of those involved in pro bono legal work, and the commercial demands and pressures under which lawyers and law firms operate.

Pro bono legal work also means different things in different parts of the legal profession. As the findings of this research demonstrate, there are significant differences in what is perceived to be pro bono legal work, and how pro bono legal services are provided, especially between family law practitioners and large and mid-sized law firms.

At one end of the spectrum is the approach taken by family law practitioners, most of whom practice in small law firms or are sole practitioners. Their approach to pro bono legal work is the **ad hoc, individual approach**. The practice of striking items off bills, or not charging the client for all the work undertaken, is a discrete way of assisting clients experiencing disadvantage or with an inability to pay. Based on the comments made by stakeholders in interviews, it is clear that family law practitioners engage in this practice out of a sense of obligation or duty to assist their client, or when the client's case is compelling. As family law practitioners interviewed for this research explained, pro bono legal work is "woven into family law".

At the other end of the spectrum is the **organised, systematic approach** to pro bono work taken by large and mid-sized law firms. Many of these firms have dedicated pro bono lawyers, are members of pro bono clearinghouses, and have sophisticated systems for measuring the amount of pro bono work undertaken, assessing the interest and availability of lawyers, keeping track of and reporting on outcomes of pro bono work, and developing pro bono partnerships and projects for sourcing pro bono legal work.

In looking to the question why pro bono legal assistance is difficult to obtain in family law matters, an understanding of these different approaches to pro bono work is important.

An examination of pro bono legal services in the area of family violence further illustrates the complexities of pro bono legal service provision. In contrast to family law, pro bono legal assistance from large and mid-size firms is easier to obtain in family violence matters. In response to this observation the Centre developed a framework to analyse why this is the case.

9.1: PRO BONO LEGAL WORK IN FAMILY LAW

The findings indicate that much of pro bono legal work in family law is undertaken by family law practitioners – by continuing to act for a client after their grant of legal aid has run out, or doing free or discounted work for clients who do not qualify for legal aid but have very limited means. Occasionally some practitioners will take on a client without fee from the outset of a matter often in response to a request from a pro bono referral scheme, but this is not common.

This way of undertaking pro bono legal work, coupled with the comments made by family law practitioners when interviewed for this project suggest that there may be little capacity for these practitioners to do more.

For large and mid-sized law firms, with (potential) capacity to undertake more pro bono work, family law as a practice area presents unique challenges and barriers. These are best illustrated through the **Analysis Framework** (see Part B on page 64)

The Framework consists of five factors, identified through the interviews conducted for this research, that influence decisions whether to provide pro bono legal services in family law. These factors are 1) the compatibility of legal need with the **scope of a firm's pro bono policy,** 2) **expertise** in a relevant are of the law and practice, 3) a law firm's **capacity** to undertake the pro bono work, 4) the availability of **discrete tasks** and 5) the **willingness and interest** of lawyers to undertake pro bono work.

For example, large and mid-sized firms, with the exception of a very few, do not have **expertise** in family law. Whilst these firms do provide pro bono legal services outside the core areas of the firm's expertise, the unique nature of family law practice presents challenges that are particularly difficult to overcome.

It may be possible to train lawyers in areas of law where they lack expertise, provided that clearly defined **discrete tasks** are available. However, the multi-faceted and complex nature of family law matters means that finding discrete tasks is difficult and any training provided to lawyers would have to be extensive. Isolating a task from the other legal issues connected to it may mean simplifying it to the extent that it is no longer effectively responding to client's needs.

Many large and mid-sized law firms expressed the view that they consider it inappropriate to respond to the core legal need in family law by providing pro bono legal services. Their view is that access to justice in family law is – and will remain – the responsibility of government and is therefore outside the **scope of the firm's pro bono policy**. Even those pro bono service providers, who expressed an interest in helping if they could, face these challenges that make providing pro bono in family law particularly difficult.

Each firm will weigh the factors in the Analytical Framework differently, but as was demonstrated in 7.6 Case studies (page 87), even a carefully planned pro bono project in family law, which addresses most, but not all of these factors, can be unsuccessful.

Pro bono service provision, especially to individuals experiencing disadvantage, is rarely simple. The complexities and nature of family law practice, coupled with challenging clients and limited available resources make the partnership between 'traditional' pro bono legal service provision and family law a difficult, if not an impossible one.

9.2: PRO BONO LEGAL WORK IN THE AREA OF FAMILY VIOLENCE

In contrast to family law, many large and mid-sized law firms provide pro bono legal services in the area of family violence, most commonly by assisting victims of family violence in seeking a Family Violence Order or to apply for Victims Compensation.

The application of the **Analysis Framework** (see Part B on page 64) in the context of family violence further demonstrates the way in which many of the factors influencing the decision whether to provide pro bono legal assistance interconnect or overlap and how they are weighted differently by firms.

Despite the availability of legal aid in the area of family violence (and in stark contrast to family law), many large and mid-size firms consider it appropriate to respond to (some aspects of) legal need in the area of family violence by providing pro bono legal services. The vulnerability of clients, existing strategic priorities of pro bono practices, an intention to be part of a holistic service delivery model and impact assessment were all factors that would seem to put the matters within the **scope of a firm's pro bono policy**. This highlights the flexible nature of pro bono legal work and its ability to respond to legal need in areas where clients are particularly disadvantaged and where the assistance provided is likely to have a clear impact without being tied to strict guidelines.

Any lack of expertise in relevant areas of the law has been overcome by providing training, and the legal needs experienced by clients make it possible for lawyers to provide legal assistance in discrete tasks that provide meaningful outcomes for clients. The **availability of discrete tasks** makes it easy to assess the firm's **capacity** to assist in any given matter, and the particularly disadvantaged client group ensures a steady stream of lawyers who have the **willingness and interest** to undertake pro bono legal work.

It appears that the interconnectedness with family law is the greatest challenge faced by pro bono service providers in the area of family violence. When legal issues regarding family violence and family law overlap or interconnect, the issues that make the provision of pro bono difficult in family law extend so far as to make the provision of pro bono in family violence difficult as well.

These difficulties highlight two things. First, any pro bono project or matter in family violence must consider whether the legal issues in question can be suitably isolated from legal issues in family law. Second, it must be considered whether isolating the legal tasks from one another and providing assistance to a client in one aspect of the law only will ensure an adequate outcome and whether referral pathways might operate to obtain legal assistance with the related family law issue.

9.3: WHERE TO FROM HERE?

One of the objectives of this research project was to discover ways in which structured, organised pro bono providers with potential capacity – mostly large and mid-sized law firms - could possibly respond to legal need in family law. The Centre pursued possible recommendations that might lead to practical, positive outcomes and in particular to increased service provision in this area. However, evidence gathered in the research does not support the making of such recommendations.

Not enough is known about the pro bono work of family law practitioners as this work is currently not visible and 'embedded' into the work they regularly undertake for clients. It is important to shed light on this work to recognise the significant pro bono contribution that

these family law practitioners are making, and its resource implications (for example, if this contribution was no longer provided). A greater understanding of the **extent** and **impact** of the pro bono legal work undertaken by family law practitioners could also inform a discussion and debate about how to respond to unmet legal need in family law, particularly the ongoing development of legal aid policy.

Given the limited capacity of family law practitioners to undertake more pro bono work, shedding light on the work they currently do is also important so they can be supported in continuing to assist clients with no or limited means in the best way possible.

Further research could provide a better understanding of:

- the factors that motivate family law practitioners to undertake this work;
- the characteristics of the clients who are receiving this assistance;
- the impact of this work on legal need and access to justice;
- the relationship between this work and work done under a grant of legal aid; and
- the ways that family law practitioners can be better supported to continue to provide family law services to clients with no or limited means.

Overall, pro bono legal assistance plays a small but important role in providing access to justice - often where no other service is available to assist. Depending on the type of matter, pro bono legal assistance can vary from providing a discrete piece of legal advice to conducting litigation in a matter of public interest. Although efforts should be made to support and encourage the provision of pro bono legal services, it will always be limited by its voluntary nature and the interests, expertise and skills of those who choose to provide pro bono legal services.

APPENDIX 1 - LITERATURE REVIEW

The Literature Review indicates that research into the provision of pro bono legal work in Australia has thus far concentrated largely on the pro bono work undertaken by large and mid-sized law firms. Much of that research looks at the quantitative metrics of that pro bono work: how many hours of pro bono work are lawyers and law firms doing, what value can be put on that time, and the participation rates of lawyers.

Very little research has been conducted into pro bono service provision in family law in Australia. In fact, only a few studies into legal service provision in family law touch upon the topic of pro bono legal work in passing, and only one pro bono project in family law has been formally evaluated and reported on (See Case Study 2 on page 88). However, there are several bodies of literature that are related to the topic of this research project and provide an important backdrop to the findings in this Report. These are: literature of legal service provision in family law generally; literature regarding self-represented litigants (both in general, and specifically within the Family Court); literature on unmet legal need and access to justice in family law; literature on the unbundling of legal services; literature on the legal aid system in Australia; and literature on the overlap of family violence and family law legislation; and literature on the provision of pro bono legal services in general.

The literature discussed below provided a framework for this research project. However, given the lack of research into pro bono legal services in the areas of family law and family violence, the stakeholders consulted for this research provided the most significant input and guidance regarding the relevant issues.

LITERATURE ON UNMET LEGAL NEED AND ACCESS TO JUSTICE IN FAMILY LAW

In 2012, the Law and Justice Foundation of NSW released the results of the **Legal Australia-Wide Survey** (LAW Survey), a comprehensive series of reports aimed at improving access to justice by providing information about legal needs across Australia. Using a representative sample of the population from each State and Territory, these reports cover the nature and number of legal problems, their relationship to other issues and their impact on those affected, taking into account influential demographic factors.[157]

According to the LAW Survey, legal problems and the ways in which people attempt to resolve them are heavily influenced by their demographics. This idea is not new, but when combined with information about the interaction that may occur between various legal problems, the results of the LAW Survey may assist in determining where legal problems occur and how they can best be resolved.

[157] Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012.

The survey results highlighted the significance of family law problems and the (potentially) significant implications for those who engage with the family law system. The LAW Survey report recognises the way in which family law problems can be interconnected with other legal and socioeconomic issues, and helps to shed light on some of the underlying causes of difficulties in undertaking pro bono work in this area.

Relevant to this research, the LAW Survey results also show that legal problems do not occur in isolation. Rather, one legal issue may breed others. Alternatively, the socioeconomic circumstances of a person or group may be conducive to certain sets of legal problems. In particular, the Survey Report reveals that family and economic issues can be heavily intertwined. Legal problems concerning family, money and debt often appeared to be connected. It may be that these issues have a cyclical effect, with family issues triggering debt or employment issues or vice versa. This potential difficulty in untangling related legal issues may also be one factor which accounts for the reluctance of lawyers to engage in pro bono work in this area. Other relevant factors may include the fact that family law problems have lower levels of finalisation.

The LAW Survey results also show that relationship breakdown, divorce and domestic violence can all result in multiple and severe adverse consequences for respondents. Physical illness, stress-related illness and debt were all identified by respondents experiencing family law issues as having been a consequence of their legal problem. The number of adverse consequences experienced by these respondents was also consistently high. For example, 21.8% of respondents had experienced four or more adverse consequences as a result of their family related legal problem. Correspondingly, a relatively high percentage of people experiencing a family law problem sought advice from a health professional (e.g. a doctor or psychologist), compared to other legal areas. This further highlights the detrimental impact that family law problems may have on a person's physical and mental health, a factor which may add to the complexity of their relationship with their legal advisor, and impact on the willingness of lawyers to undertake pro bono work in this area.

The significance attached to family law issues, and the potential for severe consequences if left unresolved, manifested in the way that respondents approached seeking help. Family law related problems consistently had the highest incidence of respondents taking action and seeking advice. The advice is divided into five different categories, including: formal legal advice, consultation with friends and relatives, websites/self-help guides, courts/tribunals, and formal dispute resolution. In each of these categories, respondents experiencing a family law problem made up the highest percentage utilising each particular mechanism. In particular, and extremely high rate of people experiencing a family law problem sought advice from a legal professional, compared to other legal problems They were more likely to seek assistance from multiple advisors, and more likely to go to a legal advisor first as compared to people with legal problems in other areas of law. It is clear from these results that family law is an area where demand for legal professional advice is particularly high, especially considering that legal matters in family law proceeded to court

or tribunal proceedings and to formal dispute resolution more often than legal problems in other areas of the law.

LITERATURE ON SELF-REPRESENTED LITIGANTS (SRL'S)

In Australia, the issue of self-represented litigants began generating interest among researchers the first years of the 21st century. A number of studies on SRLs were published between 2000 and 2005, with many of these focusing on self-representation in the Family Court and the Federal Magistrate's Court (now the Federal Circuit Court). Perhaps the most significant of these were conducted by Professor Rosemary Hunter et al.: ***The changing face of litigation: unrepresented litigants in the Family Court of Australia*** (2002)[158], ***Legal Aid and Self-Representation in the Family Court of Australia*** (2003)[159], and Professor John Dewar et al: ***Litigants in Person in the Family Court of Australia*** (2000)[160]. The topic of self-representation has also been the focus of research reports from The Family Court of Australia,[161] the Family Law Council,[162] as well as several law reform commissions.[163]

The 2002 study by Hunter et al. on unrepresented litigants in the Family Court[164] explored the dimensions of self-representation. This included the numbers and proportions of unrepresented litigants in the Family Court, the factors which may have contributed to an increase in the number of self-represented litigants, and any identifiable demographic patterns in self-represented litigants as well as recognisable patterns in the types of cases involving self-represented litigants. The research also examined the impact and experiences of self-represented litigants on appeal. The 2003 study by Hunter et al. on legal aid and self-representation in the Family Court[165] focused on examining the link between self-representation and the availability of legal aid funding in family law.

Relevant to this research, the 2002 study found a link between disadvantage and self-representation. SRLs are more likely to be young males who are reliant on welfare benefits,

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[158] Hunter *et al.*, 'The Changing Face of Litigation: unrepresented litigants in the Family Court of Australia', Research Report, Law & Justice Foundation of NSW, August 2002.

[159] Rosemary Hunter, Jeff Giddings and April Chrzanowski, 'Legal Aid and Self-representation in the Family Court of Australia', Research Report, Socio-Legal Research Centre, Griffith University, May 2003.

[160] John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia', Research Report, No 20, Family Court of Australia, 2000.

[161] Family Court of Australia, 'Self-Represented Litigants: A challenge – Project Report, December 2000-December 2002', Research Report, 2003.

[162] Family Law Council, 'Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council, Canberra', August 2000.

[163] See, for example Australian Law Reform Commission, 'The Unrepresented Party – Background Paper 4', December 1996; the Law Reform Commission of Western Australia, 'Review of the criminal and civil justice system in Western Australia – Final Report Project 92', 1999; and Victorian Law Reform Commission, 'Civil Justice Review Report', 2008.

[164] Hunter *et al.*, above n 159

[165] Hunter, Giddings and Chrzanowski, above n 160

have lower education levels and are somewhat more likely to have been born in a non-English speaking country than legally represented (or partially represented) litigants.[166] The 2003 study found that the levels at which means-testing was set for legal aid has created a group of people who were ineligible for legal assistance but could not afford to pay for representation.[167]

The 2000 study by Dewar et al. on litigants in person in the Family Court explored the reasons for self-representation, characteristics of SRLs in the Family Court, SRLs' needs for assistance and advice and the sources they used, and the effects of self-representation on the court's resources, the judicial officers and SRLs themselves.

Relevant to this research, the 2000 study found that SRLs have a wide range of needs for legal information, advice and support. The study also found that SRLs in the Family Court seek advice from a range of different sources (including unconventional ones), while some may not seek any advice at all. The effects of self representation on judicial officers and registry staff included high levels of stress and frustration, and the cases involving SRLs were found to take up significantly more of the court's time and resources. The effects of self-representation on SRLs themselves were found to be broad, ranging from suffering objective injustices to receiving preferential treatment at the expense of a represented litigant.[168]

More recent research into self-representation in Australia includes a literature review and a study by Richardson et al.: ***Self-Represented Litigants: Literature Review*** (2012)[169] and ***Self-Represented Litigants: Gathering Useful Information, Final Report - June 2012***.[170] The study examined self-represented litigants in the context of the civil justice system in Australia.

Relevant to this research, the Final Report suggests the availability of legal aid may not have had a significant impact on the number of SLRs in the Family Court and found that a number of factors such as an aversion towards lawyers, the cost of legal services, the growth of other sources of advice or assistance, and the simplification of court procedures were all possible motivators for SRLs to represent themselves in family law disputes. [171]

The issue of self-representation is not unique to Australia and has also generated research internationally. A recent Canadian study: ***The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants***[172]examined the decision

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[166] Hunter *et al.*, above n 159, viii.

[167] Hunter, Giddings and Chrzanowski, above n 160, v.

[168] Dewar, Smith and Banks, above n 161, 1-2.

[169] Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review', Australian Centre for Justice Innovation, Civil Justice Research Online, May 2012.

[170] Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Gathering Useful Information, Final Report - June 2012', Australian Centre for Justice Innovation, Civil Justice Research Online.

[171] Ibid, 9.

[172] Julie Macfarlane, 'The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants - Final Report', May 2013.

regarding self-representation (specifically the motivations and expectations), and how self-represented litigants engage with the court system.

Relevant to this research, the study found that the primary reason for self-representation was the inability to pay for, or to continue to pay for, the services of a lawyer. The study also found that many of the self-represented litigants who had been able to access pro bono legal services experienced dissatisfaction with the type of discrete task assistance that they received on a pro bono basis. Due to the limited nature of the support available, some self-represented litigants reported being more confused, or panicked, than before receiving the advice.

The study also highlighted the adverse consequences of self-representation, including physical and emotional health issues, depletion of personal funds, instability or loss of employment and social and emotional isolation from family and friends as a result of an overwhelming and increasingly complex legal issue.

LITERATURE ON THE PROVISION OF LEGAL SERVICES IN FAMILY LAW

The issue of providing legal services in family law has been the subject of two significant Australian studies: ***Family Law Case Profiles*** (1999)[173] and ***Legal Services in Family Law*** (2000)[174]. Despite some significant amendments to the *Family Law Act 1975* (Cth)[175] since the publication of the research, the consultations conducted for this research indicate that the findings of these studies are still relevant.

Family Law Case Profiles, studied the profiles of family law cases that were handled by Legal Aid Commissions, private solicitors and CLCs in the Family Court. The report, which covered cases finalised in the 1997-1998 financial year, looked at demographic factors, case characteristics and dispute processes to draw a more accurate picture of family law cases. It covered cases in New South Wales, Victoria, South Australia, and Queensland, and while the study is not specifically concerned with pro bono work, the information it has gathered is still highly relevant to family law overall.

Relevant to this research, the report corroborates the idea that very little formal, structured pro bono work is done in family law, and that pro bono work appears to be done informally, on an ad hoc basis.

Family law matters were found to be multi-faceted, with litigants having an average of 2.5 legal issues that needed to be addressed. Illustrating this, in Legal Aid cases the number of

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[173] Rosemary Hunter, *Family Law Case Profiles*, Justice Research Centre, Law Foundation of New South Wales, June 1999, xiv.

[174] Hunter *et al.*, *Legal Services in Family Law,* Justice Research Centre, Law Foundation of New South Wales, December 2000, 209.

[175] For example, *Family Law Amendment Act 2003* (Cth), *Family Law Amendment Act 2006* (Cth), *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

legal matters per litigant was found to range from one to eight. Family law cases might involve multiple matters such as contact, divorce, residence, welfare, child maintenance, contempt, and property division. Parenting matters and child maintenance appeared to dominate Legal Aid cases, and this was reflected in self-funded cases, alongside property and residence matters.

In family law cases run by CLCs, the most common matters were similarly contact and residence. In general, a high percentage of family law litigants were found to also be involved in a property dispute. Further, a high percentage of cases involved domestic violence, a factor which was likely to increase the complexity of a case. For example, approximately around 60% of CLC and private solicitors' legal aid cases, 40% of Legal Aid Commission cases, and 24% of self-funded cases involved allegations of domestic violence.

The study also found that family law matters may also be complicated by the fact that they often include a combination of dispute resolution methods or involve multiple stages. Matters at various stages were heard in both the Family and local courts, and many also involved out-of-court processes such as negotiation, mediation, private resolution, and out of court counselling. A pattern of 'litigotiation', where a combination of court processes and out-of-court negotiation is used, has been identified in previous studies. This pattern was also discerned in the report, where private negotiations between solicitors, in conjunction with court processes, played a major role in the resolution of disputes. This may have important implications, considering that many litigants were revealed to be on a limited income and a significant portion were unrepresented. In fact, the report revealed that 15% of applicants and 33% of respondents were wholly or partially unrepresented in the Family Court.

Legal Services in Family Law examined services received by legally-aided clients, as compared with self-funded clients in family law. It also compared services provided to legally-aided clients by in-house Legal Aid solicitors, and private solicitors. The study was conducted by reviewing solicitors' files and by interviewing solicitors. A comparison of the services provided to clients in family law was done relating to the solicitors' activities on the case, outcomes for the clients, funding and costs of the case, client satisfaction and service quality.[176]

Relevant to this research, the report found that for most solicitors in family law, pro bono work was understood as charging less or acting beyond legal aid grants. In particular, many solicitors were found to be doing unfunded work or acting after a Legal Aid grant had run out. Those surveyed said they were more likely to work pro bono if the client was 'genuine' or 'deserving'. A list of criteria emerged that solicitors used to judge this, which included the client's financial state, how much they cared about their children, and how abhorrent the other party appeared to be. What emerged from the findings in the report is that the decision to undertake pro bono work in family law appears to be a fairly subjective process, and that in general, the only common factor among the cases that received a discount

[176] Hunter *et al.*, above n 175, xi.

appeared to be the solicitor's attitude towards the client. However, the study also found that none of the cases sampled were done pro bono in their entirety. Instead, 29% of cases involved some kind of discount or subsidisation.

More recent research into the provision of legal services in family law includes an **Evaluation of Legal Aid NSW's Family Law Early Intervention Unit (EIU) at the Parramatta Family Law Courts** conducted by the Law and Justice Foundation of NSW.[177] The evaluation examined whether the services provided by the duty lawyer service were focused on Australians, how the duty lawyer service assisted clients, the difference the assistance made to the clients and the court and how the duty lawyer service works as an early intervention strategy.

Relevant to this research, the evaluation found that the duty lawyer service did reach clients experiencing disadvantage. It also found that clients with complex needs are more likely to wait until crisis before seeking help. Further, that many disadvantaged clients who may fall into this category are less likely to possess the skills and psychological readiness necessary to resolve their matter on their own. To illustrate this, more than one third of clients seen in the sample period were seeking to commence an action not appropriate to their matter.

The evaluation also found that many of the features of the EIU duty service that are key to its success are applicable more generally for those wishing to improve access to services in this area. It was noted that because family law matters tend to be so complex and are often accompanied by strong emotion, early intervention for time sensitive issues is especially relevant. Of all matters recorded in the snapshot period between July-August 2012, 44.7% involved two broad categories of assistance, 28.4% involved three categories of assistance and 6.1% involved four categories of assistance rendered by the EIU duty service. Much of the assistance provided was necessary on an urgent basis, with solicitors completing discrete tasks quickly. For example, just over half of all matters were judged by solicitors as requiring immediate assistance, that is, help within twenty-four hours. The ability of the service to refer clients on was essential to its efficiency in dealing with complex matters and its ability to take on a high volume of clients and tasks. The report also cites staff ability to communicate with high-needs clients, the service's location at the court, and therefore its immediacy, as well as the implementation of firewalls, and its capacity to provide referrals, as being essential to its success. It concluded that the duty service positively affected both the efficiency of the Court and the progression of clients' matters through the system.

LITERATURE ON THE OVERLAP OF FAMILY LAW AND FAMILY VIOLENCE LEGISLATION

The overlap of family law and family violence legislation has been the subject of a number of reports. In 2009, the Family Law Council produced its report ***Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues. T***he advice examines the intersection between family violence and the

[177] Suzie Forell, 'An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service', Report, Law and Justice Foundation, November 2012.

family law system, and the difficulties that may arise when family violence becomes visible in the Family Law system in Australia. It examines how there can be wider dissemination of generally accepted expert opinion about family violence and its impact in the broad family relationship and family law systems.

Relevant to this research, the advice examines how family violence is dealt with in family law disputes and makes recommendations on how the family law system's responses to family violence can be improved, including the early identification of family violence.

The Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSW LRC) ('The Commissions') conducted a joint inquiry on the overlap of family violence and family law issues. One of the issues the Commissions were asked to consider was the interaction in practice of State and Territory family/domestic violence laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, State and Territory criminal laws.[178]

A Report on the inquiry: ***Family Violence - A National Legal Response***, outlines the recommendations made to address the interaction and inconsistency between State/Territory laws and the *Family Law Act 1975* (Cth) and relevant criminal law legislation.

Relevant to this research, the report notes that "neither the Commonwealth nor the States and Territories have exclusive legislative competence" and this has led to a fragmentation of the system, which has in turn led to fragmentation of practice.[179] The resultant separation of family violence into 'silos' has meant that victims are often shuffled between different courts and agencies, which may lead to them falling into jurisdictional gaps.[180] The detrimental effect for children who may be persistently exposed to multiple legal processes is also referenced. [181]

The implementation of a 'one court' approach is recommended, which would be effected by widening the jurisdiction of Federal, State, and Territory courts that deal with family law and family violence matters. This would involve the development of 'corresponding jurisdictions' and is considered particularly relevant in cases involving children. The report correctly points out that State and Territory magistrates are often the first point of contact for those experiencing family violence, and as a result, it is argued that the Family Law Act should allow State and Territory courts to make parenting orders.[182]

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[178] Australian Law Reform Commission and NSW Law Reform Commission, 'Family Violence - A National Legal Response, Summary Report', October 2010, 11.

[179] Ibid, 12.

[180] Ibid, 12-13

[181] Ibid, 22.

[182] Ibid, 19 and 22.

LITERATURE ON THE LACK OF ENGAGEMENT WITH THE FAMILY LAW SYSTEM

In 2012, the Family Law Council published two reports examining the issue of engagement with the family law system by clients from culturally and linguistically diverse backgrounds and for clients from Aboriginal and Torres Strait Islander backgrounds. The reports, ***Improving the family law system for clients from culturally and linguistically diverse backgrounds***[183] and ***Improving the family law system for clients from Aboriginal and Torres Strait Islander backgrounds,***[184] consider the extent to which family law system meets the needs of clients, and suggests improvements in this area.

Relevant to this research, the report focusing on Aboriginal and Torres Strait Islander clients found that family law system services are under-utilised by Aboriginal and Torres Strait Islander families for a number of reasons. The report found two of the most significant reasons to be a lack of understanding about the family law system among Aboriginal and Torres Strait Islander clients and a resistance to engagement with, and even fear of, family law system services. Consultations conducted by the Family Law Council suggested that the context of the past history of forced removal of Aboriginal children and the contemporary extent of non-voluntary engagement with criminal justice and child protection agencies among Aboriginal peoples has led to resistance to voluntary engagement with government and justice system services. The report found that this resistance has meant that problems arising out of family and relationship breakdown are often left unaddressed until a point of crisis, which perpetuates conflict and can sometimes result in family violence.[185]

The report focusing on clients from culturally and linguistically diverse backgrounds found that there are several factors that act as barriers for people from culturally and linguistically diverse backgrounds to access the services of the family law system. These include a lack of knowledge about the law and a lack of awareness of available services; language and literacy barriers; cultural and religious barriers that inhibit help-seeking outside the community; negative perceptions of the courts and family relationships services; social isolation; a lack of collaboration between migrant services and the family law system; a fear of government agencies; a lack of culturally responsive services and bicultural personnel; legislative factors; and cost and resource issues.[186]

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[183] Family Law Council, submission to the Federal Attorney-General, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, February 2012.

[184] Family Law Council, submission to the Federal Attorney-General, *Improving the family law system for clients from Aboriginal and Torres Strait Islander backgrounds*, February 2012.

[185] Ibid, 3-4.

[186] Family Law Council, above n 184, 4-5.

LITERATURE ON FAMILY VIOLENCE

The Australian Government's ***National Plan to Reduce Violence Against Women and their Children*** establishes a coordinated framework for Commonwealth, State and Territory governments, aimed at reducing violence against women and children. It outlines strategies and outcomes to improve the provision of support services for women and their children, and to prevent violence in future generations by promoting awareness and behavioural change, particularly in young people. The vision, to achieve a significant and sustained reduction in violence against women, is to be achieved by a series of 3-year Action Plans between 2010 and 2022. The six National Outcomes are: communities are safe and free from violence; relationships are respectful; Indigenous communities are strengthened; services meet the needs of women and their children experiencing violence; justice responses are effective; and perpetrators stop their violence and are held to account.

Relevant to this research, one of the National Outcomes - justice responses are effective - identifies a strategy of improving access to justice for women and children. The Commonwealth's key actions between 2010 and 2013 to achieve this are to enhance legal aid funding arrangements to ensure women and their children who are at risk of violence are a key priority; to enhance the family law system's response to family violence; and, in conjunction with State and Territory governments, improve the capacity of the civil and criminal justice systems to respond effectively to patterns of risk and accumulative effects of violence.

The national initiatives pursued to achieve this are to increase funding for legal assistance programs to assist victims of domestic violence; to support victims' access to the legal system through the Family Violence Prevention Legal Services program; to improve sexual assault victims' access to justice by evaluating the impacts of the 2000 victim-focused court practice reforms; to pilot dispute resolution models to improve the family law system's response to violence; and to expand Family Pathways Networks, with a focus on family violence and child protection services.

LITERATURE ON THE PROVISION OF PRO BONO LEGAL SERVICES

An article by Scott L Cummings and Rebecca L Sandefur in the Harvard Law & Policy Review, ***Beyond the Numbers: What We Know - and Should Know - About American Pro Bono***,[187] examines the distribution and growth of pro bono services in the US. The article raises issues about the approaches to pro bono legal work by the profession and the resulting distribution of cases and causes and its overall social impact. The issues, while primarily examined in a US context, have some application to Australia, with both countries having well-developed pro bono cultures. The article provides an understanding of certain characteristics in pro bono provision which may contribute to the particular unmet legal need in this area.

[187] Scott L Cummings and Rebecca L Sandefur, 'Beyond the Numbers: What We Know - and Should Know - About American Pro Bono' (2013) 7 *Harvard Law & Policy Review* 83.

Relevant to this research, the article distinguishes between two methods of delivery of pro bono practices by lawyers. Firstly, there is an ad hoc, individual approach, where lawyers personally provide pro bono services, whether motivated by duty or in response to a compelling and deserving client. This approach often occurs in smaller-scale practices, such as sole practitioners and small firms. One characteristic of this approach are practices where lawyers write off or discount fees where clients are unable to pay (a practice which in the US is termed “low-bono”).

The second method identified by the article is an organized, systematic approach to pro bono activity, where infrastructure typically matches clients’ needs with volunteer lawyers. For example, centralised clearing houses may refer pro bono matters to law firms, based on some agreed upon priorities and criteria.

The article suggests the provision of pro bono legal work is substantially provider-driven. The priorities and agendas of these providers can influence where resources are being directed. Importantly, the article recognises that only limited information exists regarding the driving force behind pro bono contributions, and whether they are directed by unmet legal need it the preferences of pro bono providers.

APPENDIX 2 - CONSULTATION PAPER

1. INTRODUCTION

The National Pro Bono Resource Centre ('the Centre') is an independent, not-for-profit organisation that aims to support, encourage and facilitate the provision of pro bono legal services in Australia.

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendation of the National Pro Bono Task Force to the Commonwealth Attorney-General.

The Centre is an independent, non-profit organisation that aims to:

• Promote pro bono work throughout the legal profession;

• Undertake research and projects to inform the provision of pro bono legal services;

• Provide practical assistance to pro bono providers (including information and other resources);

• Develop strategies to address legal need; and

• Promote the provision of pro bono legal assistance to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth and States and Territories Attorney-General's Departments, and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, Community Legal Centres (CLCs), pro bono referral schemes, Legal Aid, Aboriginal and Torres Strait Islander Legal Services (ATSILS) and produces resources of immediate benefit to the legal profession and community sector.

2. BACKGROUND TO THE PROJECT

Family law is the legal system's metaphor, the crucible with which so much else in law intersects … It is also, because it is the area of law by means of which most people will come into contact with it, the area by which the legal system will be judged by most people.[188]

Since 1997, a decline in legal aid budgets for family law[189] and amendments to the *Family Law Act 1975* (FLA) have been factors in the rise of self-represented and partially

[188] Justice Rosie Abella of the Supreme Court of Canada, as quoted in The Honourable Diana Bryant, 'Walruses and the Changing Shape of Family Law in Australia', Speech, November 2008.

represented litigants in family law matters.[190] Studies have shown that an extensive relationship exists between the unavailability of legal aid and self-representation in the Family Court, and indicate high unmet legal need in the areas of family law and family violence. [191]

Pro bono assistance in the areas of family law and family violence has been traditionally difficult to obtain. One of the reasons cited for this is the lack of relevant legal expertise amongst the large law firms who are key pro bono providers. Pro bono referral schemes report difficulties in referring family law matters.[192] A national survey of the pro bono work of large law firms in Australia showed the highest number of requests for assistance to be turned down were in family law.[193]

Some attempts have been made to provide pro bono legal assistance in family law matters, with varying degrees of success. For example, several law firms in Sydney participated in the Family Law Affidavit Pilot Project, which aimed to address a perceived need for affidavit drafting in family law matters for Aboriginal women in the Walgett region.[194] Pro bono legal assistance is available in some matters involving or relating to family violence; to help victims in relation to court orders or to seek victim's compensation.

3. PURPOSE OF THE PROJECT

The Pro Bono and Family Law and Family Violence Project is a research project which intends to identify, specifically in the areas of Family Law and Family Violence:

- what pro bono work is currently being done in family law/family violence
- what are the reasons for pro bono service providers not taking on matters in family law/family violence

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[189] The legal aid funding priorities for family law which came into effect in 1997 implemented a more restrictive merits test, a cap on the amount available, imposed prerequisites of alternative dispute resolution, and limited the types of eligible family law matters. See Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004) 43.

[190] Hunter *et al.*, 'The Changing Face of Litigation: unrepresented litigants in the Family Court of Australia', Research Report, Law & Justice Foundation of NSW, August 2002, 3, Senate Legal and Constitutional References Committee, Parliament of Australia, Legal Aid and Access to Justice (2004) 32, and 'Family Court of Australia Annual Report 2010-2011', 69, http://www.familycourt.gov.au/wps/wcm/resources/file/eb8a700003033f8/AR2011_complete.pdf.

[191] Hunter *et al*., 'Legal Aid and Self-representation in the Family Court of Australia', Research Report, Socio-Legal Research Centre, Griffith University, May 2003, 33 and Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Inquiry into Access to Justice,* 2009, 30, 32 and 43.

[192] Based on consultations with Teresa Cianciosi, Manager of Law Institute of Victoria Legal Assistance Scheme, and Debbie Sims, Coordinator of ACT Law Society Pro Bono Clearing House.

[193] National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey – Final Report December 2010*, 35, https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%20Final%20Report%20Dec%202010.pdf.

[194] The Family Law Affidavit Pilot Project was evaluated by the Law and Justice Foundation. For the Evaluation report, see http://www.lawfoundation.net.au/ljf/app/96A5E275C9519729CA257544000FFA9C.html.

- where pro bono assistance may be appropriate in meeting unmet legal need in these areas; and
- what the limitations and opportunities of pro bono assistance are in this area.

This will be done through identifying existing research on unmet legal need in family law/family violence, and through consultations with pro bono service providers, the government, legal aid commissions, the Family Court, community legal centres and other stakeholders.

The research report is intended as a resource to government, Legal Aid Commissions, the community legal sector and the pro bono community more broadly. The purpose of this research is to contribute to policy development in the area of family law and family violence by providing a resource that increases the understanding of stakeholders of the nature, possibilities and limitations of pro bono legal services. It is also envisaged that the research paper will serve as a discussion paper for the National Pro Bono Community Forum to be held in 2012.

4. SCOPE OF THIS PROJECT AND DEFINITIONS

For the purposes of this project, 'family law matters' refer to legal matters arising under the *FLA*.

The Centre has chosen to use the term 'family violence', in keeping with the terminology used in the *FLA*.[195] Terminology used in State and Territory legislation regarding family violence[196] use both 'domestic violence' and 'family violence' and in some legal literature the terms are used interchangeably.[197] For the purposes of this project, 'family violence' encompasses the term 'domestic violence'. The term 'Family Violence Orders' will be used to describe the various protective measures available to victims of family violence under relevant state and territory legislation.[198]

[195] In short, family violence in FLA is defined as any conduct by a person towards a member of his or her family or against a family member's property that causes any member of a family to reasonably fear for, or to be apprehensive about their personal well-being or safety. For a full definition see s. 4(1) of the FLA.

[196] For example, the *Family Violence Act 2004* in Tasmania, the *Crimes (Domestic and Personal Violence) Act 2007* in New South Wales, and the *Family Violence Protection Act 2008* in Victoria.

[197] For example Parkinson, Patrick: '*Australian Family Law in Context – Commentary and Materials*' 5th Edition 2012, Chapter 6, pp.187-221

[198] For example, Apprehended Violence Orders' (AVO) in New South Wales, or 'Family Violence Intervention Orders' in Victoria.

APPENDIX 3 - CONSULTATION QUESTIONS FOR STAKEHOLDERS

LAW FIRMS: CONSULTATION QUESTIONS

The questions are intended as a guideline for consultation only. Please feel free to elaborate on any issue or to provide additional information you feel is relevant.

1. Does your firm do (or has your firm done) pro bono legal work in family law or family violence?

   If yes, please:
   - Give examples of project(s); and
   - Discuss the successes and challenges of project(s).

2. What do you view as the main barriers/constraints to providing pro bono legal services in family law and family violence matters?

3. Why do you think family law is often considered more of a government responsibility and less appropriate for pro bono legal assistance than other areas of law?

4. What is your view on the optimum balance between the private profession's responsibility to provide access to justice to those who would not otherwise be able to obtain it and the responsibility of government to provide adequately funded public legal services, especially with regard to family law?

5. In your opinion, can any of the practical barriers to providing pro bono legal assistance in the areas of family law and family violence (e.g. lack of expertise) be overcome?
   - If yes, how can they be overcome; and
   - If not, why not?

6. Would your firm be willing to consider doing pro bono work in family law and/or family violence if practical barriers were overcome and suitable projects were available?

FEDERAL FAMILY COURTS: CONSULTATION QUESTIONS

The questions are intended as a guideline for consultation only. Please feel free to elaborate on any issue or to provide additional information you feel is relevant.

1. Could you (roughly) estimate the percentage of family law and/or family violence matters that come before you in which parties are:
    - represented by a private lawyer where fees are paid by the client
    - represented by a Legal Aid lawyer
    - represented by a lawyer from a Community Legal Centre
    - represented by a lawyer acting on a pro bono basis
    - self-represented

2. Is there an identifiable group of persons as litigants in family law matters who come before you and are:
    - represented by a lawyer acting on a pro bono basis?
    - self-represented?

    If so, what are their characteristics? Is there an identifiable imbalance between males/females?

3. In your view, what are the challenging aspects and problems which arise from self-representation by litigants in family law, with respect to:
    - procedural outcomes (in terms of the Court's resources, time, processes, etc.), and
    - substantive outcomes (in terms of the impact on parties, on the court's jurisprudence, etc)?

4. Initial consultations with large pro bono service providers suggest that pro bono representation in family law matters, especially on an organised scale, is unlikely to happen. One of the key reasons for this is the lack of expertise in family law. Can you identify any specific types of assistance, other than representation, that might be beneficial with respect to:
    - procedural outcomes (in terms of the Court's resources, time, processes, etc.), and
    - substantive outcomes (in terms of the impact on parties, on the court's jurisprudence, etc)?

5. Please identify any issues in family law which you consider to be inadequately addressed by publicly funded legal services and/or clearly represents an area of unmet legal need?

6. In your view, what are the real costs (i.e. not just financial) to individuals and the wider community associated with unmet legal need in the areas of family law?

7. What types of litigants would benefit most from an expansion of either publicly funded legal services or the availability of pro bono legal services in family law?

8. In your experience, are there any factors inherent to family law matters that impose limitations on the extent to which pro bono legal service provision can aim to improve access to justice for litigants in these areas?

9. Are there any other issues which you believe are relevant to the scope of this project?

LEGAL AID COMMISSIONS: CONSULTATION QUESTIONS

These questions are intended as a guideline for consultation only. Please feel free to elaborate on any issue or to provide any additional information you feel is relevant.

1. Are there any obvious gaps in the family law and family violence services provided by Legal Aid in your State or Territory? If yes, what are they?

2. For clients unable to obtain legal assistance through Legal Aid in matters listed under question 1, what type of assistance do you feel they would most benefit from (legal advice, representation, assistance with drafting of documents etc.)?

3. Are there particular client groups/groups of people that are particularly disadvantaged due to their inability to obtain legal aid in certain matters? If yes:
    - Please describe the client group and the challenges they face; and
    - Any legal issues where obtaining legal assistance would be particularly important to the client

4. In your view, what are the real costs (i.e. not just financial) to individuals and the wider community associated with unmet legal need in the areas of family law and family violence?

5. What do you believe are the barriers to the private profession providing pro bono legal services in the areas of family law and family violence?

6. In your opinion, can these barriers be overcome?
    - If yes, how can they be overcome?
    - If not, why not?

7. Are there any other issues which you believe are relevant to the scope of this project?

PRO BONO REFERRAL SCHEMES: CONSULTATION QUESTIONS

The questions are intended as a guideline for consultation only. Please feel free to elaborate on any issue or to provide additional information you feel is relevant.

1. Could you (roughly) estimate the percentage of requests for assistance your scheme receives in family law?

2. Please detail the services your referral scheme provides in family law (in the form of direct service provision and referrals)?

3. Are there any types of family law matters that you do not accept applications for assistance for?

4. Are there any specific types of family law matters that your clients present with (evidence of gaps in Legal Aid service provision)?

5. How many practitioners do you have 'on your books' willing to accept referrals in family law matters?

6. What are the greatest difficulties you face in referring a family law matter?

7. Are there any particular types of matters that are more difficult to refer than others? If yes, what are they?

8. In matters you are unable to refer, do you feel clients would benefit from benefit receiving assistance in discrete tasks? (Drafting of affidavits etc.)

9. In your view, what are the real costs (i.e. not just financial) to individuals and the wider community associated with unmet legal need in the areas of family law?

10. What types of litigants would benefit most from an expansion of either publicly funded legal services or the availability of pro bono legal services in family law?

11. In your experience, are there any factors inherent to family law matters that impose limitations on the extent to which pro bono legal service provision can aim to improve access to justice for litigants in these areas?

12. Are there any other issues which you believe are relevant to the scope of this project?

COMMUNITY LEGAL CENTRES: CONSULTATION QUESTIONS

The questions are intended as a guideline for consultation only. Please feel free to elaborate on any issue or to provide additional information you feel is relevant.

1. Please describe the types of services your Community Legal Centre provides in the areas of family law and/or family violence (i.e. advice, representation, assistance with drafting of documents etc.)?

2. Does your CLC have any experience working together with private lawyers and/or law firms in providing the abovementioned services? If yes, please:
    - Provide details of the types of assistance your clients/CLC has received on a pro bono basis in the areas of family law and family violence, and
    - Discuss the challenges and successes of providing these services in conjunction with a private lawyer or a law firm.

3. Does your CLC refer clients on to a private lawyer or law firm for pro bono assistance?

4. Do you experience any difficulty finding pro bono service providers willing to undertake matters in family law and/or family violence compared to other areas of law? If yes:
    - Please outline the obstacles you face.
    - What do you think are the reasons for these obstacles?

5. Please identify any issues in family law and/or family violence which you consider to be inadequately addressed by publicly funded legal services (unmet legal need)?

6. In your view, what are the real costs (i.e. not just financial) to individuals and the wider community associated with unmet legal need in the areas of family law and family violence?

7. What types of litigants would benefit most from an expansion of either publicly funded legal services or the availability of pro bono legal services in family law and/or family violence?

8. In your opinion, are there any factors inherent to family law and/or family violence matters that impose limitations on the extent to which pro bono legal service provision can aim to improve access to justice for clients in these areas?

9. Are there any other issues which you believe are relevant to the scope of this project?