



NATIONAL PRO BONO RESOURCE CENTRE

Engaging Retired and Career-Break Lawyers in Pro Bono

February 2010

About the National Pro Bono Resource Centre

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendation by the National Pro Bono Task Force to the Commonwealth Attorney-General. The Centre exists to support and promote the provision of pro bono services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

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 pro bono law to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth, 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.

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Chapter 1 Executive Summary and Recommendations

1. Executive Summary

In October 2008, the National Pro Bono Resource Centre (**Centre**) started a research project on how to engage retired and career-break lawyers in pro bono legal work. Aware of the baby boomer generation approaching retirement age and of the volume of unmet legal need in Australia, the Centre intended to discover if, and how, retired and career-break lawyers could be encouraged to become involved in pro bono legal work.

The Centre conducted research and consultations with key stakeholders in the legal profession to establish the size of the retiring lawyer population and thus determine the number of potential pro bono volunteers, what current structures existed within the legal services sector through which lawyers could volunteer, whether there was a need for a specific project to engage retired and career-break lawyers, and how best to match those lawyers with unmet legal need.

Whilst homogenous demographical data was difficult to obtain from professional associations across the country, evidence suggests that the number of lawyers approaching retirement age is growing, and will continue to grow in the years to come. This potential, untapped source of pro bono lawyers have long legal careers behind them, and possess a wealth of skills and experience that could potentially be used to benefit disadvantaged and marginalised individuals.

This report examines the key legal service providers and the existing landscape of pro bono service provision in Australia. It details the constraints to pro bono service provision and explores how these constraints could be overcome. The report also considers how retired and career-break lawyers could best be matched with opportunities, and makes recommendations on future directions.

2. Key recommendations

Recommendation 1

The practising certificate regime in Australia should be amended so that *free* practising certificates are available for the sole purpose of engaging in pro bono legal work, provided that the practitioner is:

- (a) 'suitably qualified'; or
- (b) supervised by a lawyer who is 'suitably qualified'; and
- (c) covered by appropriate professional indemnity insurance.

Recommendation 2

Professional indemnity insurance requirements in relevant regulatory Acts or subordinate instruments should be amended where necessary to recognise that professional indemnity insurance is available without charge to lawyers wanting to undertake pro bono legal work.

Recommendation 3

The Centre should expand its website to act as a gateway for lawyers wanting to provide pro bono legal assistance. This website should link volunteers with the broad range of existing opportunities for legal volunteering, provide information on legal need, practising certificates, professional indemnity insurance, training and CPD, and encourage retiring and retired lawyers to volunteer.

Recommendation 4

Legal professional associations should promote:

- (a) the availability of practising certificates (where applicable) without charge to those lawyers who want to provide pro bono legal assistance but who would not otherwise require a practising certificate;
- (b) the availability of professional indemnity insurance cover for:
 - (i) lawyers volunteering at community legal centres through the NACLC professional indemnity insurance policy; and
 - (ii) lawyers and paralegals working on pro bono projects through the Centre's National Pro Bono Professional Indemnity Insurance Scheme (see part 26).

Recommendation 5

All legal professional associations should collect nationally consistent data on lawyers, particularly retiring and retired lawyers, and promote existing pro bono opportunities.

Recommendation 6

CPD and CLE providers and other relevant training providers (such as Legal Aid Commissions) should permit retired and career-break lawyers whose sole purpose is to undertake pro bono legal work to attend relevant training sessions without charge.

Recommendation 7

State-based litigation and disbursement assistance schemes should review their operations in consultation with the Centre to determine how they could improve the provision of and access to disbursement assistance in pro bono matters.

Chapter 2 Introduction

3. Introduction

In April 2008, Australia's Prime Minister, the Hon Kevin Rudd MP, invited over 1,000 Australians to participate in the Australia 2020 Summit to discuss the 10 major policy challenges facing the country.¹ It was at the Summit that 'Golden Gurus' (being senior Australians) were recognised as an invaluable resource to address the Productivity Agenda.² The concept is based on the premise that Golden Gurus have the skills, good will and time to offer in their fields of expertise and experience, and that much could be gained by creating more opportunities for them to share their experience and knowledge.

In August 2008, the Centre's Board and Advisory Council met for a Strategic Planning Day to determine the Centre's key priorities for the 2008/2009 financial year. At this meeting it was noted that as the Australian population ages and baby-boomers approach retirement, there will inevitably be an increase in the number of lawyers retiring from legal practice. These lawyers represent a potentially significant resource that can be leveraged to meet the legal needs of disadvantaged people. The Centre was aware that some retired and career-break lawyers already provide pro bono legal services.

This project aims to build upon the concept that retiring and retired lawyers, as the Golden Gurus of the legal profession, have much to offer in terms of skills and knowledge. Its premise is that much could be gained from promoting existing pro bono opportunities, and that new ways will be identified for these lawyers to help meet legal need.

Issues that have been examined include whether retiring, retired and career-break lawyers could help meet legal need in the community, how they could best meet legal need, and what constraints they face in providing pro bono legal assistance. Further, the Centre considered what service delivery models (if any) might be appropriate to better engage these lawyers in pro bono legal services.

¹ Department of Education, Employment and Workplace Relations, *Golden Gurus* (2009) <<http://www.deewr.gov.au/Employment/Programs/Jobwise/GoldenGurus/Pages/default.aspx>> 1 June 2009.

² One of the ten streams of the Summit was called the 'Productivity Agenda - education, skills, training, science and innovation'. This stream was developed on the basis that the productivity and workforce participation of the Australian population and the effective management and retention of human capital are critical to Australia's success and prosperity. See Australian Government, *Australia 2020 Summit - Final Report: The productivity agenda* (May 2008) <http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf> 9 September 2009.

4. Defining retired, retiring and career-break lawyers

4.1 *Retired lawyers*

There is no statutory retirement age in Australia - it is marked by the cessation of gainful employment. The retirement incomes system in Australia³ envisages retirement will occur between the ages of 55 to 70 years, during which time retirement savings can continue to accumulate or retirement income can be accessed. In practice, it is often affiliated with the age at which individuals can access the aged pension, which is due to be increased from 65 in 2017 to 67 years of age by 2023.⁴ This nominal retirement age is however likely to be of less significance to legal practitioners contemplating retirement, since few will have access to the aged pension, relying predominantly on superannuation and investments.

A key message derived from the Centre's consultations is that there is no clear picture of a typical retirement from legal practice. No two participants shared the same retirement plans or experience. Retirement is no longer synonymous with a life of hobbies when a person reaches the predetermined retirement age.

The concept of retirement seems to be changing from complete withdrawal from the workforce to a slow winding down from paid employment, characterised by participation in part-time, contract, volunteer or pro bono legal work.

Participants in the Centre's focus and discussion groups generally fell into the following categories:

- those forced to retire - due to family issues, health reasons or redundancy
- those who chose to retire - due to age, life choices or working conditions, and
- those approaching retirement.

4.2 *Retiring lawyers*

For the purpose of this report the Centre focused on lawyers of the 'baby-boomer' generation (being those aged between 45 and 64), as this is where the 'demographic

³ Australia's retirement income system has three pillars: the aged pension, compulsory saving through the superannuation guarantee and voluntary superannuation saving. Commonwealth of Australia, *Australia's future tax system - The retirement income system: Report on strategic issues* (2009) <http://taxreview.treasury.gov.au/content/downloads/retirement_income_report_strategic_issues/retirement_income_report_20090515.pdf> 15 January 2010.

⁴ Patricia Karvellas, 'Retirement put on hold until 67 years', *The Australian* (Melbourne) <<http://www.theaustralian.com.au/news/retirement-put-on-hold-until-67-years/story-0-1225711580776>> 10 December 2009.

bulge' exists. The oldest of this generation are currently approaching retirement, thereby constituting 'retiring lawyers'.

4.3 *Career-break lawyers*

For the purposes of this report, career-break lawyers are those qualified legal practitioners who have taken leave from legal practice. They fall into three main groups:

- those who are between legal jobs
- those who have taken temporary leave from legal practice to work in a different capacity, and
- those who have taken leave from legal practice for other reasons (such as parental responsibilities).

The Centre is aware that some career-break lawyers seek pro bono legal opportunities prior to transitioning back into full or part-time practice.

5. **Qualifications**

The Centre appreciates the feedback that it has received from many key stakeholders in refining the scope of the project and preparing this report. As a result of this feedback, the report considers ways in which career-break lawyers might contribute to meeting legal need, but does not advocate that career-break lawyers should be recruited to undertake pro bono legal work (particularly those on parental leave).

The Centre acknowledges that a separate approach to engaging retired or career-break lawyers in any new projects should be considered carefully to prevent the fragmentation of existing legal services.

Chapter 3 Methodology

6. Genesis for the project

The project came about as a result of the Centre's observation of three factors:

- (a) evidence of continued unmet need, particularly in civil and family law;
- (b) as the baby-boomer generation approaches retirement, large numbers of legal practitioners are likely to be leaving the profession, thereby creating a potentially valuable and untapped resource to meet legal need; and
- (c) although infrastructure and mechanisms exist for legal professionals to volunteer should they have an interest in doing so, there is a relatively low take-up of these opportunities by retired and career-break lawyers.

7. Project methodology

7.1 Methodology

The project progressed in two stages and culminated in the preparation of this report:

(a) Research

The Centre gathered and analysed demographic data on the legal profession (and baby boomers in particular) and their involvement in pro bono activities.⁵ This was coupled with literature research on evidence of legal need, existing retired lawyer projects abroad and existing legal volunteer opportunities.⁶ Findings from the demographic research are contained in **Chapter 5** of the report and were used to inform the analysis and findings.

(b) Consultations

In January 2009, the Centre published a Discussion Paper on the project. This paper provided background information to, and invited comment on, if and how retiring lawyers might be able to meet unmet legal need. The paper was circulated to 68 stakeholders and was subsequently discussed at roundtable meetings in Brisbane, Sydney and Melbourne in

⁵ Limited demographic data was available for legal professionals in the Australian Capital Territory, South Australia, Western Australia, Northern Territory and Tasmania. Accordingly, this report focuses on the data obtained from legal professional associations in NSW, Queensland and Victoria.

⁶ At the time this research project was undertaken, there was the NSW Law and Justice Foundation had commenced but not concluded or published its report on legal need in Australia. The report is due to be published in 2011.

March 2009. The roundtables were attended by 34 representatives from a good cross-section of the legal profession.

Various articles were published that encouraged retiring, retired and career-break lawyers to contribute to the Centre's research.⁷ The Centre also briefed relevant committees on the project, including Australian Women Lawyers and Victorian Women Lawyers, the Society of Notaries in Queensland and the Victorian Access to Justice Committee.

In addition, the Centre conducted interviews with 50 key stakeholders, including Public Interest Law Clearing Houses (**PILCHs**), CLCs, large law firms, bar associations, law societies, law foundations and Legal Aid. It also established small, state-based focus groups totalling 15 retiring and retired lawyers, and six career-break lawyers. Information on the organisations interviewed during the consultation process are contained in **Schedule 1**.

In August 2009, the Centre sent surveys to more than 200 CLCs in Australia to determine the number of existing retired and career-break volunteers and to identify barriers to their pro bono involvement.

7.2 *Limitations of consultations*

A key barrier faced by the Centre in gauging whether retired and career-break lawyers are interested in doing pro bono legal work and their suitability for doing so was its limited access to the contact information of these legal professionals held by their professional associations. The Centre sought to address this by establishing focus groups of retiring, retired and career-break lawyers in NSW, Queensland and Victoria. Whilst discussions generated from these groups helped to identify key opportunities and obstacles associated with engaging retired and career-break lawyers in pro bono, the Centre acknowledges that participants were self-selecting, and that some already provided pro bono assistance. Further, the Centre is aware that due to the small size of these focus groups, their comments (whilst useful) may not represent the views of their colleagues.

⁷ Sophie Grieve, "How to engage retired and career-break lawyers in pro bono legal work " (2009) 83 (5) *Law Institute Journal of Victoria*, 81; Chris Nicholson, 'Pro bono opening for retiring types', *The Australian* (Melbourne), 19 June 2009 <<http://www.theaustralian.com.au/news/pro-bono-opening-for-retiring-types/story-0-1225737403454>> 1 December 2009; Sophie Grieve, 'National Pro Bono Resource Centre Project: How to engage retired and career-break lawyers in pro bono legal work' (2009) 25 *PILCH Matters* <<http://www.pilch.org.au/Newsletter.aspx?ID=17>> 5 January 2010

Chapter 4 Legal need

8. Research on legal need

Despite the paucity of current national data on unmet legal need,⁸ some research has been undertaken on a state basis.⁹ The Centre undertook a basic review of research, studies and reports on legal services in Australia. Several reports were identified that examined the aspects of unmet need, including the *Senate Report on Access to Justice and Legal Aid 2004*,¹⁰ the *Justice Made to Measure - NSW Law and Justice Foundation Survey 2006*,¹¹ and the *Senate Report on Access to Justice 2009 (Senate Report)*.¹²

Key themes identified in the Senate Report, which provides the most recent overview of legal need in Australia, are summarised below. In addition, the Centre reviewed all key submissions to the Senate Legal and Constitutional Affairs References Committee that identified issues relevant to access to justice for disadvantaged people.

The Centre notes that additional research has been undertaken on a state basis into the quantity and nature of unmet legal need. Several other state based reports were identified that addressed the unmet need of people with a mental illness,¹³ homeless people,¹⁴ prisoners,¹⁵ elder persons¹⁶ and Aboriginal people.¹⁷

⁸ The Centre notes that the Law and Justice Foundation of NSW is undertaking research on legal need across Australia. A report is expected to be published in 2011.

⁹ See Mary-Anne Noone, 'Access to Justice Research in Australia' (2006) 31(1) *Alternative Law Journal* 30, which lists some of the legal needs studies undertaken in Australia. For further examples of research projects, see the *Access to Justice and Legal Needs Program* at the Law and Justice Foundation of NSW at <http://www.lawfoundation.net.au/ljf/app/&id=54A6A9F9FFD485F0CA25746400187A24>; and National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007) 92.

¹⁰ The Senate Legal and Constitutional References Committee, *Legal aid and access to justice: Fourth Report*, June 2004, <http://www.aph.gov.au/senate/Committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf> 5 July 2009.

¹¹ C Coumarelos, Z Wei, and AH Zhou, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW. Sydney, 2006 (**Justice Made to Measure**).

¹² The Senate Legal and Constitutional Affairs References Committee, *Report on Access to Justice*, December 2009, <http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/access_to_justice/report/report.pdf> 18 December 2009 (**Senate Report**).

¹³ Maria Karras, Emily McCarron, Abigail Gray & Sam Ardasinski, *On the edge of Justice: The legal needs of people with a mental illness in NSW* (Law and Justice Foundation of New South Wales, Sydney, 2006)

9. Senate Inquiry into Access to Justice 2009

In 2009 the Senate Legal and Constitutional Affairs References Committee undertook an inquiry into Access to Justice which culminated in the production the Senate Report. Whilst the Committee recognised the absence of meaningful data on the unmet need for legal services in Australia, they did find that there is significant unmet need by individuals unable to afford legal assistance.¹⁸

Submissions to the Inquiry identified the following areas of unmet need:

- Family law¹⁹
- Debt recovery²⁰
- Credit and consumer matters²¹
- Employment law including unfair dismissals²²
- Discrimination²³
- Welfare rights/social security²⁴

¹⁴ Suzie Forell, Emily McCarron & Louis Schetzer, *No Home, No Justice? The legal needs of homeless people in NSW* (Law and Justice Foundation of New South Wales, Sydney, 2005)

¹⁵ Anne Grunseit, Suzie Forell & Emily McCarron, *Taking justice into custody: the legal needs of prisoners - summary report, Justice Issues Paper 2* (Law and Justice Foundation of NSW, Sydney, 2008)

¹⁶ Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry & Katrina Wong, *The legal needs of older people in NSW* (Law and Justice Foundation of NSW, Sydney, 2004)

¹⁷ PILCH (Vic), *Report on the Indigenous Justice Research Project* (unpublished) (September 2009)

¹⁸ Senate Report, above n 13, xv, xvi, xviii, 8.

¹⁹ See DLA Phillips Fox, *Submission 32*, 16; Family Court of Australia & Federal Magistrates Court, *Submission 31*, 7, Law Institute of Victoria, *Submission 11*, 7.

²⁰ Demand for credit and debt services provided by CLCs increased by 10 percent in 2009, without a corresponding increase in funding: National Association of Community Legal Centres (**NACLC**), *Submission No. 1*, 9.

²¹ National Legal Aid, *Submission No. 34*, 19-20; NACLC, *Submission No. 1*, 9.

²² Employment services provided by CLCs increased by 22% in 2009: NACLC, *Submission No. 1*, 9. See also Employment Law Centre of WA (Inc.), *Submission No. 26*, 3.

²³ Discrimination matters are one of the highest priority areas for Aboriginal people in NSW: National Legal Aid, *Submission No. 34*, 35. There is also evidence of unmet legal need in disability discrimination: Public Interest Advocacy Centre (**PIAC**), *Submission No. 50*, 20.

- Housing and tenancy²⁵
- Motor vehicle accidents²⁶
- Compensation (including victims of crime)²⁷
- Migration.²⁸

Although the Committee did not specifically consider whether pro bono legal services could be utilised to address these areas of unmet legal need, it noted the Centre's position that pro bono legal services should not become a substitute for appropriately funded legal services by government.²⁹

9.1 *Disadvantaged groups*

The Committee found that the following groups experience greater difficulty in gaining access to justice due to factors such as socioeconomic disadvantage, cultural background and remoteness from mainstream providers:

- Women in family law matters³⁰
- Aboriginal and Torres Strait Islander people (particularly women)³¹

²⁴ The Welfare Rights Centre (NSW) for example has reported a 44% increase in advices given in March 2009 compared to March 2008: NALC, *Submission No. 1*, 10.

²⁵ Tenancy services provided by CLCs have increased 25% in 2009: NALC, *Submission No. 1*, 9.

²⁶ Inadequate funding for civil law services at CLCs removes access to justice for victims of motor vehicle accidents: Public Interest Law Clearing House (Vic) Inc, *Submission No. 33*, 51.

²⁷ In the Northern Territory for example, the Crimes Victims Services Unit does not travel outside Darwin, and Aboriginal clients may not have access to a telephone or Police Station in order to access the Unit's services. Further, Indigenous women are significantly more likely to be victims of violence compared to non-Indigenous women, yet their access to dedicated Indigenous support services is restricted by inadequate policy approaches. See North Australian Aboriginal Justice Agency, *Submission No. 6*, 8; and Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission No. 38*, 3.

²⁸ Law Council of Australia, *Submission No. 12*, 9; Refugee Advice and Casework Service (RACS), *Submission No. 64*, 1.

²⁹ Senate Report, above n 13, 20.

³⁰ Submissions indicated that the low cost cap for legal aid in family law matters discriminates against women, as applicants of domestic violence orders make repeated applications in court, quickly exhausting the grant and leaving applicants without legal assistance. Because higher levels of legal aid funding is available in criminal law matters where men comprise the vast majority of grant recipients, women receive significantly less legal aid funding than men: Senate Report, 47-49.

- People living in regional, rural and remote Australia³²
- Migrants and refugees,³³ and
- Other groups (including homeless people,³⁴ the mentally ill³⁵ and young people³⁶).

10. Other evidence of unmet legal need

The Centre's consultations confirmed that there is significant unmet legal need. Many organisations consulted in 2009 in relation to the Senate Inquiry on Access to Justice emphasised that this unmet need is most pronounced in civil and family law, and that certain groups (such as Aboriginal people, women, people from a non-English speaking background, people in regional, rural and remote areas (**RRR areas**), elderly persons, prisoners and people with a disability) were particularly vulnerable to legal problems and had a need for legal assistance.

Respondents also observed that while key legal providers, such as Legal Aid Commissions, CLCs and ATSILS provide valuable legal services, they do not have the resources to meet current demand. Some organisations emphasised that the culling of civil law services in ATSILS and Legal Aid (due to limited funding) and the significant reduction (or cessation) of litigation by CLCs (due to limited resources) is in itself indicative of legal need.³⁷

10.1 Areas of legal need

The Centre research and consultations suggest that there is a range of civil and family issues affecting people from low socio-economic backgrounds or disadvantaged groups.³⁸ Some legal service providers indicated that there is a significant need for assistance with complex civil litigation against government (particularly in administrative law matters), and

³¹ Senate Report, above n 13, xix.

³² Ibid, 25.

³³ Ibid, 51.

³⁴ Ibid, 32.

³⁵ Ibid, 33.

³⁶ Ibid, 47.

³⁷ DLA Phillips Fox, *Submission 32*, 8-10; Consultation with Mat Tinkler, PILCH (Vic) (Victoria) (June 2009).

³⁸ These included infringement fines, Centrelink disputes and other social security issues, debt and credit problems, housing issues, victims of crime applications (particularly in relation to domestic violence or child sexual assault, mental health, family law (particularly access to children and child protection, employment law and discrimination).

that CLCs and ATSILS do not have the resources to meet this need. This is an area in which pro bono legal resources may be of particular assistance.

10.2 Organisations

The Centre's consultations identified the following areas of legal need for organisations (including CLCs, ATSILS and other community or not-for-profit organisations (**NFPs**)):

- Governance, incorporation and taxation (especially applications for deductible gift recipient status);
- All of the legal issues faced by NFPs in their ongoing operations (such as employment disputes, property/leasing issues, occupational health and safety issues, contractual disputes, and intellectual property issues);
- Contracts, particularly negotiating funding contracts with government; and
- Training in relation to governance issues.³⁹

Information obtained from some law firm pro bono coordinators suggests that demand for pro bono assistance by these organisations has increased nationally, with some firms reporting significant increases in the pro bono referrals related to deductible gift recipient status (**DGR Status**) and contractual issues in the last 18 months.⁴⁰

10.3 Regional, rural and remote areas

The relative lack of access to legal services for disadvantaged people in regional, rural and remote areas is well-documented.⁴¹ Due to isolation, small populations and long distances between town centres, it is difficult for many to access frontline legal services. The Law Council of Australia's 2009 *Report into the Rural, Regional and Remote Areas Lawyers Survey* highlights that many law firms in country Australia lack the resources to meet this

³⁹ Consultations with Liz Morgan, Manager, PILCHConnect (Melbourne, December 2009)

⁴⁰ Email from Toby Blyth (Middletons) to Skye Rose, 23 March 2009; Letter from Michelle Hannon (Gilbert + Tobin) to Skye Rose, 26 March 2009.

⁴¹ For reports and research into the lack of services for rural Australians, see Tony Vinson, *Community adversity and resilience: the distribution of social disadvantage in Victoria and NSW and the mediating role of social cohesion* (St Ignatius Centre for Social Policy Research, March 2004); The Senate Legal and Constitutional References Committee, above n 11, 113-136; cited in National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 92, 111.

legal need.⁴² Of the 1,185 legal practitioners surveyed in RRR areas, 43% indicated that their practice did not currently have enough lawyers to service their client base.⁴³ Many rural firms are already providing significant pro bono legal services and have limited capacity to do more.⁴⁴ If, as the report suggests, 42% of lawyers in country Australia retire in the next five to ten years,⁴⁵ there will be an even greater shortage of lawyers able to meet this legal need.

⁴² Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey* (2009) <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=58075666-1E4F-17FA-D22C-92C2CC13DA7C&siteName=lca> 25 November 2009.

⁴³ *Ibid*, 5.

⁴⁴ M Gawler, 'Pro Bono in the Suburbs and Country', Paper given at the first National Pro Bono Conference, August 2000, cited in Victorian Parliament Law Reform Committee, *Review of Legal Services in Regional and Rural Victoria*, May 2001 at 273; National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 92, 112.

⁴⁵ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, above n 43, 5.

Chapter 5 Profiling retiring, retired and career-break lawyers

11. Baby boomers

The Australian Bureau of Statistics defines baby boomers as those born between 1946 and 1965 inclusive.⁴⁶ According to the ABS definition, in 2009 baby boomers were aged between 45 and 64 years of age, meaning that the oldest of the baby boomers are currently approaching retirement. This section focuses primarily on those baby boomers aged between 55 and 64, as they are likely to retire in the next ten years. Demographic data on lawyers in this age bracket was only available for Queensland and Victoria, whilst more general data was available for New South Wales.

12. Demographic data

12.1 Overview

Senior Australians comprise a significant proportion of Australia's population. Australian Bureau of Statistics (**ABS**) data indicates that the population aged 65 years and over will increase rapidly over the next 40 years both in terms of numbers and proportions of the total population.⁴⁷ By 2026 for example, those aged 65 years and over will increase from 2.8 million (as at June 2007) to between 5.1 million and 5.3 million.⁴⁸ This large increase in those aged 65 years and over can be attributed to the ageing baby boomer generation, since in 2026 the youngest of the baby boomers (those born in 1965) will be 61 years of age. The annual growth rate for people aged 65 years and over will peak in 2012, when the large cohort born in 1947, together with naturalised Australians born in the same year, reach 65 years of age.⁴⁹

⁴⁶ This definition reflects the views of leading demographers based on those years having a total fertility rate at or above 3.0. Since 1966 the fertility rate in Australia has slowly declined. See Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2004*

<<http://www.abs.gov.au/ausstats/abs@.nsf/1020492cfd63696ca2568a1002477b5/47f151c90ade4c73ca256e9e001f8973!OpenDocument>> 1 December 2009.

⁴⁷ Australian Bureau of Statistics, *Population Projections Australia: 2006 to 2101- 3222.0*

<[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0E09CCC14E4C94F6CA2574B9001626FE/\\$File/3222_0_2006%20to%202101.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/0E09CCC14E4C94F6CA2574B9001626FE/$File/3222_0_2006%20to%202101.pdf)> 22 January 2010.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

According to the Productivity Commission, by the year 2030, 23.4 percent of the Australian population will be aged 65 and over, almost double the present proportion.⁵⁰

12.2 *Legal profession*

There are approximately 56,000 legal professionals in Australia.⁵¹ In the absence of national demographic data on the Australian legal profession, the Centre sought information regarding the profile of legal professionals in each state from legal professional associations across the country. As there are great variations in the data that professional associations collect of their members, it is difficult to paint a coherent national picture of the demographics of legal profession and those who are retired or approaching retirement.

Whilst legal professional associations from all States and Territories provided the Centre with data on lawyers approaching retirement or already retired, this section focuses primarily on solicitors in New South Wales, Victoria and Queensland, which were the only states with available demographic data on solicitors of the baby-boomer generation. These states are home to approximately 82 percent of the Australian legal profession.⁵²

The Law Society of New South Wales is the only professional association that has comprehensive and publicly available data on the profile of the legal profession, including a break-down by age and employment sector, as well as projections of the profile of solicitors in the year 2015.⁵³ Data from other professional associations was less comprehensive and not as readily available.

⁵⁰ Productivity Commission, *Economic Implications of An Ageing Australia* (2005) <www.pc.gov.au/projects/study/ageing/docs/finalreport> 28 January 2010.

⁵¹ John Corcoran, President, Law Council of Australia, *National and International Trends for the Legal Profession* (speech given at the Law Society of WA Law Week Luncheon, 15 September 2009) 3.

⁵² Of the 56,000 legal practitioners in Australia, 24,849 practise in NSW, 7,834 practise in Queensland, and 13,511 practise in Victoria. See Ibid; Urbis Keys Young, *2008 Profile of Solicitors in NSW*, (prepared for the Law Society of NSW), 11 <<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/025941.pdf>> 10 January 2010; New South Wales Bar Association, 'Section 1, All Members of the NSW Bar Association (practising and non-practising)' in *Statistics Booklet* (October 2008), 3 <http://www.nswbar.asn.au/docs/about/barstats/barstats_index.php> 22 January 2010; Queensland Law Society, *Annual Report 2008*, 8 <http://www.qjs.com.au/content/lwp/wcm/resources/file/eb2b5f483b8a557/2007-08-annual-report_web.pdf> 22 January 2010; Email from Nicole King, Legal Services Board, to Skye Rose, dated 28 January 2010.

⁵³ The Law Society of NSW commissioned a report on the predicted characteristics of solicitors in NSW in 2015 from social research company Urbis Keys Young. The projected profile of the legal profession in 2015 is based on the Law Society's membership database and information collected in its annual practising certificate surveys. The report did not identify any projections in relation to the changing age demographic of the legal profession that

Some general observations on the legal profession nationally can be made based on the data obtained. The number of lawyers in Australia aged 50 years and over is steadily increasing.⁵⁴ As baby boomers get older, there will inevitably be an increase in the number of lawyers retiring from legal practice. Some suggest that this is likely to have considerable practical implications for the workforce and for access to justice.⁵⁵ This exodus from the legal profession is likely to create a shortage in skills and experience to meet the high levels of unmet legal need. Notwithstanding that the numbers and proportion of those retiring are projected to increase, the impact of this is likely to vary from State to State.

12.3 *Legal profession in NSW*

NSW is home to approximately 22,105 solicitors⁵⁶ and 2,744 barristers,⁵⁷ making up approximately 44% of Australia's legal profession.

On 1 October 2008, the average age of the solicitors in NSW was 41.3 years, with half of the profession aged less than 40 years.⁵⁸ Roughly one quarter of the solicitors in NSW are aged between 50 and 69 (5,694 solicitors).⁵⁹ Solicitors aged between 50 and 59 years counted for 18.6 percent of solicitors (4,111 solicitors), with solicitors aged 60-69 comprising a further 7.2 percent (1,583 solicitors).⁶⁰

The majority of solicitors in NSW (70.3 percent) continue to work in private practice. Of the other major sectors of the profession, 18.3 percent are in-house solicitors and 11.4 percent

were of relevance to this report. See Urbis Keys Young, *The Solicitors of NSW in 2015: Final Report J79-04*, (prepared for the Law Society of NSW)
<<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/025942.pdf>> 21 January 2010.

⁵⁴ Data was provided by the law societies of New South Wales, Victoria, Queensland, South Australia, the Northern Territory, the Australian Capital Territory, and the Law Council of Australia. No data was available for Western Australia or Tasmania.

⁵⁵ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, above n 43, 6.

⁵⁶ As at 1 October 2008: Urbis Keys Young, *2008 Profile of Solicitors in NSW*, above n 53, 11.

⁵⁷ New South Wales Bar Association, above n 53, 3.

⁵⁸ Urbis Keys Young, *2008 Profile of Solicitors in NSW*, above n 53, 11.

⁵⁹ *Ibid.*, 8.

⁶⁰ Since the Law Society of NSW was not able to provide the Centre with demographic data on the numbers of practising solicitors aged between 55 and 64, the Centre was only able to quantify the number of practising solicitors aged between 50 and 69 for 2008. The NSW figures in this report look at a wider sample of lawyers than in Queensland and Victoria, where statistics were available for lawyers aged 55-64 years of age.

are government solicitors.⁶¹ Of all solicitors in private practice, 20.3 percent (3,157 solicitors) were aged between 50 and 59 years old, and a further 9.1 percent (1,411) were aged between 60-69 years.⁶² Of all government lawyers, 20.9 percent (526 solicitors) were aged 50-59 and a further 4.1 percent (104 solicitors) were aged between 60 and 69.⁶³ Of all in-house solicitors, 10.6 percent (428 solicitors) were aged between 50 and 59 years, and a further 1.6 percent (66 solicitors) were aged between 60 and 69.⁶⁴

| Year | No. of practising certificates held in NSW | No of solicitors aged 50+ | Percentage of all practising solicitors in NSW ⁶⁵ |
|------|--|---------------------------|--|
| 2004 | 18,934 | 4,637 | 24.4% |
| 2005 | 19,809 | 5,017 | 25.32% |
| 2006 | 20,330 | 5,167 | 25.41% |
| 2007 | 21,255 | 4,682 | 22.0% |
| 2008 | 22,105 | 5,694** | 25.75% |

** Includes solicitors aged 50-69 only.

12.4 *Legal profession in Queensland*

As at 30 June 2008, there were 7,834 practising solicitors in Queensland, being approximately 13.9 percent of Australia's legal profession.⁶⁶

In Queensland the number and proportion of solicitors aged between 55 and 64 has been steadily increasing in the last five years. In 2004, there were approximately 640 practising solicitors in Queensland aged between 55 and 64, constituting 10.4 percent of all practising solicitors in the State. In 2008, the number of solicitors in that age bracket had risen to 916

⁶¹ Ibid, 17.

⁶² Ibid, 17, 21.

⁶³ Ibid, 17, 27.

⁶⁴ Ibid 17, 29.

⁶⁵ Note that because data was only available for lawyers aged 50-59 and 60+ , the percentage of lawyers in this bracket is higher than in other states where data was available for lawyers aged 55-64 years old.

⁶⁶ Queensland Law Society, above n 53, 8.

(an increase of over 43 percent) constituting 12.2 percent of all practising solicitors in Queensland.

| Year | No. of practising certificates held in Queensland | No of solicitors aged 55-64 | Percentage of all practising solicitors in Queensland |
|------|---|-----------------------------|---|
| 2004 | 6,137 | 640 | 10.4% |
| 2005 | 6,680 | 712 | 10.6% |
| 2006 | 7,114 | 816 | 11.4% |
| 2007 | 7,967 | 905 | 11.35% |
| 2008 | 7,527 | 916 | 12.2% |

12.5 *Legal profession in Victoria*

As at 30 June 2008, there were 13,511 practising solicitors in Victoria, being approximately 24.5 percent of the legal profession in Australia.⁶⁷

As in Queensland, the number and proportion of solicitors aged between 55 and 64 has steadily increased in Victoria in the last five years. In 2004, there were approximately 1,608 practising solicitors in Victoria aged between 55 and 64, constituting 11.9 percent of all practising solicitors in the State. In 2008, the number of solicitors in that age bracket had risen to 1,973 (an increase of over 22 percent).⁶⁸

Twenty seven percent of the legal profession in Victoria as at 30 June 2009 was aged 51 years or older.⁶⁹ 895 legal practitioners did not renew their practising certificates in the year 30 June 2009.⁷⁰

⁶⁷ Email from Nicole King to Skye Rose, above n 53.

⁶⁸ Ibid.

⁶⁹ Legal Services Board of Victoria, *Annual Report 2009*, 15
<<http://www.lsb.vic.gov.au/documents/LSB2009AnnualReport.pdf>> 22 January 2010.

⁷⁰ Ibid, 14.

| Year | No. of practising certificates held in Victoria | No of solicitors aged 55-64 | Percentage of all practising solicitors in Victoria |
|------|---|-----------------------------|---|
| 2004 | 13,511 | 1,608 | 11.9% |
| 2005 | 13,889 | 1,690 | 12.2% |
| 2006 | 14,597 | 1,802 | 12.3% |
| 2007 | 15,128 | 1,879 | 12.4% |
| 2008 | 15,635 | 1,973 | 12.6% |

12.6 *Regional, rural and remote areas*

The Law Council of Australia's 2009 *Report into the Rural, Regional and Remote Areas Lawyers Survey* suggests that impact of the ageing legal profession in RRR areas on access to justice is likely to be most pronounced in country Australia, particularly in light of increased difficulties attracting and retaining legal practitioners in these areas.⁷¹ There is evidence that the numbers of lawyers in regional, rural and remote areas is either static or falling, adding pressure on those remaining (generally older) lawyers to meet legal need.⁷² The report found that 35 percent of respondents to their survey on lawyers in RRR areas are nearing or past their retirement age (being 50 years or over),⁷³ and that a disproportionately large number of lawyers in regional, rural and remote areas, many of whom are sole practitioners, will retire in the next five to ten years.⁷⁴

Overall, 42% of respondents indicated that they do not intend to practise law in five years time.⁷⁵ Retirement was cited as the most common reason that lawyers would leave regional, rural and remote areas.

⁷¹ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, above n 43, 5.

⁷² National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 112.

⁷³ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, above n 43, 8.

⁷⁴ *Ibid.*, 5.

⁷⁵ *Ibid.*, 5.

13. Practice type

There is an absence of national data on where lawyers approaching retirement practise law. Although legal professional associations collect data on where their members work (i.e. sole practice, government department, corporation, law firm), no nationally available data isolates type of practice or workplace by age, thus giving a breakdown of the types of practices.

The Law Society of NSW has reported that the proportion of over 50's practitioners is the highest in the private firm segment of the profession, which comprises over 70% of all NSW solicitors.⁷⁶ Large law firms are not however likely to be a source of retiring lawyers. According to the partnership survey published by the *Australian Financial Review* in 2008, the proportion of partners aged 56+ employed by the 26 major law firms was minute compared with partners in all other age brackets.⁷⁷ The survey revealed that only 2.8% of partners were over 60 years old, with partners over the age of 65 comprising less than one percent of all partners.⁷⁸ Consultations with large law firms also indicate that few have retiring lawyers, as many lawyers in the baby-boomer generation move on to positions with other organisations or into consultancy roles. It is therefore unlikely that these firms will be a source of pro bono volunteers. This suggests that potential volunteers may be more likely to come from sole practices, or small or medium sized firms, with a smaller proportion from the judiciary, and government departments or corporations.

14. Skills and experience

The Centre's national survey of the pro bono legal work done by individual Australian solicitors in 2007 (**Solicitor Survey**) indicates that senior legal practitioners (being those with 30 + years experience) were more likely than other groups to do transactional work (as the second highest type of work after advice) and more likely to do it for not-for profit organisations than for individuals.⁷⁹ This is quite a different pattern from those still in the early years of practice, who are more likely to do advice work and to do it for individuals.⁸⁰

⁷⁶ Law Society of New South Wales, *Retaining Experienced, Over 50 lawyers in the Profession* (2008) unpublished.

⁷⁷ Ibid.

⁷⁸ 'AFR Partnership Survey', *Australian Financial Review*, 27 June 2008, 56.

⁷⁹ National Pro Bono Resource Centre, *National Survey – Report on the pro bono legal work done by individual Australian solicitors* (December 2007)

<http://www.nationalprobono.org.au/ssl/CMS/files_cms/SolicitorSurveyReport-Final.pdf> 14.

Due to the small size of the Centre's focus groups with retiring, retired and career-break lawyers, the Centre was not able to identify any area of practice that would necessarily lend itself to a particular pro bono project. Focus groups run in Queensland, New South Wales and Victoria highlighted the diversity of practice areas, willingness to undertake pro bono in an area outside their traditional practice area, and willingness to undertake training.

Participants generally shared the view that their skills and experience placed them in a good position to remain in the workforce for as long as they wanted, although participants expressed mixed views as to whether they would want to use their specific skills and expertise to meet legal need, or provide pro bono legal assistance in a different area of law. Consistent with the Centre's Solicitor Survey however, many retiring and retired lawyers expressed an interest in meeting legal need by providing advice to not-for-profit organisations. Some indicated that their skills would be relevant to a range of roles (such as corporate governance, advising NFPs, general advice work in CLCs) while others were less optimistic. Management and mentoring skills were also identified as skills that could be utilised to provide leadership and managerial assistance to not-for-profit and community legal organisations.

The following comments obtained from focus groups provide some insight into the factors influencing lawyers' participation in and practice areas of pro bono work:

- *The Self-Representation Civil Law Service provides me with a good opportunity to give back to the community in an ad hoc manner. When I have a day free I can attend the clinic to assist unrepresented litigants without having to commit to a matter long-term.*
- *I'll continue providing pro bono assistance to NFPs because it's challenging and I like the strategic thinking. It's also less emotionally taxing than acting for individual clients.*
- *You cannot be too choosy with pro bono matters because there is existing legal need in a particular area and so learning and refreshing of knowledge is needed.*
- *I'd be happy to work at a CLC because it provides a variety in legal practice, mentoring opportunities and has a sense of community to relieve the sense of isolation.*
- *I would like a peaceful and happy life in retirement so I'm unlikely to work in criminal law and family law again.*

⁸⁰ Ibid, 14.

15. Current involvement in pro bono

The 2006 ABS Report *Voluntary Work Australia* estimates that the number of volunteers aged 18 years and over in 2006 was 34% of the Australian population (up 2% from 2001)⁸¹ and of that, 4.4% were involved in law/justice/political organisations.⁸² The report indicated that twice as many men aged 65 years and over volunteer in law/ justice/ political organisations as women of the same age group.⁸³ This could be reflective of the gender divide in the legal profession in that age group.

The Centre's national survey of the pro bono legal work done by individual Australian solicitors indicates that although age is not a major factor in determining who undertakes pro bono work, there is a tendency for more lawyers to do pro bono work as they get older.⁸⁴ This was consistent with information gathered in the Centre's focus groups, which indicated that pro bono and volunteer work featured in most of the participants' retirement plans.

Research undertaken by the Centre suggests that some retired and career-break lawyers currently avail themselves of existing volunteer opportunities at CLCs, though few volunteer at ATSILS.⁸⁵ In August 2009, the Centre surveyed more than 200 CLCs in Australia to assess the current involvement of retired and career-break lawyers at CLCs. The survey aimed to ascertain how many retired and career-break lawyers currently volunteer at CLCs, the barriers to volunteering, and whether CLCs would benefit from greater pro bono assistance by these lawyers. Of the 43 CLCs that responded to the survey (21.5%), nine reported having existing retired lawyer volunteers (with a total of 28 retired lawyer volunteers), whilst 12 out of 43 centres reported having existing career-break volunteer lawyers (with a total of between 33-43 career-break volunteer lawyers).

⁸¹ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 46.

⁸² Australian Bureau of Statistics, *Voluntary Work, Australia* (2006) 4441.0
<[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C52862862C082577CA25731000198615/\\$File/44410_2006.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C52862862C082577CA25731000198615/$File/44410_2006.pdf)> 46.

⁸³ 6.5% of male volunteers and 3.3% of female volunteers aged 65 years and over in volunteered in law/ justice/ political organisations: see Australian Bureau of Statistics, *Voluntary Work, Australia* (2006) 4441.0
<[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C52862862C082577CA25731000198615/\\$File/44410_2006.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C52862862C082577CA25731000198615/$File/44410_2006.pdf)> 46.

⁸⁴ National Pro Bono Resource Centre, *National Survey - Report on the pro bono legal work done by individual Australian solicitors*, above n 80, 14.

⁸⁵ It has been suggested that this is because there is less awareness of opportunities to volunteer at ATSILS, as well as the limited space, resources and equipment required to engage pro bono lawyers.

Further, research conducted by the Victorian Federation of Community Legal Centres indicates that six out of 33 CLCs in Victoria (16 percent) had retired lawyers or career-break volunteer lawyers working with them.⁸⁶

Given that approximately 2,200 lawyers provided pro bono legal work at CLCs throughout the country between 2007 and 2008,⁸⁷ these surveys confirm that participation rates by these lawyers are fairly low.

The Centres consultations suggest that retired and career-break lawyers are not volunteering for the following reasons:

- they have no knowledge of the CLC or the service it provides
- there are few senior lawyers located in RRR areas
- they have no knowledge of specialist area of law (e.g. family law and community law)
- they have concerns about their ability and the currency of their legal knowledge,
- they are not interested in participating.

While these lawyers may also provide pro bono legal assistance through the pro bono schemes run by the various legal professional associations and duty lawyer schemes, consultations with these organisations suggest that few retired and career-break lawyers currently make use of the schemes. However, evidence provided by pro bono referral schemes suggest that a reasonable number of lawyers approaching retirement still provide pro bono legal assistance through these schemes whilst still in legal practice. The key constraints identified in these consultations were the availability of professional indemnity insurance and the cost of practising certificates.

16. Motivation

While there is little consensus about what motivates people to volunteer, a study of CLC volunteers in NSW suggests that volunteers are largely driven by altruistic reasons.⁸⁸ The primary motivating factors were the opportunity to help others, working for social justice, a strong agreement with the philosophy of a CLC, a sense of fulfilment and the desire to

⁸⁶ Victorian Federation of Community Legal Centres, *2009 Census* (unpublished) 12.

⁸⁷ National Association of Community Legal Centres, *Why community legal centres are good value* (2008) 6 <http://www.pc.gov.au/__data/assets/pdf_file/0004/89644/sub099.pdf> 12 December 2009.

⁸⁸ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 46.

make a difference.⁸⁹ Career development and work experience were also cited as less significant instrumental motives, though these motivations are arguably irrelevant for lawyers nearing the end of their professional career.

The Centre's consultations and focus groups with retired and retiring lawyers confirmed that these lawyers are primarily driven to undertake pro bono work for altruistic reasons, intellectual stimulation is another relevant (though less significant) driver.

⁸⁹ R Melville, *My Time is Not a Gift: An Exploratory Study of NSW Community Legal Centre Volunteers* (Institute of Social Change and Critical Inquiry, University of Wollongong, 2002) 31, cited in National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 47.

Chapter 6 Legal service providers

17. Overview

As well as the private legal profession, the key legal service providers are Legal Aid Commissions, CLCs and ATSILS. The pro bono legal services provided by lawyers are intended to fill gaps in the government funded legal services in each State and Territory. Figures released by the Australian Bureau of Statistics in 2008 indicate that legal practitioners spent an estimated 955,400 hours on pro bono work during the 2007-08 financial year.⁹⁰ Law firms (including sole practitioners) undertook 78.7% of this pro bono work, with barristers delivering the remaining 21.3%.⁹¹

18. Legal Aid Commissions

Limited funding of Legal Aid Commissions has restricted their capacity to meet legal need. Legal Aid Commissions have had to apply restrictive means and merits tests which exclude many people from receiving grants of legal aid. This is particularly evident in civil law matters where grants of legal aid are very difficult, if not impossible, to obtain.⁹² The availability of legal aid in civil law matters was dramatically reduced in 1996 when the Commonwealth reduced its contribution to legal aid funding. While the Commonwealth used to provide 55 percent of legal aid funding, this has fallen to less than a third.⁹³

Similarly, many people involved in family law proceedings are ineligible for legal aid or exhaust their grant through lengthy proceedings.⁹⁴ Anecdotally, pro bono referral schemes in NSW, Queensland, Victoria and the ACT have noted that restrictive legal aid guidelines have led to a surge in requests for pro bono legal assistance in family law. Limited legal aid

⁹⁰ Australian Bureau of Statistics, *8667.0 - Legal Services, Australia, 2007-08* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8667.0Main%20Features82007-08?opendocument&tabname=Summary&prodno=8667.0&issue=2007-08&num=&view=>>> 16 December 2009.

⁹¹ Ibid

⁹² This varies from State to State: National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 96-97.

⁹³ Victorian Government, *Attorney-General's Justice Statement 2 (2008)* 36 <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Vision/JUSTICE+-+Justice+Statement+2+-+interactive+and+PDF>> 20 January 2010.

⁹⁴ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 96-97.

funding and more restrictive means and merits tests have also been accompanied by the rising incidence of self-representation.⁹⁵

19. Community Legal Centres

CLCs are so overwhelmed by demand for their services that they cannot sustain current levels of service or meet emerging gaps in legal services.⁹⁶ To manage this demand, many CLCs have had to reduce the services offered by applying restrictive guidelines, particularly in civil and family law. According to the National Association of Community Legal Centres (**NACLC**), this trend has been accompanied by a reluctance to take on litigation in courts and tribunals, as these matters are more resource intensive and prevent CLCs from meeting the overwhelming demand for their day-to-day services.⁹⁷

Consequently, even where a client has rights that could be enforced or legal remedies available, litigation is not pursued. DLA Phillips Fox suggests that this aversion to litigation will create a skills deficit in the CLC sector, and ultimately impact on the quality of advice being provided.⁹⁸ Without exposure to court processes, lawyers at CLCs will be less able to advise parties to a dispute of the likely outcome.⁹⁹

Due to funding constraints, CLCs rely heavily on the volunteer support of the legal profession, with more than 2,200 lawyers around Australia regularly providing free legal services to clients at CLCs.¹⁰⁰ In 2007, the Centre conducted a national survey of CLCs

⁹⁵ National Pro Bono Resource Centre, *Submission to the Legal and Constitutional Affairs Committee Inquiry on Access to Justice 2009*, <https://wic041u.server-secure.com/vs155205_secure/CMS/files/cms/Submission%20to%20Senate%20Inquiry%20on%20Access%20to%20Justice%2009.pdf> 9.

⁹⁶ Legal Aid Commission of NSW, *Review of the NSW Community Legal Centres Funding Program - Final Report, June 2006* <<http://www.nswclc.org.au/useful%20reports/NSWclcReviewReport.pdf>> (Review of NSW CLC Funding Program) at 3.3(accessed 30 April 2009) cited in DLA Phillips Fox, *Submission No. 32*, 8.

⁹⁷ National Association of Community Legal Centres, Response to the Internal Review of the CCLSP by the Commonwealth Attorney-General, March 2007, <http://www.naclcqat.socialchange.net.au/multiattachments/2155/DocumentName/NACLC-CLSP_Final.pdf> (NACLC Response) 59, cited in DLA Phillips Fox, *Submission No. 32*, 9.

⁹⁸ DLA Phillips Fox, *Submission No. 32*, 10.

⁹⁹ DLA Phillips Fox, *Submission No. 32*, 10.

¹⁰⁰ National Association of Community Legal Centres, *Submission to the Inquiry into Access for Justice* (April 2009) 5. <<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=0171c7a5-9ce5-4ceb-bec9-e51a1b544f70>> 6 January 2010.

and their use of pro bono assistance.¹⁰¹ Seventy percent of CLCs surveyed by the Centre said that without pro bono assistance, key services such as advice clinics, complex casework and litigation, could not be delivered at current levels. Volunteer lawyers inject significant human capital into CLCs and greatly assist in meeting unmet legal need in the community.

20. **Aboriginal and Torres Strait Islander Legal Services**

Despite evidence of 'overwhelming levels of unmet legal need in Aboriginal communities, particularly in the civil and family law areas',¹⁰² ATSILS have limited (if any) capacity to undertake consultations in civil law that would enable them to refer appropriate matters to pro bono providers. Whilst ATSILS in most States and Territories provide limited civil law services,¹⁰³ the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) no longer offers legal services in civil or family law matters due to lack of funding.¹⁰⁴ Without a dedicated civil legal section, the ALS has had limited resources to identify and refer civil law matters to pro bono providers.¹⁰⁵

21. **Pro bono referral schemes**

The development of pro bono referral schemes operated by legal professional associations,¹⁰⁶ as well as state-based pro bono clearing houses or PILCHs in South Australia, Queensland, NSW and Victoria¹⁰⁷ has occurred since 1992.

¹⁰¹ National Pro Bono Resource Centre, *Community Legal Centres and their use of pro bono assistance: report of a survey undertaken March – July 2007* (September 2007) 14 < http://www.nationalprobono.org.au/ssl/CMS/files_cms/CLCSurveyReport.pdf> 21 January 2010.

¹⁰² Submission from Legal Aid NSW to Law and Justice Foundation (2002), Access to justice and legal needs. Stage 1: Public Consultations <http://www.lawfoundation.net.au/ljf/app/&id=7127CB146A1785BACA257060007D4EAB#bmk_fnote118#bmk_fnote118> (accessed 30 April 2009) cited in DLA Phillips Fox, *Submission No. 32*, 15.

¹⁰³ 90 percent of the work undertaken by ATSILS is in criminal law. See National Pro Bono Resource Centre, *ATSILS Pro Bono Guide* (October 2009) 110 < https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/ATSILS%20guide%20final%20web%2006_11_09.pdf>.

¹⁰⁴ Aboriginal Legal Service (NSW/ACT) website <www.alsnswact.org.au> 15 January 2010.

¹⁰⁵ DLA Phillips Fox, *Submission No. 32*, 15.

¹⁰⁶ These include the Law Society of NSW Pro Bono Scheme, the Bar Association of NSW Legal Assistance Scheme, the Law Institute of Victoria Legal Assistance Scheme, the Victorian Bar Legal Assistance Scheme, the Law Society of Western Australia Law Access Pro Bono Referral Scheme, the Western Australian Bar Association Pro bono Service, the Law Society of ACT Pro Bono Clearing House, the Northern Territory Law Society Pro

Unlike the professional association schemes, most PILCH operations are substantially funded by fees paid by members that are law firms but may also include barristers, corporate and government legal units. In addition to advice and representation for individuals, a significant proportion of PILCH referrals are requests by NFP groups for non-contentious transactional advice. Some PILCHs also coordinate and support specific projects designed to help meet legal need, such as the Stolen Wages of the Stolen Generation Project and Predatory Lending Project run by PILCH (NSW) and the Public Interest Advocacy Centre (**PIAC**), the QPILCH Consumer Law Advice Clinic, and PILCHConnect (which provides pro bono legal assistance and training to not-for-profit organisations in Victoria).

The following general comments can be made about the schemes:

- The schemes receive far more applications than they are able to refer
- Between 2005 and 2008, most schemes recorded increases in the numbers of applications for assistance¹⁰⁸
- Many have been unable to meet the increased demand for assistance in family law,¹⁰⁹ child care and protection, and credit and debt assistance, and
- Requests for pro bono assistance in regional, rural and remote areas are increasingly difficult to place.¹¹⁰

Bono Clearing House, the Queensland Bar Association Pro Bono Scheme and the Queensland Law Society Pro Bono Scheme

¹⁰⁷ These include JusticeNet (SA), QPILCH, PILCH (NSW) and PILCH (Vic).

¹⁰⁸ National Pro Bono Resource Centre, *Submission to the Legal and Constitutional Affairs Committee Inquiry on Access to Justice 2009*, above n 96, 4.

¹⁰⁹ Consultations with the NSW Law Society, VBLAS, LIVLAS, QPILCH, and the ACT Law Society suggest that family law matters are increasingly difficult to place. This has been attributed to the indeterminate length of family law matters (since some go on for years and are labour intensive), and the small pool of lawyers and barristers with experience in family law. Due to limited pro bono resources, VBLAS has tightened its guidelines and can only accept family law matters which include a special circumstance such as mental health, family violence, financial power imbalance, and CALD background. VBLAS has also established a family law sub-committee to look at ways to increase the numbers of barristers who will accept family law pro bono briefs.

¹¹⁰ Consultation with Michelle Payani, LIVLAS (Victoria) (November 2009).

22. Court-based pro bono schemes

22.1 Federal Courts

The Federal Court of Australia and the Federal Magistrates' Court (**FMC**) in each state and territory administer pro bono schemes referred to as the Order 80 scheme¹¹¹ and Part 12 scheme¹¹² respectively. These schemes require a litigant to be before the court in order to request pro bono assistance. The schemes enable a Judge or Magistrate to refer a self-represented litigant to a legal practitioner (usually a barrister) on the Court's Pro Bono Panel, which is maintained by Registrars of the Court. In the FMC, Magistrates also refer matters to external pro bono schemes and duty lawyer services. Referrals for pro bono assistance are commonly confined to general federal law matters.

Despite the rise in self-representation, few pro bono referrals are made through the Order 80 and Part 12 schemes, and evidence suggests that these have been declining in recent years.¹¹³

22.2 State Courts

Noting that the rise in self-represented litigants is clearly impacting on the administration of justice and their operations, courts and tribunals are individually and collectively considering strategies to secure legal representation for those otherwise unable to get assistance.

In Victoria, the Court of Appeal has employed a self-represented litigants' coordinator to act as a contact point, explain procedures and help manage the expectations of self-represented litigants before the court. In New South Wales, Judges in the Supreme Court,

¹¹¹ Established under Order 80 of the Federal Court Rules (1979) made under the *Federal Court of Australia Act 1976* (Cth).

¹¹² Established under Part 12 of the *Federal Magistrates' Court Rules 2001* made under the *Federal Magistrates Act 1999* (Cth).

¹¹³ A total of 1208 referrals have been made under the Order 80 Scheme since its commencement in 1998. Based on figures to 30 June 2008. The Order 80 Scheme commenced in Victoria in 1998 and in 1999 in other states. Of these, 76% have been in migration matters; and 48% of all referrals have been made in Western Australia. With recent limitation on judicial review on accessibility of judicial review applications, the number of referrals in migration matters has significantly decreased. Order 80 referrals in migration matters fell from 113 in 2002 to 74 in 2003 to 1 in 2008. Statistics on the number of referrals made through the Part 12 Scheme are not available.

District Court and Local Court can refer litigants to a lawyer on each Court's Pro Bono Panel through various legal assistance schemes.¹¹⁴

In Queensland, QPILCH has developed, in conjunction with the courts, a Self-Representation Civil Law Service to assist eligible litigants in person with the conduct of their case in the civil trial jurisdictions of the Supreme and District Courts. A number of retired lawyers have become involved in this program.

22.3 *Duty lawyer schemes*

Previous inquiries have found that duty lawyer schemes coordinated by courts, legal aid bodies, professional associations and groups of local lawyers are of enormous assistance to self-represented litigants and help to alleviate problems with inadequate pleadings and the preparation of evidence.¹¹⁵ Duty lawyers typically provide initial ad hoc, one-off advice, identify cases which may be eligible for legal aid, preliminary consideration of means and merits and whether to refer the matter to another lawyer, but rarely have the resources to represent these individuals in court. Due to limited resources, duty solicitor schemes cannot assist all self-represented litigants and assistance is often restricted to those individuals that are, for example, likely to be imprisoned if convicted. In regional, rural and remote areas where duty solicitor schemes are extremely difficult to resource, individuals may not be able to obtain preliminary advice or representation at all. In courts where no funding is available, duty solicitors or barristers may be provided through a pro bono roster.

23. **Law Firms**

A significant proportion of pro bono legal work is provided in-house at law firms. The past decade has been marked by substantial increases in the size, structure and sophistication of large law firm pro bono programs. In 2008 the Centre conducted a survey on the pro bono legal work of 25 large Australian law firms (**Law Firm Report**). The Law Firm Report noted that 25 of Australia's largest law firms undertook approximately 44.5 hours of pro

¹¹⁴ Information on the number of referrals made was not publicly available through these panel arrangements was not publicly available.

¹¹⁵ Senate Legal and Constitutional References Committee, *Report on legal aid and access to justice*, June 2004, 10.74, (**Fourth Report**) 128
<http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf> 11 October 2009.

bono legal work per lawyer in the previous year. These firms delivered a total of about 194,000 hours of pro bono legal work or an average of 3,740 hours per week.¹¹⁶

Little information is available on the size or structure of pro bono at medium or small law firms, or by sole practitioners. The Centre's national surveys of the legal profession suggest that some medium sized firms have active and well-coordinated pro bono programs, but many do not. Since many sole practitioners undertake pro bono legal work in an informal manner, data on the amount of pro bono legal work undertaken has been difficult to obtain. Anecdotally however, it appears that sole practitioners undertake pro bono legal work especially in small communities where it is an integral part of legal practise.¹¹⁷

¹¹⁶ National Pro Bono Resource Centre, *Report on the pro bono legal work of 25 large Australian Law Firms* (September 2008) 8 <https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Firms%20survey%20report%20FINAL%20100908.pdf>.

¹¹⁷ Jodie Thomson, "Law on the Land", 47 *Law Society Journal* 10, 26.

Chapter 7 Constraints to pro bono

24. Overview

The elimination of constraints to pro bono legal work is essential if retired and career-break lawyers are to be better engaged in pro bono legal work. Though many of the constraints identified below (such as the availability of professional indemnity insurance, cost of practising certificates and disbursements) are faced by the broader legal profession, consultations have revealed that there are particular obstacles to providing pro bono legal assistance that are pertinent to retired and career-break lawyers.

25. Practising certificates

25.1 Cost

Before lawyers can undertake pro bono legal work involving the provision of legal advice or representation, they must hold a practising certificate. The cost of practising certificates in some States and Territories presents a barrier for many lawyers, including retired and career-break lawyers, wanting to provide pro bono legal assistance. Where an individual is not required to hold a practising certificate as part of their employment, the cost of holding a practising certificate is generally born by the individual practitioner, even if it is only required to provide pro bono legal assistance. This cost may be prohibitive for retired lawyers and other lawyers temporarily out of practice (who may not have a steady stream of income), and acts as a disincentive to participation in pro bono service provision.

Only in Victoria and Queensland are lawyers able to apply for a free volunteer practising certificate solely so that they can provide pro bono legal assistance at a CLC. This provides an incentive for lawyers who would not otherwise need a practising certificate, to practice law as volunteers of a CLC.

In other States and Territories, some legal practitioners wanting to obtain a practising certificate for the sole purpose of volunteering at a CLC have to pay for the privilege, the cost of which is not insignificant. In Western Australia for example, the cost of a practising certificate is \$1,000 per annum. This may discourage qualified lawyers, such as retired lawyers who may not otherwise need a practising certificate, from volunteering at a CLC or ATSILS unless they are willing to work as a paralegal under the supervision of a principal solicitor.

CLCs rely heavily on the volunteer support of the legal profession. As mentioned above, volunteer lawyers inject significant human capital into CLCs and greatly assist in meeting unmet legal need in the community. In Victoria, 99 legal practitioners held a Volunteer

Practising Certificate as at 31 March 2008. In Queensland, which has a much smaller legal profession, the Queensland Law Society issued seven Unrestricted Volunteer Practising Certificates and nine Restricted Volunteer Practising Certificates in the 2007/2008 financial year.

In the Centre's joint submission to the Council of Attorneys-General (**COAG**) Taskforce on the National Legal Profession Project in 2009, it was recommended that free practising certificates be made available to lawyers wanting to provide pro bono legal assistance through a CLC, or undertake other pro bono legal work provided that the work is undertaken or supervised by a 'suitably qualified lawyer and there is appropriate professional indemnity insurance.'¹¹⁸ The recommendation was premised on the basis that practitioners who offer their services on a purely voluntary basis should not have to pay for a practising certificate. The availability of free practising certificates would act as an incentive to lawyers who have recently retired from paid legal work or have temporarily left legal practice to continue to make a contribution to the community.

The Centre notes that this issue has been tackled in the United States through the creation of Emeritus Rules in 32 of the States in the United States. Originally aimed at senior and retiring lawyers, the Emeritus Rules encourage qualified, experienced lawyers no longer practising law to provide pro bono legal services by waiving their bar fees so that they can volunteer on a pro bono basis. Further information on the Emeritus Rules is available at the American Bar Association's website at <http://www.abanet.org/legalservices/probono/emeritus.html>.

26. Professional indemnity insurance

Before a lawyer with a practising certificate can undertake pro bono legal work, they must have appropriate professional indemnity insurance cover. This insurance is essential not just to safeguard the lawyer and client against risk, but to provide cover in the event that the lawyer operates outside the scope of his or her practising certificate.

The availability and cost of professional indemnity insurance represents a barrier to many lawyers (particularly government, corporate, and retired or career-break lawyers) from undertaking pro bono legal work.

This has in part been addressed through the availability of professional indemnity insurance coverage for lawyers with a valid practising certificate to undertake pro bono

¹¹⁸ It was suggested that 'suitably qualified' could be defined, for example, as a lawyer with more than five years post-admission experience. See National Pro Bono Resource Centre et al, *Joint Submission to the Task Force for the National Legal Profession Project*, above n 1, 8.

legal work as a volunteer of a CLC or ATSILS.¹¹⁹ Where there is no other professional indemnity insurance in place, lawyers may apply to the Centre to undertake pro bono legal work under the Centre's National Pro Bono Professional Indemnity Insurance Scheme (**Scheme**).¹²⁰ The Centre introduced the Scheme in May 2009 to encourage lawyers without professional indemnity insurance (such as government and corporate lawyers but also retired and career-break lawyers) to undertake pro bono legal work. The Scheme removes one of the major barriers faced by these lawyers wanting to provide pro bono assistance. The Centre has taken out a professional indemnity insurance policy (**Policy**) with LawCover Insurance Pty Ltd that covers lawyers carrying out or involved in the provision of pro bono legal work with the approval of the Centre.

Lawyers with a valid practising certificate may seek cover under the Policy by completing an application form and submitting it to the Centre for approval. If the proposed pro bono work falls within the definition of pro bono legal work based on the definition used by the Law Council of Australia, and there is a solicitor with an 'unrestricted practising certificate' willing to supervise the work,¹²¹ the application will be approved.

Professional indemnity insurance already exists for lawyers working on many pro bono projects. The Policy is a "safety net" policy that only extends to circumstances where no other professional indemnity insurance policy covers an approved project. The Scheme has been created to provide insurance to cover gaps with a view to expanding the range of possible pro bono projects and partnerships. In the six months following the launch of the Policy the Centre approved four pro bono projects for cover under the Policy. Applications for cover under the Policy are expected to increase in 2010 following increased promotion to the legal profession.

The Centre has paid the premium on the Policy and will cover the excess payable on any claim. The Policy provides a high level of cover of \$2,000,000 on any claim. Information on the Scheme and Policy is available on the Centre's website.¹²²

¹¹⁹ CLCs have professional indemnity insurance in place to cover the work undertaken by volunteer lawyers.

¹²⁰ For further information see National Pro Bono Resource Centre website, *National Pro Bono PI Insurance Scheme* <<http://www.nationalprobono.org.au/page.asp?from=8&id=236>> 12 January 2010.

¹²¹ National Pro Bono Resource Centre et al, *Joint Submission to the Task Force for the National Legal Profession Project*, above n 1, 8.

¹²² National Pro Bono Resource Centre website, *National Pro Bono PI Insurance Scheme*, <http://www.nationalprobono.org.au/page.asp?from=8&id=236>.

27. Disbursements and out-of-pocket expenses

The inadequate reimbursement of disbursements and out-of-pocket expenses incurred when carrying out pro bono legal work can be a constraint to pro bono legal work across the profession. Out-of-pocket expenses may include the cost of travel and accommodation (particularly travelling to RRR areas). Disbursements incurred in litigation include counsel fees, interpreter fees, court filing fees, and expert reports, and can be financially significant. Although many practitioners are willing to act pro bono and some may be willing to cover minor expenses, others may not be willing or able to meet the full costs of disbursements associated with a matter. Hence where an individual does not have the capacity to pay these disbursements and cannot obtain disbursement assistance, it is unlikely that a matter will proceed.

For retired lawyers and lawyers temporarily out of work who no longer have an income, these expenses can be particularly prohibitive. Whilst the Centre's consultations with retired lawyers indicated that some may be in a financial position to cover costs associated with travel and accommodation, consultations with various pro bono referral schemes suggest that this rarely occurs.

Some states and territories reimburse legal practitioners for expenses through a disbursement fund, however these are often subject to limitations that reduce their accessibility, such as an application fee, or a condition that an application can only be made once the disbursement has been incurred. Other limitations include caps on the amount that can be recovered, means and merits tests, and conditions that limit assistance to cases where damages are likely to be recovered. Anecdotal evidence by legal practitioners suggests that obtaining funding for reimbursement of disbursements, if available at all, is difficult and time consuming. The Centre has also been informed that for at least two of the funds, applications have been declining in recent times.

Only in NSW and Queensland is there a fund specifically designed to cover disbursements in pro bono cases, including volunteer expenses.¹²³ The QPILCH Disbursement Fund, which was recently developed from fundraisers such as the Walk for Justice, has (for example) paid a retired solicitor to travel to interview a client.

Limited disbursement assistance may also be available to pro bono lawyers through the Volunteers Grants Program administered by the Department of Families, Housing, Community Services and Indigenous Affairs (**FaHCSIA**). CLCs and pro bono clearing

¹²³ National Pro Bono Resource Centre, *Australian Pro Bono Manual (2005)*

<<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=11>> 8 February 2010.

houses are able to apply for a grant of between \$1,000 and \$5,000. This funding enables organisations to 'contribute towards the reimbursement of fuel costs incurred by volunteers when carrying out their voluntary work, as well as for the purchase of equipment used by volunteers, including computers'.¹²⁴ However this process is very competitive as the Department receives over 17,000 applications for this funding, which come in over a six week period. As funding is limited and not all organisations that apply for funding are successful,¹²⁵ it is unclear whether these grants are likely to defray the out-of-pocket expenses incurred by pro bono lawyers working at recipient organisations.

Pro bono legal work, particularly for country lawyers, often requires one to travel a great distance to court. This can involve significant costs, such as the cost of accommodation and petrol, which are rarely recoverable. You can't expect everybody to pay that. Isn't their time enough?

Retired lawyer

28. Mismatch of skills

A commonly perceived barrier to pro bono is the mismatch between the skills and knowledge of pro bono lawyers and the expertise and services typically required by pro bono clients. While most lawyers have a range of generalist and generic skills that can be put to use in the interests of disadvantaged clients, retiring and retired lawyers of the baby boomer generation often have long legal careers behind them, and therefore possess a wealth of skills and experience that could be directed to meet legal need. However, where there is a mismatch of specific skills and/or unfamiliarity with an area of law, practitioners may be understandably reluctant to offer their services.

Whilst research indicates that senior lawyers are more inclined to provide pro bono legal assistance to not-for-profit organisations, some concerns have also been raised about the provision of pro bono legal advice to charities where lawyers do not have specific experience. The law relating to charities is highly specialised (particularly in taxation law). As such, a lawyer with extensive commercial experience may not necessarily have the skills to provide high-quality legal advice to a not-for-profit organisation. Whilst some

¹²⁴ Department of Families, Housing, Community Services and Communities Services and Indigenous Affairs ('FAHCSIA') *Volunteer Grants Program 2008 – Application Guidelines* (2008), http://www.fahcsia.gov.au/sa/volunteers/funding/vgp_round2/Pages/overview.aspx.

¹²⁵ QPILCH's application for a grant for a chair and computer for volunteers for example was recently rejected.

suggest that this has led to the provision of poor quality pro bono legal advice to many charities,¹²⁶ others consider that this is an overstatement of the risks involved, which can be appropriately managed through training and centralised coordination of pro bono referrals (such as through PILCH Connect).

Organisations such as CLCs, large law firms, legal aid and PILCHs have responded to this mismatch in skills by offering training opportunities to increase skills and knowledge transfer, but there is always a balance to be struck between the cost of training lawyers and the benefit to be obtained for clients from their service delivery.

29. Continuing Professional Development

Most practising certificate regimes in Australia require solicitors who hold a current practising certificate to complete CPD, also known as CLE, unless they qualify for an exemption. These requirements are designed to ensure that legal practitioners undertake education relevant to their professional development and practise of the law.

The Centre's consultations indicated that the costs associated with CPD can be prohibitive for some retired or career-break lawyers who are interested in undertaking pro bono legal work outside of CLCs or ATSILS.

The Centre's focus groups suggest that retired and career-break lawyers view CPD/ CLE as a positive experience because it provides a source of collegiality and an ongoing connection to the legal profession, and current knowledge of the law. These focus groups suggest that retired and career-break lawyers do not consider it appropriate to be exempt from these requirements because they ensure that lawyers are aware of recent legal developments in their area of practice.

Some training and CLE or CPD sessions are available free of charge to lawyers acting on a pro bono basis through Legal Aid Commissions, CLCs, pro bono clearing houses or PILCHs, and law firms. Not all seminars provided to pro bono lawyers qualify for CLE or CPD points.

Recognising that the cost of training can be a barrier to pro bono, other industry associations have started offering significant discounts to their members to encourage their re-entry to the workforce and provision of pro bono services. For example, Certified Practising Accountants Australia offers a 50 percent discount on courses to retired

¹²⁶ Tony Featherstone, 'Q & A with Anne Robinson', *Company Director*, November 2009, 16.

members. However many accountants still find this low-cost training unaffordable, given their reduced incomes.¹²⁷

30. Changing technology

Respondents indicated that constantly changing technology can be a challenge for senior and retired lawyers, particularly those with limited computer skills who rely or relied on support staff. Most expressed a willingness to undertake further training to develop their skills and recognised the importance of doing so, particularly when providing pro bono assistance through the already under-resourced CLC and ATSILS sectors. Despite this willingness to undertake training, CLCs, ATSILS and pro bono referral schemes have limited capacity to provide this training and limited resources to provide additional administrative support.

¹²⁷ CPA Australia, *A Mature Solution: The Report of the CPA Australia Mature-Age Employment Project* (September 2006) 13 <http://www.cpaaustralia.com.au/cps/rde/xbcr/SID-3F57FECB-B7E38A43/cpa/mature_age.pdf> 1 December 2009

Chapter 8 Future directions

31. **Overview**

The Centre's research and consultations make it clear that there is significant unmet need for legal services in Australia, especially in relation to family law, debt recovery, credit and consumer matters, employment law, discrimination, social security, housing and tenancy, compensation, and migration. There is also significant capacity to meet this need if retired and career-break lawyers can be encouraged to offer (or continue to offer) their skills and expertise on a pro bono basis to the community, they are suitable to do so and opportunities exist that support their involvement.

In bringing the two together, it will be necessary to identify the potential of these lawyers to meet legal need through collecting better data, encourage participation, overcome the constraints to pro bono, promote opportunities and match skills with legal need.

32. **Identifying the potential**

32.1 *Collecting better data*

Legal professional associations will play a crucial role in collecting data on lawyers to facilitate the matching of retiring, retired and career-break lawyers with pro bono opportunities. These associations, which already collect data on the age, experience and practice area of legal practitioners and have a long-standing relationship with their members, are best equipped to collect better data and promote pro bono opportunities.

More comprehensive data should be collected by legal professional associations on age, gender, area of practice, practice type, geographic area and involvement or willingness to undertake pro bono legal work. With regard to retiring, retired and career-break lawyers, the following information should be collected:

- The number of members approaching retirement (aged 55 years and over) ceasing to practise per annum
- Of those lawyers who do not elect to renew their practising certificates, how many would be willing to:
 - Maintain their practising certificate solely to undertake pro bono legal work (and a reduced or nil fee)
 - Meet CLE or CPD requirements, and
 - Conduct pro bono work in specific areas of identified legal need.

- The areas of law in which retiring, retired or career-break lawyers have practised or currently practice law
- Would they be willing to undertake training in areas outside their expertise to meet legal need?

This data will help determine the extent to which retiring, retired and career-break lawyers would be available to help to meet legal need, and inform whether a separate project to leverage their skills and experience may be appropriate.

33. Attracting retired and career-break lawyers

33.1 *Overcoming the constraints to pro bono*

The National Legal Profession Project currently underway represents a significant opportunity for COAG to introduce a nationally consistent legislative framework for the regulation of the legal profession that facilitates access to justice by encouraging participation in pro bono legal work to the fullest extent possible. Presently, there are a number of inconsistencies across jurisdictions.¹²⁸ Harmonising the rules and procedures in relation to legal practice in Australia is necessary to properly address the constraints to pro bono, particularly with respect to the cost and availability of volunteer practising certificates, and professional indemnity insurance.

All classes of practising certificate in each State and Territory should authorise the holder to undertake pro bono legal work provided that the work is supervised by a suitably qualified lawyer. The practising certificate regimes in each State and Territory should also recognise that professional indemnity insurance is now available to cover pro bono legal work undertaken with the approval of the Centre. These amendments will address the two main barriers faced by retired and career-break lawyers wanting to undertake pro bono legal work.¹²⁹

Individuals providing pro bono legal assistance should be able to recover the reasonable costs that they incur when providing pro bono legal assistance. State-based litigation and disbursement assistance schemes should conduct a thorough review of their operations in consultation with the Centre to determine how they could improve access to disbursement

¹²⁸ See National Pro Bono Resource Centre et al, *Joint Submission to the Task Force for the National Legal Profession Project*, above n 1, 6-7, 9, 11, 13.

¹²⁹ The Centre acknowledges that lawyers can already obtain professional indemnity insurance cover by volunteering at a CLC or ATSILS. This cover is therefore intended to reduce barriers to providing pro bono legal assistance in another capacity.

assistance in pro bono matters. This process should be coordinated and monitored by the Centre with a view to reporting on the scope of this problem and how it might be best addressed.

A broader range of free CLE and CPD sessions should be made available by CLE and CPD providers (as well as other relevant training providers such as Legal Aid Commissions) to retired and career-break lawyers wanting to provide pro bono legal assistance other than at CLCs. 'Pro bono only' practising certificates may facilitate the issue of eligibility for free entry to these sessions.

33.2 *Developing a national web-resource*

A website containing information on the pro bono opportunities available in each State and Territory, as well as the availability of free practising certificates, professional indemnity insurance and CPD sessions would help to encourage retired and career-break lawyers to provide pro bono legal assistance. This may be achieved through expansion of the Centre's existing website, which contains a section for lawyers on '[How to help](#)', or the creation of a stand-alone website designed to direct legal volunteers to areas of legal need. This web-resource should help match legal need with volunteers by providing information on opportunities to volunteer, the availability of free practising certificates, professional indemnity insurance and CPD training, as well as case studies on volunteer success stories. The Centre intends to conduct consultations with existing legal services providers and legal professional associations around Australia in order to facilitate the expansion of its website and consolidate information for legal professionals wanting to volunteer.

33.3 *Promoting opportunities*

The collection of better data should be accompanied by the promotion of existing pro bono opportunities. Most legal professional associations¹³⁰ have expressed a willingness to play a more active role in identifying those lawyers that do not renew their practising certificates, ascertaining their reason for ceasing practise and (where appropriate) notifying them of:

- the availability of free volunteering practising certificates (if applicable)

¹³⁰ Despite evidence of significant unmet legal need in RRR areas, regional law societies have been reluctant to engage with their members to promote a more active pro bono culture in these areas. This is in part due to the already substantial pressures on lawyers in RRR areas to undertake pro bono legal work, their commercial interest in ensuring that lawyers in RRR areas are appropriately paid for work, and their concerns that pro bono will become a substitute for adequately funded legal aid.

- the availability of professional indemnity insurance to undertake pro bono legal work (through CLCs as well as through the Centre's Professional Indemnity Insurance Scheme), and
- pro bono opportunities in their State or Territory.

The Centre could play an active role in collating this data, working with professional associations to produce marketing material on state-based pro bono opportunities, and identifying synergies between the skills and expertise of these lawyers and opportunities to assist. As awareness of pro bono opportunities grows, new projects may develop.

There is very little awareness of, or accessible information about, the opportunities to provide pro bono assistance. I think more retired lawyers would volunteer if they were made aware of the opportunities available. Some retired lawyers will never want to see a court again, so you will never be able to encourage them to practice for the public good. There are however other lawyers who find the idea of retirement repugnant and may be attracted to the idea of community service and ongoing intellectual stimulation. The key to attracting these lawyers is getting the message out there through free publications.

Retired lawyer

34. Matching lawyers with opportunities

34.1 Client focused pro bono

The design, organisation and provision of pro bono legal services should be driven by client need. Flowing from this is the need to importance of identifying client needs and recruiting and equipping lawyers with the necessary skills and expertise to provide appropriate services.¹³¹

The client needs identified in **Chapter 4** of this report make it clear that legal needs vary according to state, region, population and demographics. The Centre is also mindful of the fact that those most aware of unmet legal need are local community organisations, particularly CLCs, ATSILS and legal aid commissions, and that community organisations themselves have important unmet legal needs.¹³²

¹³¹ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 116.

¹³² Large law firms and law foundations are also aware of unmet legal need.

Whilst acknowledging that retired and career-break lawyers should first be directed to existing volunteering opportunities through CLCs, ATSILS and pro bono referral schemes, the collection of better data on their skills combined with an evidence based approach to legal need will enable the Centre and other legal service providers to determine over time how these lawyers might assist, and what other channels might be appropriate.¹³³

Engaging lawyers in pro bono legal work when they are no longer in practice, regardless of how experienced they may be, does however presents some challenges. During consultations, some questioned whether the needs of pro bono clients can be adequately met by lawyers who are no longer in practice. These issues are discussed below.

34.2 *Delivery models*

Several pro bono service delivery models may be appropriate for retired and career-break lawyers to help meet unmet legal need across Australia. The options, both new and existing, are summarised below together with a discussion of their advantages, disadvantages and challenges. The effectiveness of existing pro bono structures to help meet unmet legal need, and the capacity of retired and career-break lawyers to meet legal need through these structures, varies considerably from State to State.

Given that many of the legal service providers are already unable to meet legal need, some have argued that projects specifically designed at better engaging retired and career-break lawyers in pro bono legal work would simply create an extra layer of bureaucracy and expense.

Whilst acknowledging that any new strategies to engage these lawyers should be considered very carefully to avoid the fragmentation of existing services, some have suggested that senior lawyers could help meet legal need through other pathways.

34.3 *Individual volunteering at CLCs and ATSILS*

Opportunities exist for retired and career-break lawyers to provide pro bono legal assistance at CLCs and some ATSILS across Australia. One resource that connects lawyers with CLCs in need of volunteers is the website www.clcvolunteers.net.au,¹³⁴ though many become aware of these opportunities through word of mouth.¹³⁵

¹³³ The Centre notes that the Law and Justice Foundation of NSW is due to publish its report on legal need in Australia in 2011.

¹³⁴ Only 51% of surveyed CLCs were aware of the website www.clcvolunteers.net.au. Whilst 44 percent of respondent CLCs indicated that the website was a useful resource, only 12 percent had been contacted by

Not only are CLCs and ATSILS well-placed to identify whether specific projects may be appropriate to meet unmet legal need in the community, some rely heavily on pro bono lawyers to meet this need. These lawyers come from a broad range of practise areas and types, and range from barristers to law firm secondees.

In addition, they are able to provide volunteers with orientation and training (in cultural awareness and on specific areas of law) to address any mismatch of skills and knowledge.¹³⁶ Volunteers are provided with professional indemnity insurance cover through the NACLCL professional indemnity insurance policy that covers all volunteers at CLCs thus removing the need for them to maintain their own professional indemnity insurance.

The Centre's national survey of CLCs indicated that whilst some CLCs and ATSILS have managed to attract retired and career-break lawyers as volunteers and appreciate their work, many have not and some have reservations about what value can be added.¹³⁷

CLCs identified a number of limitations to using retired and career-break lawyers to meet legal need. Firstly, anecdotal evidence suggests that some CLCs and ATSILS are so under-resourced that they do not have the capacity to supervise additional volunteers. Secondly, the CLC volunteers website indicates that many metropolitan CLCs have an oversupply of volunteers, suggesting that retired lawyers should be directed elsewhere to meet legal need.¹³⁸ In addition, not all CLCs and ATSILS have the space or equipment to accommodate additional volunteers. In Queensland for example, some offices of the Aboriginal Legal Service barely have sufficient desks for paid staff let alone volunteers.¹³⁹

Notwithstanding these obstacles, a majority of CLCs surveyed expressed enthusiasm for better utilising the skills and experience of retired lawyers to help meet unmet legal need and bolster the services that can be provided. Fifty-eight percent of all respondents surveyed indicated that they need more volunteers, with 56 percent indicating that this gap

potential volunteers as a result of the website. National Pro Bono Resource Centre, *Survey of Community Legal Centres* (2009) unpublished.

¹³⁵ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, above n 10, 47.

¹³⁶ Volunteers in CLCs undertake training and orientation on issues issues as becoming culturally attuned to clients who often are from backgrounds of generational poverty. Other resources available to volunteers include cultural awareness training and CLE sessions on areas of legal need.

¹³⁷ National Pro Bono Resource Centre, *Survey of Community Legal Centre*, above n 135.

¹³⁸ CLC volunteers website, <www.clcvolunteers.net.au>

¹³⁹ Consultation with Greg Shadbolt, ATSILS (Queensland) (November 2009).

could be met by retired or career-break lawyers. Only two CLCs (four percent), said that these lawyers would not be likely to fill the gap.

The NACLC thought that retired and career-break lawyers would add the most value by volunteering one to two days each week for a minimum of three to six months on a specific legal project as this would maximise the value to be obtained from training volunteers. As volunteers become acquainted with a CLC over time, less supervision is required. Consultations with other organisations also indicated that retired lawyers could build capacity in civil litigation and family law, as CLCs and ATSILS rarely have the resources to undertake litigation.

Case study 1

Ian Taylor retired as in-house counsel with a major Australian corporation in 2005. After some "time out" he commenced volunteering at CLCs, first at St Kilda in 2007 and later at Brimbank Melton CLC. In 2008 he carried out two paid secondments, one with Brimbank Melton CLC at Deer Park and other with the newly created Prisoner's Legal Service at Melton. He ceased volunteering at St Kilda in 2008 and resumed part-time employment on a 12 month contract with North Melbourne Legal Service in January 2009. In October 2009, he ceased volunteering with Brimbank Melton CLC and commenced part-time employment on a 12 month contract as the Solicitor Advocate with the Prisoners Legal Service.

Speaking personally, Ian notes as follows:

"When I retired I was 62. I took a year off to learn (try to!!) rock n' roll and the guitar. While I had a great time, I realised that I wasn't ready to stop work in the law altogether.

Working in a CLC as both a volunteer and an employee has given me the opportunity to work with some great lawyers (plus law students) and I enjoy very much being here to help people who couldn't otherwise afford legal assistance.

In my CLC career to date, I have worked on an exciting variety of cases and problems spanning legal areas I had not encountered before over my long corporate commercial law involvement.

I've been supervised by, and worked with, some exceptional people. I'm referring to dedicated principal lawyers and other very talented people in the CLC sector. Having to be across so many different areas of law - crime, family, and civil - means that there's a heck of a lot to learn – but all the assistance one could ask for is there and the "new legal areas" learning process or curve is both stimulating and enthralling.

I enjoy being busy, doing the casework, and appreciating the “vibes” of a CLC. I hope to be in CLCs when I'm 80 – and beyond if I can make it there."

Ian Taylor, formerly semi-retired lawyer and now employed lawyer.

Case Study 2

Former Justice of the Supreme Court of the Northern Territory, the Hon. John Nader RFD QC, started doing pro bono legal work approximately five years ago. In that time he has worked closely with the Aboriginal Legal Service in Taree and Newcastle providing pro bono assistance in criminal matters.

"I started doing pro bono legal work because I wanted to assist Aboriginal people. The law was good to me so I felt compelled to give something back to the community. I was also excited to go back to the bar.

I approached the Aboriginal Legal Service in my area to see if they needed assistance. They were chronically understaffed and seemed grateful to have an experienced advocate to take on some of their criminal matters.

I've taken on many criminal matters pro bono since I retired from the bench. My court appearances on these matters generally ranged from one day to one week. I find these matters both challenging and rewarding".

Hon. John Nader RFD QC, retired lawyer

34.4 *Pro bono clearing houses*

During the consultations pro bono clearing houses were identified as possible placement organisations for retired lawyers to undertake pro bono legal work. The rationale behind this idea was that PILCHs in Queensland and NSW are resource poor and may benefit from increased capacity.

QPILCH sees potential in engaging retired lawyers to meet legal need within its organisation. As at November 2009, one retired lawyer and two career-break lawyers were volunteering at QPILCH to expand the services it provides. Consultations with the retired lawyer revealed that his work with the Self Represented Litigants Service was personally and professionally satisfying, providing intellectual stimulation whilst assisting needy individuals who would not otherwise be able to afford legal services. QPILCH has indicated that the skills and expertise of the retired volunteer, who was previously the managing partner of a large law firm and has extensive commercial legal experience, have been invaluable in expanding the Self-Represented Litigants Service as well as assessing merits of highly complex credit and debt matters for pro bono referrals for the Queensland Law Society and Queensland Bar Association.

QPILCH has expressed a keen interest in utilising additional retired and career-break lawyers to expand its existing services and is preparing *Guidelines for Retired and Career-break Lawyers* on the practicalities of volunteer work.

Yet whilst QPILCH has taken action to encourage retired lawyers to build capacity within its organisation, PILCH (Vic) and PILCH (NSW) identified a number of problems associated with the on-site placement of retired lawyers at their offices. Firstly, they lack the space and infrastructure (e.g. computers and telephones) required to accommodate additional volunteers. Secondly they currently lack sufficient resources to scope a project, train, support and supervise these retired lawyers on a specific project or legal matter. Thirdly, they can easily refer pro bono matters to broad range of member law firms without these complications. Professional indemnity insurance was identified as another constraint to this model. Unless a retired lawyer is willing to maintain their own professional indemnity insurance, they would have to be willing to work as a paralegal or under the supervision of a lawyer with an unrestricted practising certificate.

Case Study 3

Retired lawyer, Lex MacGillivray, has been a volunteer with QPILCH since 2008 where he has assisted with the Self-Representation Civil Law Service, and the Public Interest and Queensland Law Society and Queensland Bar Association Pro Bono Referral Schemes.

“I thoroughly enjoy being a QPILCH volunteer. For the last two years I have assisted with cases in the Self-Representation Service at the Brisbane Courts Complex and now attend at the QPILCH office from 9am to 1pm on Wednesdays and Thursdays, although of late I have attended only occasionally to receive and discuss cases. I find working with my own computer much easier.

The cases at QPILCH are challenging, not least because there is no budget, save for search fees when necessary. I have recently been working on two cases, each in my field of banking and finance. They may ultimately be referred to a QPILCH member firm for representation, but I have been gathering information, speaking to the applicants and researching the law to determine how best to assist two very disadvantaged applicants.

The advantages are that it keeps, I hope, my grey matter ticking over at some level of alertness; the pressure is far less than in private practice as there is flexibility in the matters you take on; there is the pleasure of frequent contact with practitioners in private practice; there are the skills at and pleasant atmosphere of QPILCH; it gets me out of the house; and not least, you get the buzz out of using such moves as you can think up to try to benefit others.

I would recommend to retired or retiring solicitors that you give it a go. You will not be sorry.”

Lex MacGillivray, retired lawyer

“With enthusiastic, retired practitioners, a great deal can be achieved for disadvantaged clients. Lex MacGillivray, a long time volunteer at QPILCH, for example, is always ready to help at short notice. Recently, a client who Lex had previously assisted called to seek further advice with an order for additional disclosure. Lex offered to help by seeing the client the next day. Our self-representation service was fully booked until after the time for complying with the order.

Volunteers play a crucial role within QPILCH and we could not keep up the significant level of assistance it provides without their invaluable support. QPILCH volunteers are mostly senior law students, although we have been fortunate at times to obtain the volunteer assistance of qualified and experienced lawyers. The skills and experience offered by such practitioners make an essential contribution to disadvantaged people seeking access to the civil law system. QPILCH staff rely on the practical assistance of experienced lawyers in assessing the varied applications for assistance.”

Tony Woodyatt, Director of QPILCH

34.5 Professional association pro bono schemes

The pro bono schemes of some legal professional associations constitute another pathway through which retired lawyers can already provide pro bono assistance. While these schemes are well-placed to match matters with the skills and expertise of a lawyer, participation is contingent on those lawyers maintaining their own professional indemnity insurance. Like pro bono clearing houses, individuals must also have their own infrastructure, such as computers, software, printers, and internet and telephone access.

34.6 Law firms

During consultations it was suggested that some law firms might be able to provide retired lawyers with the desks, infrastructure (such as computers, telephones, photocopiers and internet access) and support (such as administrative and legal research) to facilitate their involvement in pro bono projects other than through a CLC. Consultations with large law firms indicated that this model presents considerable difficulties, particularly in relation to confidentiality as well as the responsibility and costs associated with supervising and supporting non-employees to conduct pro bono work.

34.7 Other existing structures

Court and duty lawyer schemes present another less formal avenue through which retired and career-break lawyers may meet legal need. Duty lawyer schemes provide the opportunity for lawyers to provide ad hoc legal assistance without the responsibility of an ongoing commitment, similar to evening advice sessions at CLCs. Because legal advice is provided at the court, usually on the day of a court appearance, there is no need for administrative resources. This potentially signifies a good match with retired and career-break lawyers but duty lawyer schemes vary from court to court. Some are run by

coalitions of barristers, such as the NSW Bar Association and the City of Sydney District of the Law Society of NSW, which operate duty solicitor and barrister schemes at the Downing Centre Local and District Courts in Sydney. Others are run by Legal Aid Commissions.

34.8 *Regional, rural and remote areas*

Because research suggests that pro bono legal work in RRR areas is undertaken in an informal manner, it may be difficult for individual retired volunteers to assist other than through CLCs and ATSILS or through an arrangement with a small firm.

While the Law Council of Australia's survey of country lawyers did not specifically contemplate whether those lawyers intending to retire in the next five to ten years¹⁴⁰ would be willing to maintain their practising certificate and undertake CPD to participate in pro bono legal work, the survey suggests that pro bono legal work is now part of everyday practice in RRR areas, with 64% of respondents indicating that their law firm undertakes pro bono work.¹⁴¹

34.9 *Other potential projects based on legal need*

In addition to existing pathways for individual volunteering, the Centre's consultations with PILCHs identified a number of projects that may be a good match through which retired and career-break lawyers can provide pro bono legal assistance.

(a) Legal needs of NFPs

There are strong synergies between the skills and expertise of retired lawyers and the legal need of not-for-profit organisations. As mentioned above, legal practitioners with more than 30 years experience are more likely than other groups to do transactional work (as the second highest type of work after advice) and more likely to do it for not-for profit organisations than for individuals.¹⁴²

The existing volunteering structures identified in **Chapter 6** provide limited opportunities to meet this legal need, as CLCs and ATSILS and some professional association schemes do

¹⁴⁰ The survey found that 42 percent of lawyers in country Australia intend to retire in the next five to ten years. See Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, above n 43, 5.

¹⁴¹ *Ibid*, 17.

¹⁴² National Pro Bono Resource Centre, *National Survey – Report on the pro bono legal work done by individual Australian solicitors*, above n 80,14.

not offer pro bono legal services to these organisations although all PILCHs provide such services.

PILCHConnect is a specialist legal service for not-for-profit community organisations in Victoria that provides free and low cost legal information, training and, subject to eligibility criteria, pro bono referrals to member law firms. The service was established in 2008 to help meet the demand for free and low-cost legal information and assistance by not-for-profit community organisations.

The Centre's consultations with PILCHConnect indicated that retired lawyers could help meet legal need of NFPs in the following ways:

- A panel of retired lawyers with expertise in various areas of law could:
 - assist with training and information sessions provided by PILCHConnect (or similar organisations). This may involve, for example, providing short, one-off advice at information sessions run by PILCHConnect in the form of an ad-hoc legal clinic. This service would be conditional on retired lawyers having the necessary practising certificate, CPD and professional indemnity insurance which is available through the Centre. Legal advice could include, for example, a brief contract review or oral advice on an employment issue, and may help the NFP to identify if further legal advice is required.
 - be used to support in-house lawyers at PILCHConnect - for example, providing advice to in-house lawyers on specialised legal issues.
- Act as a board member for a NFP to provide mentoring and governance assistance¹⁴³ and help meet quality requirements for accreditation (such as in aged care and housing where a NFP may be required to have a lawyer on its Board of Directors).

The provision of pro bono legal advice to NFPs however raises two important considerations. First, while lawyers with a generalist or commercial background may be suited to providing assistance with contractual disputes, it is unlikely that they would have the expertise to provide legal assistance on highly-specialised areas specific to NFPs, such as tax law for charities. Second, NFPs have limited resources and lawyers need to recommend realistic risk management strategies.

¹⁴³ This suggestion was raised at the ACT Philanthropy Roundtable convened by the ACT Philanthropy Advisory Committee, being an initiative of the Department of Disability, Housing and Community Services (DHCS/ACT) (18 September 2009, Canberra).

PILCHConnect has indicated a willingness to use retired lawyers to expand its services, provided that they meet the necessary requirements in relation to practising certificates, professional indemnity insurance and CPD.

(b) Legal needs of elder persons

Faced with an ageing population, State and Federal Governments have acknowledged the need to implement strategies to address the diverse needs of older people in the community. The importance of addressing the legal needs of older people is underscored by the fact that older people are identified as a group who are socially and economically disadvantaged.¹⁴⁴

During consultations, retired lawyers were raised as a potential pro bono resource to meet the needs of elder persons, whether through a separate clinic or as part of an integrated model with a law firm. During one of the focus groups it was suggested that retired lawyers would be more easily able to relate to elderly people because they are from a similar age demographic.

Seniors Rights Victoria (**SRV**), which is based in Victoria, was identified as a potential filter through which these lawyers could provide pro bono assistance.¹⁴⁵ SRV is a specialised community legal service targeted to the needs of disadvantaged older persons that aims to safeguard the rights of older Victorians by addressing the hidden issues of elder abuse, such as social isolation, exclusion and discrimination. The service uses a clinical outreach model for the delivery of pro bono legal services to individuals at risk of elder abuse.

The Seniors Rights Legal Clinic (**SRLC**) is administered by PILCH (Vic) and each clinic is staffed by law firms on a fortnightly basis, with three appointments each day. The demand for SRLC services to date has outstripped supply, with clinics reporting waiting lists of around four weeks. Accordingly, PILCH (Vic) is currently considering whether additional pro bono resources could be harnessed to provide legal advice and representation to a greater number of elder law clients by increasing the frequency of the clinics or by establishing clinics at other locations.

¹⁴⁴ On the legal needs of elder persons generally, see Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law* (2007) <<http://www.aph.gov.au/House/committee/laca/olderpeople/report/fullreport.pdf>> 15 February 2010. See also Victorian Federation of Community Legal Centres, *For Older People, By Older People: Submission to the Elder Abuse Prevention Consultation* (7 October 2005); Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry & Katrina Wong, *The legal needs of older people in NSW* (Law and Justice Foundation of NSW, Sydney, 2004)

¹⁴⁵ Established in 2008 through a joint venture between PILCH (Vic), Eastern and Loddon Campaspe CLCs, and the Council on the Ageing (COTA)

Consultations with the Manager and former Manager of SRLC suggest that whilst there may be a need for an additional clinic in the western or southern suburbs of Melbourne,¹⁴⁶ retired and career-break lawyers may not be best suited to meet this need.¹⁴⁷ One of the obvious benefits in using a law firm to manage a clinic is that they facilitate the rostering, support and training of these lawyers. This task alone is very labour intensive.

Although PILCH (Vic) has not ruled out the involvement of retired and career-break lawyers to meet legal need through SRV, it expressed some reservations about its resources to coordinate individual volunteers, and emphasised that additional funding would be required to scope any potential project.

35. Ensuring best practice

Pro bono work should always be done to the same standards of attention, priority and professional performance as paid work. As such, it should only be undertaken by a lawyer who is adequately trained, has appropriate skills and experience and, where necessary, is adequately supervised for the work in question.

The legal needs of pro bono clients will not necessarily be met by retired lawyers simply because they have the time. To ensure best practice, these lawyers should have a genuine commitment to meeting legal need, training or experience in the relevant area of law (including but not limited to CPD or CLE sessions), and where appropriate, cultural and disability awareness training.

36. Managing expectations

Whilst there are many benefits for retired and career-break lawyers wanting to volunteer, the issues of managing and responding to their expectations still need to be resolved. Ineffective volunteering typically arises when skilled people are given unskilled volunteer work, and when expectations of a volunteer's role and responsibilities are not clearly defined.

Particular care must be taken to ensure that lawyers with extensive experience are aware of the limitations of their involvement. Some concerns were raised in consultations that those retiring from senior or managerial positions may be inclined to 'take over' or 'run an organisation' and feel disinclined to take directions from employees or volunteers, including

¹⁴⁶ This is currently being considered although no formal needs assessment has yet been undertaken.

¹⁴⁷ PILCH (Vic) indicated that it may be difficult to integrate volunteer retired lawyers into existing clinics that are managed by law firms, and that any clinic staffed by retired lawyers would need to be independent and self-sustaining: Sophie Grieve, Consultation with Mat Tinkler, PILCH (Victoria, July 2009).

younger managers. Whilst acknowledging that this is likely to depend on the individual, the Centre's consultations with retired and career-break lawyers suggest that these issues can be resolved through induction training to manage their expectations on their role as a volunteer and the limitations on the services that they can provide.

Chapter 9 Conclusion

Upon embarking on this research project, the Centre intended to discover how (and by how much) retired and career-break lawyers can assist in meeting unmet legal need. Research into the existing pro bono landscape, constraints to pro bono participation and other considerations specific to retired lawyers have shown that whilst retired lawyers do represent an untapped resource, existing pro bono opportunities through CLCs, ATSILS and pro bono referral schemes are the best current option for retired and career break lawyers seeking to volunteer.

To better ascertain the extent to which retired lawyers might be able to assist with the provision of pro bono legal services in the future, better data needs to be collected from retiring lawyers and legal professional associations are best positioned to do this.

Overcoming the key constraints to pro bono, particularly in relation to practising certificates, professional indemnity insurance and out-of-pocket expenses, is vital to encourage a broader range of lawyers (particularly retiring and retired lawyers) to undertake pro bono legal work. The Centre has already sought to advance the recommendations in this report concerning practising certificates and professional indemnity insurance, through a submission made to the COAG Taskforce on the national review of the legal profession and at state level through meetings with the Law Institute of Victoria, the Legal Services Board of Victoria, as well as Law Societies of Queensland, New South Wales and Western Australia.¹⁴⁸ Some states have taken steps to address these barriers by making available free 'pro bono only' practising certificates, and changing relevant provisions to recognise that professional indemnity insurance is available free of charge to lawyers wanting to work at CLCs or on approved 'pro bono projects'. The remaining constraints can be addressed by appropriate action by government, COAG, and legal professional associations.

There is limited awareness of, and a lack of easily accessible information about opportunities for retiring, retired and career break lawyers to provide pro bono assistance. While the Centre can provide more information about pro bono opportunities, free practising certificates, professional indemnity insurance and CPD training, the effective distribution of this information will require the ongoing cooperation of legal professional associations in order to reach its target audience.

¹⁴⁸ National Pro Bono Resource Centre et al, *Joint Submission to the Task Force for the National Legal Profession Project*, above n 1.

CLCs, ATSILS and pro bono referral schemes remain the most appropriate place to direct retired and career-break lawyers wanting to provide pro bono assistance. The community legal sector in Australia provides legal advice and assistance to hundreds of people across the country every day,¹⁴⁹ however legal needs remain unmet. Most CLCs use volunteers and many even rely on them to produce some of their core services. Some CLCs cannot take on more volunteers, others can't find enough. Due to the tradition of volunteering and the connection with their community, CLCs present a best-practice model through which retired lawyers can be matched with pro bono opportunities. Volunteering through a CLC also addresses many of the barriers to pro bono that are detailed in this report, but CLCs themselves need adequate resources and support to manage and house additional volunteers.

Pro bono referral schemes and clearing houses present another avenue through which retired lawyers can be matched with pro bono opportunities. In order to make this avenue of participating in pro bono service delivery available to more lawyers (retired or otherwise), issues regarding practising certificates, supervision and insurance need to be resolved.

Demographic data provided by the legal professional associations indicates that the number of lawyers approaching retirement is steadily increasing. The true potential of these lawyers to meet legal need will only be realised when the collection of better data is combined with the promotion of existing opportunities and the constraints to pro bono are adequately addressed.

¹⁴⁹ In 2006-07, CLCs, in addition to casework, provided more than 222,000 individual legal advices, provided more than 123,000 information, support and referral services, and concluded more than 2,000 community legal education projects. National Association of Community Legal Centres, *Why Community Legal Centres Are Good Value* (2008) <http://www.naclc.org.au/multiattachments/2287/DocumentName/NACLC_value_web.pdf> 15 February 2010.

Chapter 10 Recommendations

Recommendation 1

The practising certificate regime in Australia should be amended so that *free* practising certificates are available for the sole purpose of engaging in pro bono legal work, provided that the practitioner is:

- (a) 'suitably qualified'; or
- (b) supervised by a lawyer who is 'suitably qualified'; and
- (c) covered by appropriate professional indemnity insurance.

Recommendation 2

Professional indemnity insurance requirements in relevant regulatory Acts or subordinate instruments should be amended where necessary to recognise that professional indemnity insurance is available without charge to lawyers wanting to undertake pro bono legal work.

Recommendation 3

The Centre should expand its website to act as a gateway for lawyers wanting to provide pro bono legal assistance. This website should link volunteers with the broad range of existing opportunities for legal volunteering, provide information on legal need, practising certificates, professional indemnity insurance, training and CPD, and encourage retiring and retired lawyers to volunteer.

Recommendation 4

Legal professional associations should promote:

- (a) the availability of practising certificates (where applicable) without charge to those lawyers who want to provide pro bono legal assistance but who would not otherwise require a practising certificate;
- (b) the availability of professional indemnity insurance cover for:
 - (i) lawyers volunteering at community legal centres through the NACLC professional indemnity insurance policy; and
 - (ii) lawyers and paralegals working on pro bono projects through the Centre's National Pro Bono Professional Indemnity Insurance Scheme (see part 26).

Recommendation 5

All legal professional associations should collect nationally consistent data on lawyers, particularly retiring and retired lawyers, and promote existing pro bono opportunities.

Recommendation 6

CPD and CLE providers and other relevant training providers (such as Legal Aid Commissions) should permit retired and career-break lawyers whose sole purpose is to undertake pro bono legal work to attend relevant training sessions without charge.

Recommendation 7

State-based litigation and disbursement assistance schemes should review their operations in consultation with the Centre to determine how they could improve the provision of and access to disbursement assistance in pro bono matters.

Schedule 1 Consultations

In preparing this report the Centre consulted the following organisations:

Allens Arthur Robinson

Arnold Bloch Leibler

Blake Dawson

Californian Bar Association

Clayton Utz

Corrs Chambers Westgarth

Deacons (now Norton Rose)

Department of Education, Employment and Workplace Relations

DLA Phillips Fox

District of Columbia Bar Association

Federation of Community Legal Centres (VIC)

Freehills

Gilbert + Tobin

Henry Davis York

Herbert Geer

Holding Redlich

Hon. Mr John Nader

Judith Stubbs & Associates

Law and Justice Foundation of New South Wales

Law Institute of Victoria

Law Society of New South Wales

Law Society of Western Australia

Legal Practice Board of Western Australia

Mallesons Stephen Jaques

McCullough Robertson Lawyers

Middletons

Minter Ellison

National Association of Community Legal Centres

New South Wales Bar Association

Public Interest Advocacy Centre

PILCHConnect

PILCH (NSW)

PILCH (Vic)

Redfern Legal Centre

QPILCH

Queensland Association of Independent Legal Services

Queensland Law Society

Victorian Bar Association

Victoria Law Foundation

Volunteer Grants Program, FAHCSIA

The Centre also consulted 16 retiring/retired lawyers and 5 career-break lawyers. Amongst those retired lawyers consulted was the former Justice of the High Court, the Hon Michael Kirby, former Justice of the Supreme Court of the Northern Territory, the Hon. Mr John Nader, and former Justice of the District Court of Western Australia, the Hon. Mr Hal Jackson.

Schedule 2 Glossary

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| ABS | Australian Bureau of Statistics |
| ALS | Aboriginal Legal Service (NSW/ACT) Limited |
| ATSILS | Aboriginal and Torres Strait Islander Legal Services |
| Centre | National Pro Bono Resource Centre |
| CLCs | Community Legal Centres |
| CLE | Continuing Legal Education |
| COAG | Council of Australian Governments |
| COTA | The Council on Ageing |
| CPD | Continuing Professional Development |
| DGR Status | Deductible Gift Recipient tax status |
| FaHCSIA | Department of Families, Housing, Community Services and Indigenous Affairs |
| NACLC | National Association of Community Legal Centres |
| PIAC | Public Interest Advocacy Centre |
| PILCHs | Collective term for all Public Interest Law Clearing Houses, including PILCH (NSW), PILCH (Vic), and QPILCH |
| PILCH (NSW) | Public Interest Law Clearing House (NSW) |
| PILCH (Vic) | Public Interest Law Clearing House (Vic) |
| QPILCH | Queensland Public Interest Law Clearing House |
| LIVLAS | Law Institute of Victoria Legal Assistance Scheme |
| NACLC | National Association of Community Legal Centres |
| PIAC | Public Interest Advocacy Centre |
| RRR | Regional, rural and remote |
| Scheme | The Centre's National Pro Bono Professional Indemnity Insurance Scheme |
| SRV | Seniors Rights Victoria |
| VBLAS | Victorian Bar Legal Assistance Scheme (now Victorian Bar Pro Bono Scheme) |