



NATIONAL **PRO BONO** RESOURCE  
CENTRE

**COMMENTS ON THE FEDERAL CIVIL JUSTICE SYSTEM  
STRATEGY PAPER – DECEMBER 2003 AND ITS  
RECOMMENDATIONS**

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# COMMENTS ON THE FEDERAL CIVIL JUSTICE SYSTEM STRATEGY PAPER – DECEMBER 2003 AND ITS RECOMMENDATIONS

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## **Executive Summary**

The National Pro Bono Resource Centre (**'the Centre'**) welcomes the opportunity to provide comments on the *Federal Civil Justice System Strategy Paper* December 2003 (**'the Strategy Paper'**).

The Centre has been in operation since August 2002 and makes the following comments based on its experience to date. Our comments are, in the main, limited to the recommendations and/or discussion that relates to the provision or enhancement of pro bono legal services. However, given that pro bono service delivery is only one component of an inter-related complex of legal service delivery for disadvantaged people, and the ongoing need for the disadvantaged to have access to justice, our submission also extends to commenting on broader matters discussed in the Strategy Paper. Our comments follow the Chapter headings contained in the Strategy Paper.

The legal profession, through the provision of services on a pro bono basis, makes a significant voluntary contribution to the operation of the federal civil justice system. This contribution is growing but there are still areas of the profession where a greater contribution to pro bono could be made. Leadership from government and from within the profession is required to make pro bono part of every lawyer's work. The message that provision of pro bono services is an essential professional responsibility should be spread widely and repeated often among lawyers.

The Centre believes there is scope for lawyers' pro bono work to be enhanced and increased, through better coordination, better targetting of pro bono resources and increasing involvement in pro bono across the legal profession as a whole, including by government lawyers and lawyers in corporate legal departments. The Centre will continue working in partnership with other stakeholders to maximise pro bono efforts.

Pro bono services are but one part of a package of services that may be available to low income and disadvantaged people. The major components of that package are services provided by legal aid commissions, Aboriginal and Torres Strait Islander Legal Services (**'ATSILS'**) and Community Legal Centres (**'CLCs'**). Clearly the demand for and provision of pro bono legal services is inextricably linked to the availability of publicly funded legal services and the funding of these services is an issue of key importance. The Centre submits that increasing funding of these services is necessary and desirable in order to meet key needs of low income and disadvantaged people, and importantly, this would have the effect of leveraging further pro bono contributions from the profession.

The Centre is pleased to see Recommendation 14 (*That the Legal Services Directions be amended to oblige government agencies (subject to direct conflict of interest) to give all lawyers the same level of consideration in selecting legal service providers, regardless of whether those lawyers have acted, or may act, pro bono for clients in litigation against the Commonwealth*) following on from its Consultation Paper and Protocol sent to government on this matter in April 2003. The Centre supports the thrust of the

recommendation but not the wording. Using the words “same level of consideration” may create a problem if the federal government were to implement any incentive scheme that gives advantage to a legal service provider who provides a certain amount of pro bono (like the Victorian Government’s tender scheme and Legal Services Contract arrangements). The Centre will be making a separate detailed submission to the Issues Paper on the Review of the Legal Service Directions on this matter (for further detail see 2.6.1 below).

### **Centre suggestions**

Having regard to the discussion contained in the Strategy Paper and the 20 months experience of the Centre the following additional actions by government relating to pro bono and the Federal Civil Justice Strategy are suggested, namely:

1. Funding interpreters and translation services for pro bono matters (see comments on Recommendation 7);
2. Promoting, facilitating and actively resourcing pro bono work by government lawyers (2.6.4);
3. Providing a level of recurrent funding for the Centre (2.6.2);
4. Supporting a project to develop a model disbursement assistance fund and providing funding for disbursements (2.6.3);
5. Supporting and funding evaluations of the pro bono referral schemes presently operating in the Federal Court and Federal Magistrates Court (2.6.5).
6. Subject to evaluation of the Victorian tender scheme, consider making pro bono contributions a condition of retaining law firms to provide legal services to the Commonwealth and a key performance indicator in evaluation of work done for the Commonwealth; and/or consider other mechanisms by which government can encourage lawyers to do pro bono work, including lawyers instructed by the Commonwealth (2.6.6)
7. Support the introduction of rules in federal courts and tribunals conferring an exemption from filing fees upon appropriate certification by a practitioner acting pro bono (2.6.7).

### **Other Comments**

The Centre has also made comment on discussion and recommendations contained elsewhere in the Strategy Paper so far as it may impact on the delivery of pro bono services as follows. The Centre:

- Supports the need for enhanced funding of community legal centres, including in regional and remote areas but not limited to those States where reviews have been completed (Recommendations 9 & 12);
- Draws attention to the need for increased funding for legal aid and Indigenous legal services;
- Notes the need for a national coordinated approach to the provision of legal services to low income and disadvantaged Australians and the need to fund national bodies such as the National Association of Community Legal Centres, National Legal Aid, national Indigenous legal representatives and the Centre to facilitate this approach;

- Supports the call for a comprehensive national assessment of legal needs;
- Supports the further development of duty lawyer schemes in the federal courts (Recommendation 13) but submits that these schemes should be publicly funded and should extend to Commonwealth tribunals;
- Seeks Centre involvement in consultations concerning issues arising from discrete task representation (Recommendation 15 & 16);
- Supports the development of cooperative regional service models, subject to evaluation (Recommendation 17), and ideally informed by a national assessment of legal needs and with some agreement by government to consider funding services to meet gaps identified;
- Raises a concern that the proposal in Recommendation 31 (*to introduce amendments, based upon NSW provisions, to require legal representatives to certify reasonable prospects of success with sanctions of costs orders*) will act as a deterrent to the provision of pro bono legal services and will have a disparate impact upon low income and disadvantaged people as well as prevent the litigation of important public interest matters; and
- Raises a concern about the proposal in Recommendation 43 to introduce partial fee waiver (in effect, minimum fees) for matters in the High Court.

## **DETAILED COMMENTS**

### **Chapter 2: Supporting access to justice for cases with merit**

#### **2.1 A national, cooperative approach to meeting needs**

The conclusion of Chapter 2 refers to ‘the increased cooperation between, and coordination of services provided by, the legal information and service providers operating within the federal civil justice system’. The Centre suggests that this kind of cooperation is crucial to the success of any long term civil justice strategy. We suggest that the provision of legal services to disadvantaged people ought be considered in a coordinated fashion and at national as well as regional levels and to facilitate this, the Commonwealth government should fund bodies such as the Centre, the National Association of Community Legal Centres, National Legal Aid and representatives of Indigenous legal organisations to work together to coordinate service delivery to meet needs.

The Centre notes that various submissions to the Senate Inquiry into Legal Aid and Access to Justice recommended a coordinated and independent assessment of legal needs (see for example submissions made by the Law Council of Australia, National Legal Aid and ACOSS). The submission by Noone, Giddings and Curran refers to calls by these and other organisations for research into unmet legal need, including by the Senate Legal and Constitutional Committee, the Victorian Parliamentary Law Reform Committee, the Australian Legal Assistance Forum, the Supreme Courts of Victoria and NSW and the Family Court of Australia. Such calls for a study are supported by this Centre as the results will, amongst other things, much better identify where limited pro bono resources are most needed. At present much of the decision making as to areas of application of pro bono services is made by practitioners on a broad range of criteria which range from

connection or identification with a particular group or cause to simply assisting only in those matters where the skill set of the firm lawyers or other practitioners matches the problem at hand. A study would assist practitioners to better target their limited pro bono resources to areas of greatest need.

The Centre notes that the Law and Justice Foundation of NSW (**‘LJF’**) is undertaking a project in NSW which involves an assessment of the legal and access to justice needs of the community, especially socially and economically disadvantaged people. As part of this research, the LJF has recently released a Data Digest which analyses data collected by the main publicly funded legal service providers in NSW. The Digest, and the suggestion therein for the establishment of common data collection protocols, could greatly improve the quality of information available to the legal profession, legal aid, the community legal sector and policy-makers for service delivery and long term planning and policy development.

The Centre supports the calls referred to above that there be a coordinated and independent assessment of legal needs. Funding for this study should be part of the Government’s Civil Justice Strategy. This research would then inform national and regional decision making, for example, as to how needs can best be met within a particular area.

## **2.2 Availability of interpreters**

The Centre notes Recommendation 7, but is unclear about what “enhancing the availability of low cost interpreters” entails. CLCs and their clients rarely, if ever, have the capacity to pay for interpreter or translation services. The Centre supports the provision of *free or funded* interpreters and translators, who are properly accredited to the NAATI professional level, for CLCs and also for similar services that offer legal assistance to disadvantaged people from linguistically diverse backgrounds. These interpreters need to be made available by telephone as well as face-to-face where necessary.

One matter commonly raised by practitioners as a barrier to their doing pro bono work is the need to cover disbursements in such matters, including interpreter fees. Some firms have a policy of bearing part of the cost of disbursements up to a ceiling (e.g. \$300) however this money is very quickly exhausted if used to pay for interpreter or translation services. Other practitioners are simply not in a position to meet any such disbursements and the client may therefore be denied pro bono assistance (see discussion below on disbursement schemes).

In order to assist access to justice for disadvantaged people from linguistically diverse backgrounds, the Centre recommends that properly accredited interpreters be made available free to lawyers assisting disadvantaged clients on a pro bono basis. This would include free interpreter and translation services being available to:

- pro bono referral schemes including Public Interest Law Clearing Houses and also professional association schemes (who may need access to no-cost translation and

- interpreter services to take instructions and make inquiries necessary to enable the assessment and referral of cases);
- law firms acting for clients being considered for and /or accepted into the firm's pro bono program;
  - clients in court and tribunal proceedings who are being assisted on a pro bono basis.<sup>1</sup>

The Centre notes the increasing cost of interpreters for court matters however considers their provision is crucial for the resolution of matters in an equitable manner. The Centre supports arrangements in courts and tribunals for efficient listing of matters requiring interpreters.

### **2.3 Aboriginal and Torres Strait Islander services, Community Legal Centres and Legal Aid**

The level of Government funding for ATSILs, CLCs and legal aid has a direct effect on the amount of pro bono services sought and provided. Whilst restricted funding leads to greater demand for pro bono services the Centre believes there is evidence of a greater willingness of law firms to do more pro bono in an environment where it is felt that Government is meeting its obligations but there is still unmet need.

The Strategy Paper considers funding of Indigenous peoples' legal needs<sup>2</sup> and also considers legal aid<sup>3</sup> but does not include recommendations specifically relating to funding such services. The Strategy Paper notes in relation to legal aid that many matters concerning legal aid will be considered in the context of renegotiating agreements with the States and Territories<sup>4</sup> and also makes reference to the Senate Legal and Constitutional Reference Committee's consideration of legal aid and access to justice arrangements. Release of the report of that Committee has been delayed until 11 May 2004.

In relation to Indigenous legal services, the Centre notes the recently released Exposure Draft of a request for tender for the provision of legal services to Indigenous Australians ('**Indigenous Exposure Draft**') and the Joint Committee of Public Accounts and Audit's Inquiry into Indigenous Law and Justice.

Whilst these initiatives post date the Strategy Paper the Centre suggests that the submissions made in relation to these developments will be important matters to be considered before settling on adoption of final recommendations of the Federal Civil Justice Strategy.

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<sup>1</sup> The Centre understands that whilst courts provide interpreters at no cost in the case of self-represented disadvantaged litigants, this is not always the case when those litigants are represented. We note the policy of the Federal Court of Australia that the court will provide interpreter services for litigants who are represented but have exemption from, or have been granted a waiver of fees under the Federal Court of Australia Regulations, see Annual Report of the Federal Court of Australia 2002, p.48, and the Guidelines for the use of court-funded interpreter services 2001.

<sup>2</sup> Strategy Paper pp 82 – 84.

<sup>3</sup> Strategy Paper p 106 and following.

<sup>4</sup> Strategy Paper p 106.

Funding for CLCs is dealt with in Recommendations 9 and 12 of the Strategy Paper. The Centre supports Recommendation 12 and also supports funding additional CLCs in regional and outer metropolitan areas, noting that there are areas in need of support additional to those referred to in Recommendation 9.

The levels and conditions of funding of publicly funded legal services have a significant impact upon the demand for and provision of pro bono legal services. The Centre notes that:

- Restrictions on the availability of legal aid, assistance from CLCs and ATSILS has increased the demand for pro bono legal services. The demand for pro bono is acute for civil matters because considerable restrictions apply to the availability of legal aid. Commissions generally spend their budgets on criminal and family matters leaving very little for civil matters. Legal aid is not available at all for some types of matters or only in respect of a very limited class of such matters. In addition, as noted on p 108, the legal aid means test excludes many people who nevertheless lack the means to pay for legal assistance, for example, young people on low wages. Indigenous legal organisations in the main do not provide assistance for civil matters.<sup>5</sup> Pro bono services can meet only a small amount of the unmet need for assistance in civil matters. Pro bono service providers are increasingly being called upon for criminal and family law assistance. This demand appears to be accompanied by increased difficulties, particularly in regional, rural or remote areas, in locating practitioners willing or able to act pursuant to grants of aid.

Commonwealth funding of legal aid and Indigenous legal services needs to be significantly increased as part of the government's civil justice strategy to enable the provision of publicly funded assistance in a greater range and number of civil matters, to expand the range of family law related matters that are considered Commonwealth matters and to enable assistance and representation in locations currently unable to access such services.

- Whilst there is a great willingness on the part of the profession to provide pro bono services, and notwithstanding recent increases to legal aid funding, concern has been expressed to the Centre by firms and in the community sector that providing pro bono services may allow government to avoid meeting its responsibility to provide publicly funded services to those in need. The Strategy Paper notes this concern.<sup>6</sup> If the government moves to significantly enhance the public funding of legal services – to legal aid, CLCS and ATSILS – this will allay the concern noted and in the Centre's view, is likely to enhance the profession's willingness to provide pro bono services.

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<sup>5</sup> As at 2002-3, 91% of case and duty services provided by ATSILS were criminal: 2%family: 4% civil: 2% violence protection: 1% other: ATSIC Annual Report 2002-03

<sup>6</sup> Strategy Paper, at p 115.

- Most pro bono programs rely on the assistance of the community legal sector and legal aid bodies for referral of pro bono matters and also for training and other input. Legal aid commissions, CLCs and ATSILS are best placed to have contact with clients in need and to identify and make informed referrals of pro bono matters to practitioners willing to provide pro bono assistance. These organisations perform a very important filtering role that allows pro bono resources to be most efficiently utilized. In addition, CLCs provide an opportunity for large numbers of disadvantaged people to access significant pro bono services provided by volunteer lawyers and students who staff ‘advice sessions’ at CLCs. A healthy publicly funded sector is vital to the effective provision of pro bono services.
- In relation to Indigenous legal services the Indigenous Exposure Draft contemplates the possibility of such services being provided by private entities. One outcome of this could be the loss of, or diminution of, valuable pro bono assistance that might not be available to private entities.
- The Centre believes there is scope for expanding pro bono services and for greater coordination and more effective allocation of such services. However, it should be recognised that pro bono services are subject to significant limitations. Tort reforms, changes to conveyancing practice and other such developments have diminished the financial capacity of many practitioners to provide free or significantly subsidised services. Amongst larger legal practices that have greater resources, there can be a mismatch between their expertise and the legal problems facing disadvantaged and marginalized people. For example, it can be very difficult if not impossible to obtain pro bono assistance for family law matters (although recent developments indicate some firms may be willing to provide help with certain aspects). Larger firms lack the expertise and practitioners who do have the necessary expertise are already inundated with requests for pro bono assistance in addition to requests to take on poorly remunerated legal aid work. Irrespective of matter-type, it is very difficult to obtain pro bono assistance for long or complex matters and or urgent matters. Particular issues arise in relation to the provision of pro bono services to Indigenous people and to Indigenous legal organisations – not the least of which are distance, language and cultural issues and the preference of Indigenous people for receiving assistance from Indigenous-specific services. Some of these matters will be considered in a forthcoming report from the Centre concerning the unmet pro bono needs of Indigenous legal organisations.
- Given the finite and supplementary nature of pro bono legal services, it is particularly important to coordinate their provision with the availability and scope of publicly funded services. The discussion below of duty lawyers makes this point in a specific context.

## **2.4 Rural, Regional and Remote Australians**

The Centre notes the discussion about rural, regional and remote Australia in the Strategy Paper<sup>7</sup> and confirms the very significant problems that exist in relation to the availability and provision of legal services (including pro bono) for low income and disadvantaged people in these areas. Local practitioners may be few in number, already at capacity for pro bono and legal aid work and unable to take on a number of matters due to conflicts. One city law firm with an active pro bono program has commented that referrals from outside cities tend to be for matters which are more serious and arise from events which have a greater impact on the day to day lives of clients.

By way of initiatives additional to those discussed in the Strategy Paper, the Centre notes its 'RRR' (regional, rural and remote) project (referred to briefly on p 116), funded by the Law and Justice Foundation of NSW, that involves piloting the creation and support of pro bono partnerships between 3 city law firms and 3 RRR CLCs in NSW and fostering other pro bono relationships. It will also involve some research into pro bono services provided in RRR locations in NSW. That project (including evaluation) is scheduled for completion in September 2004. The Queensland Public Interest Law Clearing House plans soon to commence 2 similar pilots.

## **2.5 Duty lawyer schemes**

Recommendation 13 states: "That the further development of duty lawyer schemes in the federal courts be supported." This recommendation is preceded by discussion about the positive feedback about current duty lawyer schemes coordinated by Legal Aid Commissions.

Recommendation 13 is silent about which kind of duty lawyer schemes it supports and about how such schemes would be funded and resourced. Properly informed advice and information from a duty lawyer can make a significant difference in terms of access to justice for the individual concerned and particularly for those who, for whatever reason, have not sought assistance before attending court. However duty lawyer services in the main provide limited rather than complete assistance and should not be a substitute for providing proper and full representation to those in need (see below). The Centre supports the development and enhancement where appropriate of duty lawyer services. The Centre notes the provision of duty lawyer services in family law raises special issues.

Duty lawyers provide very useful assistance including procedural advice, identifying cases which may be eligible for legal aid, preliminary consideration of merits and whether to refer the matter to another lawyer. This initial filtering can be in certain cases of considerable value to the courts particularly in relation to how unrepresented litigants conduct themselves.

Duty lawyers will ideally be aware of legal aid guidelines, community legal centre services and relevant pro bono schemes and service providers. They thus facilitate

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<sup>7</sup> Strategy Paper, at pp 88-92.

effective utilization of available resources. Duty lawyers also provide an important service for those people who have simply been too afraid or unable to access any form of legal assistance before arriving at court.

The Administrative Appeals Tribunal (AAT) has been piloting duty lawyer schemes in its Sydney and Melbourne registries, in conjunction with the NSW Legal Aid Commission and Victoria Legal Aid, pursuant to which legal aid lawyers attend and provide advice and minor assistance to self-represented litigants one day per week.<sup>8</sup> Significantly, this service results in formal grants of legal aid in a significant number of cases.

We consider that where there is a real identified need for duty lawyer schemes (a likely key indicator would be a large number of unrepresented litigants) the need should be met by publicly funding regular schemes rather than relying on the goodwill, availability and capacity of the private profession to provide the service pro bono.

In addition to being a core means of providing access to courts and tribunals for disadvantaged people (itself a government responsibility), publicly funded duty lawyer services can promote effective use of finite pro bono resources in that structured referrals can be made to pro bono practitioners of cases that are outside legal aid guidelines and where representation is required.

In some locations, a legal aid lawyer may best provide the service; in other locations, it may be that for example, for reasons of conflicts, local practitioners would best provide it. However, regardless of which, we suggest that it should be a funded service.

The Centre notes the dilemma that may be faced by Legal Aid Commissions in deciding whether to allocate their funds to providing or funding duty solicitor services or to meeting other needs (for example making full grants of aid to eligible applicants), if there are insufficient funds to meet all needs. This dilemma points to the need for legal aid funding to be increased so as to be sufficient to meet all of these needs and to meet the full range of costs incurred by Commissions in providing the services.

The Centre submits that Recommendation 13 should be expanded to support the creation of, or where relevant, expansion of, federally funded duty lawyer schemes in Commonwealth tribunals. Commonwealth tribunals are a very important part of the federal civil justice system and provide a forum for resolving more matters than the federal courts. The advantages of duty lawyers in courts apply also to tribunals - and include benefits for the clients as well as for the tribunal and others.

We note that if funding is to go to the private profession to provide duty lawyer services, the funding must be sufficient to avoid the trend of lawyers withdrawing from the legal aid market, as noted in the Strategy Paper.<sup>9</sup>

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<sup>8</sup> This duty lawyer service may soon be extended to the Queensland registry of the AAT.

<sup>9</sup> Strategy Paper, p 107.

The Centre notes the discussion<sup>10</sup> in the Strategy Paper of conflicts of interest in the context of duty lawyer schemes and the suggestion that it may be appropriate for the Centre to assist in looking at this issue. The Centre is of course happy to work with National Legal Aid, legal aid commissions, CLCs and ATSILS in looking at the conflicts issue.

## **2.6 Pro bono work**

### **2.6.1 Recommendation 14:**

*That the Legal Services Directions be amended to oblige government agencies (subject to direct conflict of interest) to give all lawyers the same level of consideration in selecting legal service providers, regardless of whether those lawyers have acted, or may act, pro bono for clients in litigation against the Commonwealth.*

The Centre agrees that there is a need to amend the Legal Services Directions to deal with this issue but does not support the wording of recommendation 14.

Consistent with an aim of encouraging pro bono, the Centre suggests that the Legal Services Directions should be amended in such a way as to make clear that a legal service provider's pro bono work against government is prevented from being taken into account *to their detriment* in the allocation of government legal work but not so as to preclude it being taken into account *to their benefit*. Such an amendment would leave open to Government the option of making pro bono work a selection criterion for obtaining government legal work, as discussed at 2.6.6 below.

The Centre notes the Issues Paper on Review of the Legal Services Directions and paras [29] – [32] that discuss pro bono and conflicts. The Centre will be making a detailed submission to that Review. The thrust of that submission will be that amendment of the Directions is one part of a more general strategy that is necessary to prevent 'commercial' conflicts of interest with government from being a barrier to pro bono work. The Protocol<sup>11</sup> developed by the Centre to deal with this issue has a number of components, including:

- The encouragement by government of pro bono legal services and recognition by government that it is appropriate for legal service providers to act against government in pro bono matters where there is no direct legal conflict of interest;
- A prohibition on government agencies penalising legal service providers on the ground of their actual or likely pro bono work in matters against government;
- The nomination of a senior contact person in each agency;
- A complaints mechanism;
- An obligation to take practical steps to deal with the issue.

The Centre has previously called for 'robust implementation' of the protocol: anything less will fail to remedy the perception by lawyers that acting pro bono against government may disadvantage them when seeking to secure or retain government legal

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<sup>10</sup> Strategy Paper, at pp. 110-112.

<sup>11</sup> <http://www.nationalprobono.org.au/publications/conflicts/protocol.pdf>

work. Implementation should include detailed information being provided to agencies and monitoring of compliance.

Consideration should also be given to measures to encourage lawyers instructed by the Commonwealth to act pro bono in matters where there is no legal conflict of interest, including advising them of the amended Direction and government policy on the issue. These measures could be taken in conjunction with action suggested elsewhere in this submission, for example, the Attorney-General could advise lawyers of relevant initiatives it is pursuing, could inquire of their pro bono activity, could invite suggestions about possible joint pro bono activities with government lawyers and the like. Other possible measures are discussed at 2.6.6.

### **2.6.2 The National Pro Bono Resource Centre**

The Centre notes the comment in the Strategy Paper that it is playing a valuable role in facilitating the up-take of pro bono practice in Australia but that “it will be important for it to seek actively ongoing funding from non-Government sources beyond the seed funding provided by the Australian Government.”<sup>12</sup>

The Centre has actively raised the issue of financial funding from the legal profession for the continuance of the Centre beyond June 2005 in discussions with various firms and representative bodies in the legal profession. These discussions have been held in the context of a model, which sees the long term funding solution being one of a community/private/government partnership.

The Centre has received very positive feedback about activities, resources and outcomes achieved thus far. Details of most of these are provided to the Commonwealth in its six monthly reports.

The ongoing role that the Centre would perform includes:

- building interest and capacity amongst all sectors of the profession including corporate lawyers, government lawyers, students and academics as well as law firms and barristers;
- supporting referral schemes and development of new schemes;
- providing leadership and advocacy on key national issues affecting the delivery of pro bono services;
- identifying potential partnerships and projects and brokering relationships;
- providing input to federal, state and territory government policy on matters affecting the delivery of pro bono legal services;
- working on a national level with other agencies concerned with the provision of services to disadvantaged people to coordinate approaches to meeting needs;
- coordinating, initiating and advocating new and innovative ways of trying to meet the key areas of unmet legal need, e.g. family law, pro bono for Indigenous people, RRR communities, unrepresented litigants;

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<sup>12</sup> Strategy Paper, at p116.

- developing and documenting standards of best practice for the delivery of pro bono services;
- conducting client-focused research including measuring and mapping pro bono in Australia; and
- sponsoring and conducting events that will continue to grow, build and strengthen the culture of pro bono in Australia.

As regards core funding for the Centre being obtained from the legal profession a number of difficulties have emerged. Key amongst these are:

- Firms of sufficient size and profitability to fund the Centre are for the most part devoting significant resources to pro bono activities as well as to community service projects more generally. Their primary objective in relation to pro bono is direct service delivery and this is where their funds are directed. Accordingly firms pay membership fees to belong to State based Public Interest Law Clearing Houses<sup>13</sup> (whose primary business is pro bono referrals). These firms commonly have pro bono budgets that are fully utilized. Hence any monies paid towards the Centre would have to come from increased budgets or from cutting services or assistance elsewhere;
- Law firms generally take the view that that in relation to pro bono, they are best placed to provide legal services rather than funding. Larger firms commonly operate community service programs, in addition to pro bono programs, which involve the firm providing non-legal support (for example volunteers) and funding;
- A firm's human resources are deployed in secondments, as pro bono coordinators, directly in other schemes such as shopfront clinics and duty lawyer schemes and on pro bono casework. It is easier to justify deployment of resources in direct service delivery than in the bigger picture issues that the Centre tackles;<sup>14</sup>
- The Centre's work is national and few firms operate in all States and Territories.

However the Centre continues to receive support from the firms in various forms and this is expected to continue. The firms with structured pro bono practices have worked with the Centre on various projects in particular contributing significant time and resources for development of The Australian Pro Bono Manual,<sup>15</sup> providing input on policy issues, contributing monies to sponsor, and speakers for, the 2<sup>nd</sup> National Pro Bono Conference and providing summer clerks to conduct research on various issues. The Centre continues to work more closely with pro bono coordinators from firms that have such positions and expects a representative pro bono coordinator to soon join the Centre's Board as a director of the company.

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<sup>13</sup> Now existing in Victoria, New South Wales and Queensland. There are proposals to establish organizations of this or a similar kind in the ACT and South Australia.

<sup>14</sup> The Centre was deliberately established without a direct role in client referral or matching, as this function is best handled at State, regional and local levels.

<sup>15</sup> The Australian Pro Bono Manual: A practice guide and resource kit for law firms. NPBRC and Victoria Law Foundation, October 2003. available at <http://www.nationalprobono.org.au/probonomanual/index.htm>

The Centre will be continuing discussions with law firms and their representative organisations about ways in which ongoing financial support for the Centre might be obtained from the profession. The Centre believes that a profession wide approach is appropriate.

The Centre is exploring obtaining funding from the corporate sector and was successful in obtaining corporate sponsorship to support holding the 2<sup>nd</sup> National Pro Bono Conference. Further sponsorship for events or products is possible but there are real difficulties in obtaining core funding. Pro bono legal services are still not part of the life of many corporations in Australia. Indeed addressing this deficiency is an important part of the Centre's ongoing role. However a closer relationship with a suitable corporation is being actively pursued.

The Centre notes that it does not have deductible gift recipient status under the *Income Tax Assessment Act 1936* (Cth). This makes the Centre a less attractive proposition to potential funders in the private sector than many other direct service delivery bodies where donations can be fully claimed as a tax deduction. Corporations and legal firms are called on to fund a large range of projects and charities. The Centre is directly competing with these requests.

It is instructive to look at the way that the Solicitors Pro Bono Group ('**SPBG**') in the UK and Pro Bono Law Ontario are funded. SPBG is now in its fifth year of operation and was established by a group of the larger UK law firms. It is a registered charity in England and Wales and thus donations made to it are tax deductible in the hands of donors. SPBG is a membership organization (membership is open to law firms, in-house legal departments, law centres etc). So far only 50 law firms have taken up membership and these are principally the larger city based firms. Smaller and regional firms have not become members as they take the view that SPBG is not relevant to them because they are not large enough to run structured pro bono programs. The membership fees raised by SPBG pay only for the salary of the CEO, an administrative assistant (plus other core costs). All other funding has been obtained by way of donations (and some fundraising activities) and is restricted to specific projects. Government provides some funding through project-based activities.

This seems to demonstrate the difficulty of obtaining significant funding from the profession but also the advantage of a non-membership model which allows the Centre to be independent and relevant to the entire legal profession (including the community and legal aid sectors) and to universities and NGOs rather than just to the large firms.

Pro Bono Law Ontario ('**PBLO**') is now in its third year of operation and is involved in a number of direct service delivery projects as well as broader based policy initiatives. Its funding comes from the Law Foundation of Ontario, Legal Aid Ontario with the Law Society of Ontario providing office space, computers and other support. PBLO expects ongoing funding support from these sources and not direct from the profession.

The Centre's mission is to build the pro bono culture across the profession and to increase access to pro bono services that are based on need. The Centre has current projects that aim to build capacity to provide pro bono services amongst both corporate and government lawyers and to facilitate and enhance law students developing a pro bono ethos and providing pro bono legal services. These programs are quite diverse in terms of the constituencies involved but important in terms of a national approach to the issue of promoting and developing pro bono in Australia.

The Centre has a good working relationship with the community sector and will be providing value to the community legal sector through the launch of its upcoming national guide to volunteering at CLCs. The academic sector will obtain value from the resources soon to be launched as part of the Centre's law school and student strategy. The Centre's Regional, Rural and Remote ('RRR') project (referred to above) is facilitating invaluable partnering between firms and RRR communities, which will greatly benefit people in those communities. Both this project and the Indigenous project (identifying pro bono opportunities) will provide guidance, ideas and encouragement to lawyers who provide pro bono services in these areas of great need.

These and other initiatives will take time to bear fruit and require ongoing coordination and promotion.

Government represents many of the stakeholders involved in the work of the Centre including, most importantly, people in need of pro bono legal services. In direct terms, value to Government is being obtained by an increase in the amount and quality of pro bono legal services being provided as a result of the work of the Centre. Whilst difficult to measure, anecdotal evidence indicates that the amount of pro bono being provided in Australia is consistently growing. The Centre believes that there is great potential for many more lawyers to become involved in the provision of pro bono legal services and for existing services to be more effectively targeted.

The Centre also provides an important role in policy development, a role that is outside the operational capacity of firms or clearing houses. This includes leadership on national issues such as government conflicts, court fees, disbursement schemes, law school policy, aspirational targets and on systemic issues such as mentoring, capacity building and issue identification. Some of these are touched on in this submission.

The University of New South Wales Law Faculty ('UNSW') has indicated its support for the Centre beyond June 2005 by agreeing to provide accommodation on campus at UNSW and meeting some of the Centre's operational expenses. This is contained in a formal Access Agreement recently entered into between UNSW and the Centre. This provides the community part of the partnership funding model.

The Centre will be pursuing discussions in the corporate sector and with the legal profession in relation to core funding but by the time government decisions have to be made for the 2005/06 financial year budget it is likely to be too early in the development of the Centre to secure adequate commitments from these sources. In order to allow

Government time to consider what support might be appropriate in the 2005/06 budget the Centre proposes to provide the Attorney-General's Department with a detailed submission in September 2004 seeking funding from government. Current indications are that the Centre will be seeking an extension of current funding at least for the 2005/2006 financial year.

Based on the present experience of the Centre, the community/private/government partnership model of funding appears to be best satisfied in the foreseeable future by UNSW continuing to provide accommodation and some support to meet overhead costs, the private sector (law firms and corporations) continuing to provide in-kind support and sponsorship for various events or activities and government providing core funding to sustain the infrastructure of the Centre.

The Centre believes that there is a continuing need for national leadership, advocacy and coordination on issues relevant to the delivery of pro bono services beyond June 2005 so as to build the pro bono culture across the profession, increase the capacity and amount of services delivered and to increase access to pro bono services that are based on need. The Centre is well positioned to fulfill this role.

### **2.6.3 Funding disbursements in pro bono matters**

The lack of funds to pay disbursements associated with pro bono matters is a commonly cited barrier to pro bono. Whilst many practitioners are willing to act without fees, at reduced fees, or on the basis that fees would only be recovered in the event of a costs order, these practitioners may not be able or willing to meet the costs of disbursements associated with the pro bono matter – thus the matter cannot proceed.

The Centre suggests that government policy should be to foster a “green light” approach to pro bono matters so that once a matter has been evaluated by a lawyer and a lawyer-client agreement has been entered into on a pro bono basis, the justice system should support that matter by paying for reasonable disbursements (with recovery by the disbursement fund in appropriate cases). Whilst this raises definitional and ‘proof’ issues, the Centre considers their resolution is worthwhile. This approach should also apply so as to confer exemption from court filing and other fees for pro bono matters (see 2.6.7 below).

The types of disbursements that are creating a barrier and might be met by such a scheme are: travel costs (e.g. counsel traveling out of the metropolitan area to attend a hearing), interpreters or translation costs, fees for expert medical and other reports. It would not be intended to cover solicitor's office disbursements (photocopying, phone etc), counsel's fees, filing fees or other statutory costs. Disbursement funding currently available, if any, differs between jurisdictions. Some states and territories have a fund that can be utilized, however these are in many instances limited to cases where an award or damages or compensation is likely so as to enable the fund to recover its expenditure. This excludes a very wide range of matters in which pro bono assistance may be required. In other cases, the fund has other limitations that reduce its effectiveness, for example, an application fee; or a condition that the expense be paid for by the individual or practitioner with only

reimbursement available; or strict and low monetary limits being set on expenditure – in addition to restrictions on matter types. Practitioners comment that obtaining funding for disbursements, if available at all, is difficult and time consuming and anecdotal evidence suggests for at least two of the funds applications have been declining in recent times. Details of the way the various State and Territory based litigation and disbursement assistance schemes now operate are set out in the Australian Pro Bono Manual.<sup>16</sup>

The Centre suggests that Government should support a project to develop a model disbursement assistance scheme. In the Centre's view such a scheme, specifically for the purpose of meeting certain disbursements in pro bono matters where access to funding is as simple and speedy as possible and by making funding available, would remove a significant barrier to the provision of pro bono services. If this were adopted as Government policy, the Centre would be willing to co-ordinate a project working with the Attorney-General's department, courts, legal aid commissions, law societies and PILCHs in various jurisdictions to develop a model disbursement assistance fund. Such a project could also examine and report on litigation lending and insurance schemes, the latter being a relatively new part of the Australian litigation landscape.

#### **2.6.4 Government lawyers**

We suggest that the Government's Civil Justice Strategy include the goal of promoting pro bono on the part of Government lawyers and strategies to achieve this goal. The Centre believes there is potential to expand the involvement of Government lawyers in pro bono work. This scope was recognised by the former Attorney-General, Darryl Williams, who when launching the Centre spoke of the need for the Centre, the Australian Government Solicitor ('AGS') and others to work together to address barriers to participation and enhance the contributions of government lawyers and their employing agencies. We would welcome the opportunity to work with the Government in developing these strategies.

Our preliminary research indicates that current involvement by government lawyers in pro bono is quite limited. The AGS has conducted an internal survey of the amount and nature of pro bono that its lawyers undertake and is in the process of reviewing its existing pro bono policy in order to enhance the pro bono work of the agency and its lawyers. We have been liaising with the AGS and intend to work further with them. We are not aware of pro bono activity in other Government departments or agencies although we have not yet completed our inquiries.

Two types of initiatives could be considered. First are those where Government takes steps to facilitate lawyers undertaking pro bono in their own time, for example, paying for practising certificates and allowing leave without pay to pursue pro bono work. The second kind of initiative could involve Government itself allocating resources to pro bono in the form of lawyer-hours, funding, and other agency resources, for example, agency lawyers might be able to participate in community advice clinics or undertake

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<sup>16</sup> Australian Pro Bono Manual at p191; available at: [http://www.nationalprobono.org.au/probonomanual/ProBono\\_Manual\\_04.htm#5](http://www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5).

secondments in community locations. Such initiatives would be beneficial not only for the community but also for the agency and for individual lawyers participating.

The Centre is currently developing an information paper concerning government lawyers and pro bono that will look at some of the barriers (for example, practising certificates, insurance, conflicts) that may arise and means of overcoming them. The information paper will also look at overseas experience and include examples of the kinds of projects that government lawyers have undertaken in other jurisdictions.

The Centre is of the view that there is scope for leadership by government in this area. For example, the US Attorney General and Department of Justice has adopted and published a policy on pro bono legal and volunteer services.<sup>17</sup> The policy encourages Department employees to set a personal goal of 50 hours per year of pro bono legal and volunteer services, provides an approvals procedure, and deals with issues such as use of agency resources.<sup>18</sup>

### **2.6.5 Court pro bono schemes**

The Strategy Paper mentions the pro bono referral schemes operating in the Federal Court and Federal Magistrates Court.<sup>19</sup> These schemes are fairly new and appear to operate differently in different locations and there are differences in practice between the Federal Court's scheme and that of the Federal Magistrates Court. Our understanding is that they offer coverage in only some geographic areas and in some areas of law. Courts in other jurisdictions, most particularly NSW, are in the process of setting up similar schemes or may be interested in doing so. It is timely now the schemes have been operating for several years to undertake an evaluation of them – to enable adjustments and improvements, if necessary. It may be, for example, that more attention could be given in some locations to the involvement of solicitors. It may be that more thought needs to be given to the interaction between these schemes and duty lawyer schemes and other services that might be available to unrepresented parties, for example, assistance by way of a speculative arrangement concerning payment of fees rather than pro bono assistance. An evaluation could look at associated issues, such as the desirability of establishing a register of practitioners willing to take on matters on a speculative basis, in addition to having a register of pro bono practitioners.

The Centre suggests that the Government support an evaluation of the schemes, including by providing funding for this purpose.

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<sup>17</sup> See [http://www.usdoj.gov/jmd/ethics/docs/probonopol\\_pol.htm](http://www.usdoj.gov/jmd/ethics/docs/probonopol_pol.htm)

<sup>18</sup> The policy generally urges employees to seek pro bono work outside their scheduled working hours however permits pro bono activities during work hours, where approved, generally on an unpaid, leave, basis. In limited circumstances 'administrative leave' may be granted, for example, where the service is officially sponsored or sanctioned by the Attorney General or where it will enhance the professional development or skills of the employee in his or her current position. The policy of the Office of the Attorney General of the State of Washington provides that where performance of pro bono work is required during regular work hours, attorneys should be allowed to take advantage of flexible work schedule arrangements rather than being required to take leave.

<sup>19</sup> Strategy Paper, at pp 117-118.

### **2.6.6 Other Government interventions to encourage pro bono**

The discussion elsewhere in this submission includes a number of steps that the Government could take to encourage and support pro bono. In addition to those activities, we suggest that consideration be given to pro bono initiatives along the lines of the Victorian Government's tender scheme and the Victorian Pro Bono Secondment Scheme.

In July 2002 the Victorian Government introduced a policy to take into account the value of pro bono work performed by law firms in tenders for government legal work. Firms tendering to provide legal services to government were required to commit to providing pro bono legal services to the value of between 5% and 14% of the value of the tender.<sup>20</sup> Ultimately 33 firms were successful and the pro bono commitments in the contracts commenced on 1 January 2003. The Centre understands that the scheme will be evaluated after 30 June 2004. This scheme has attracted considerable support. The Centre notes submissions by the Public Interest Law Clearing House in Victoria, the Homeless Persons Legal Clinics<sup>21</sup> of Victoria and Queensland and by Clayton Utz to the Senate Committee on Legal Aid and Access to Justice that urged the Commonwealth to introduce a similar scheme under which the conduct of pro bono work would be a matter taken into account in the consideration of tenders. Such a scheme could provide a means of encouraging pro bono as well as an opportunity to acknowledge pro bono contributions being made by the profession.

Whilst a novel initiative on the part of government, these kinds of conditional retainers are not as novel in the corporate sphere. In the USA companies are increasingly incorporating pro bono in their 'Requests for Tenders' issued to law firms. The Centre has been told that some companies in Australia, in tendering out their legal work, are starting to ask bidding firms to describe their pro bono work.

A government wishing to actively encourage pro bono in this way could choose to make pro bono contributions an essential condition of a contract with government,<sup>22</sup> with or without prescribing quantities of work. Alternatively government might choose to make pro bono work a desirable although not essential criterion when selecting legal service providers.

The effect and forms of these types of "incentive schemes" both in Australia and overseas is an area where the Centre would like to commence a research project which could inform government policy.

Based on anecdotal evidence to date in Victoria, the Centre suggests that once the Victorian arrangements have been evaluated, and subject to this evaluation, the Commonwealth should consider implementing these kinds of measures at the Commonwealth level.

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<sup>20</sup> Alternatively firms could pay that percentage to the government which would then be applied to legal services for the disadvantaged.

<sup>21</sup> Their submission was endorsed by additional organisations therein noted.

<sup>22</sup> And a key performance indicator in assessing the performance of legal service providers so retained.

The Victorian Government has also been involved in a pro bono secondment scheme, which was a joint initiative between Government, Victoria Legal Aid, the Federation of Community Legal Centres (Vic) and the Law Institute of Victoria. The scheme offered a formal process for law firms to second lawyers to the 'legal aid sector'. The Report on the 12 month pilot project undertaken from March 2002 to December 2003 has recently been published and is available at: [www.justice.vic.gov.au](http://www.justice.vic.gov.au). The scheme was initiated by the Victorian Attorney-General and involved an initial feasibility assessment by a Working Group then a 12 month pilot project in which six law firms provided ten lawyer secondees to eight community legal centres and one section of Victoria Legal Aid.<sup>23</sup> These secondments were, in the main, full-time positions for six month periods.<sup>24</sup> The evaluation of the scheme was very positive. Government involvement included a letter from the Attorney-General to one hundred Victorian law firms and to CLCs inviting them to participate in the scheme and membership on the Steering Committee<sup>25</sup> by representatives of the Attorney-General and from the Department of Justice. The Report of the pilot recommended that the scheme continue. It referred to the Attorney-General's involvement as having been 'invaluable' and recommended that the Attorney-General remain as the 'patron' of an ongoing scheme. The Centre understands that the Attorney-General has written to law firms and CLC's seeking their expressions of interest and that Victoria Legal Aid will continue to facilitate the scheme.

#### **2.6.7 Court fees**

We note the discussion on court fees and fee waiver in the Strategy Paper.<sup>26</sup> As noted in the Strategy Paper, rules of courts in NSW contain pro bono-specific fee provisions in addition to general waiver provisions.<sup>27</sup> These specific rules postpone the payment of fees until after judgment where the applicant is being represented under the pro bono scheme of the Law Society of NSW or the NSW Bar Association. In these cases, the solicitor or barrister acting for the party need only certify in writing to the relevant court that the party is being so represented and undertake to pay the fee in the event that the concession does not apply.

The NSW Law Society in March 2002 made representations to the Federal Court and the Federal Attorney-General requesting the Federal Court to make a general exemption in the Federal Court rules in respect of filing fees in that court for matters referred under the pro bono schemes of the Law Society of NSW, the NSW Bar Association and the NSW PILCH. The Federal Attorney's response was to keep the matter under review and

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<sup>23</sup> One secondee worked 4 days per week at a CLC and one day per week in the refugee and immigration law section of Victoria Legal Aid.

<sup>24</sup> As noted above, one secondment was split between two organisations. While most of the secondments were for 6 months, one was for 4 months and another was for 13 months. The scheme's facilitator also explored interest in 'sessional' (part-time) secondments. One such secondments resulted and several smaller firms have expressed interest.

<sup>25</sup> The Steering Committee was responsible for oversight of the pilot and reporting to the Attorney General at the end of the pilot program.

<sup>26</sup> Strategy Paper, at pp 274 – 295.

<sup>27</sup> Strategy Paper, at p 278.

suggest that the Centre might work with courts to develop and establish rules and guidelines and a more regulated process for dealing with court fees in pro bono matters.

The Centre advocated above a “green light” approach by government to pro bono matters. In the context of court fees such an approach would entail conferring exemptions from court fees for pro bono matters, in a similar way as for legally aided matters. Again definitional and ‘proof’ issues are raised but the Centre considers their resolution is worthwhile. Existing exemption and waiver of fee provisions, for example in the Federal Court of Australia Regulations, would need little amendment to formally recognise pro bono matters.

The Centre has consulted with the Federal Court and believes there is merit in Government supporting amendments to the rules of the federal courts and tribunals that would exempt from payment of fees matters referred by pro bono schemes approved by the Attorney-General. Pro bono referral schemes operated by the legal professional associations, and by firms that have structured pro bono programs and the Public Interest Law Clearing Houses, for example, generally undertake an assessment of the means of applicants – considering their capacity to pay for legal assistance. This initiative would streamline the lodging of proceedings in pro bono matters, as it would not be necessary for the court to undertake another assessment of financial capacity. In addition, the conferral of automatic exemption can encourage practitioners to take on these matters.

The Centre therefore suggests that the Government consider supporting amendments to the rules of the federal courts and tribunals that would exempt from payment of fees matters referred by recognised pro bono schemes. These schemes could be listed in a schedule to the rules. We note the precedent referred to in the Strategy Paper, namely s 37B *Supreme Court Act 1933* (ACT) that confers an exemption from fees for applicants legally assisted under a scheme approved by the Attorney-General. We also note sub reg 2(4)(a) of the *Federal Court of Australia Regulations 1978* which provides:

A fee is not payable if:

- (a) the person liable to pay the fee has been granted legal aid, under a legal aid scheme or service established under Commonwealth, State or Territory law or approved by the Attorney-General, for the proceedings for which the fee would otherwise be payable...

This provision permits the Attorney-General to approve certain legal aid schemes for the purposes of the regulation. This power has been used to approve many Aboriginal legal aid services and similar organisations. It is suggested that a similar mechanism could apply for pro bono schemes to be approved by the Attorney-General once certain criteria were satisfied, one being that an assessment of the means of applicants – considering their capacity to pay for legal assistance, is undertaken. It would be open to any pro bono scheme to approach the Attorney to seek approval. Then, on a case-by-case basis, the relevant court or tribunal would require certification by the practitioner that the particular matter has been undertaken pursuant to an approved pro bono scheme. If the Government is generally supportive of this idea, the Centre would be happy to work with Attorney-

Generals Department representatives, courts and other interested parties to develop appropriate criteria for approval.

In relation to fees, the Centre notes Recommendation 43 that the High Court's Regulations be amended to impose fees of approximately 20% of the existing prescribed fees for litigants who would otherwise be granted a complete fee waiver on the grounds of financial hardship. Fee waiver provisions have always existed to assist access to justice for those already disadvantaged by their comparative poverty. Commentary in the Strategy Paper states that imposing such a fee "would present some disincentive to litigants seeking to bring unmeritorious proceedings" and could not be said "to seriously inhibit access to justice".<sup>28</sup> The Centre understands that this recommendation would in fact impose a minimum fee of 20% of the standard fee and is concerned that this will deter and prevent meritorious as well as unmeritorious applications. If there is a need to filter applications coming to the High Court, we suggest that the filter should not be the financial means of the applicant. The Centre has noted above that the need to meet disbursements (such as court fees) can be a significant barrier to pro bono. The Centre does not support this recommendation.

#### **2.6.8 Sharing pro bono expertise online**

The Centre notes the discussion in the Strategy Paper<sup>29</sup> about the development of a pilot version of Pro Bono Net ([www.probono.net/au](http://www.probono.net/au)) which is a site to facilitate information sharing amongst practitioners who provide pro bono services in a particular area of law. The Centre, in partnership with the National Association of Community Legal Centres, established a practice area in asylum seeker law but had difficulty getting the community of lawyers who practice in this area to take over running of the site. Sufficient resources were not available at the necessary time to maintain and update content and drive acceptance of it amongst the community. Victorian lawyers practicing in this area have now established a site at [www.sparelawyers.com.au](http://www.sparelawyers.com.au), led by a key lawyer practicing in this area that performs some of the information sharing functions of the pilot Pro Bono Net site.

The Centre is now reassessing the continuing role and operations of Pro Bono Net in Australia. Pro Bono Net is used widely in the US and Canada to service pro bono lawyer communities and is well supported. The online tools that Pro Bono Net has created could be very useful if adopted in Australia. It is clear that in order to be successful any online resource must be accepted and 'owned' by the community that it is to serve. The success of such a site also depends on there being sufficient resources not only to establish it but also to develop and maintain it. The Centre intends to explore further the use of Pro Bono Net to assist in the coordination of activities amongst and between members of the pro bono community as well as its potential to share information and resources in particular practice areas.

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<sup>28</sup> Strategy Paper, p 288.

<sup>29</sup> Strategy Paper, pp 118-119.

## 2.7 Discrete task representation

We refer to the discussion on discrete task representation in the Strategy Paper and to Recommendations 15 and 16.<sup>30</sup> These recommendations concern the development of model conduct rules to provide guidance to lawyers engaging in discrete task representation and possible amendments to court rules designed to clarify the obligations of lawyers when they are not acting on an ongoing basis in litigation.

Pro bono services are frequently provided in relation to discrete tasks – ranging from advising in relation to the drafting of court documents to limited appearances. The Centre notes the references in the Strategy Paper to concerns in the legal profession about liability and ethical issues. Whilst such a concern was raised with the Centre, it has not loomed large in the Centre’s consultations with practitioners and we would not wish to create concerns where there are none presently. If there are concerns, whilst they may not be warranted by legal principle, if they operate as a barrier to the provision of pro bono, they need to be addressed. The Centre would like to participate as a stakeholder in any discussion of this matter as envisaged in Recommendation 15.

The Centre would also wish to participate, as a stakeholder, in discussions concerning possible amendments to court rules. In 2003 the Centre provided comments to the Federal Court concerning one such possible amendment – which would have required practitioners who had prepared documents for use in proceedings to put their names on the document. The Centre’s consultations with practitioners and others revealed a number of concerns about such an amendment including that it could have a significant chilling effect on the provision of pro bono services. The Centre suggests that any process of clarification needs to take into account the implications of particular rules on the provision of pro bono legal services.

There is considerable material available from the USA that may be useful to inform discussions in Australia. We note in particular:

- The American Bar Association has recently created a new site, the ‘Pro Se/Unbundling Resource Center’ as a resource to help lawyers, bar leaders, the judiciary and other better understand and analyse the issues involved in self-representation and unbundled legal services: see <http://www.abanet.org/legalservices/delivery/delunbund.html>
- Selfhelpsupport.org has an unbundled folder in its library with a wide range of relevant publications (including reports, papers, articles, guides, sample retainer agreements) as well as a listserv on unbundling: see <http://www.selfhelpsupport.org>
- [www.unbundledlaw.org/](http://www.unbundledlaw.org/) is a website containing documents, ideas and recommendations from the national conference in the USA in 2000, ‘The Changing Face of Legal Practice: A National Conference on ‘Unbundled’ Legal Services’.

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<sup>30</sup> Strategy Paper, at pp 120-123.

## **2.8 Cooperative Service Delivery**

The Strategy Paper recommends (Recommendation 17) that the Government consider supporting the development of cooperative service delivery models similar to the NSW Legal Aid Commission model currently being piloted, following its evaluation. This Centre supports a cooperative regional approach to service planning and delivery as well as the other goals of the model. The Centre is represented on the Steering Committee of the project, and is thus being kept up to date with developments and issues. The Centre is working closely with the Commission, notably in relation to the Centre's own RRR project, to ensure the complimentary and coordinated nature of our work. The Centre is looking forward to seeing the evaluation of the two cooperative service delivery model pilots that have recently commenced and to working with other national bodies to promote similar coordination throughout Australia.

The model will likely encounter certain regions and communities that will require additional resources if unmet needs are to be adequately and appropriately met. The Centre considers that a national evidence-based analysis of legal needs (recommended above) would complement and inform a cooperative and coordinated regional approach to legal service delivery.

## **Chapter 3 Maximising the performance of the system**

### **3.1 Certification of reasonable prospects of success and costs penalties**

Concern has been raised with the Centre that the amendments contemplated by Recommendation 31 may operate as a significant impediment to the provision of pro bono legal services. Practitioners may be willing to act for a person without charging fees but may well be unwilling to expose themselves to what may be perceived as an enhanced risk of personal liability for doing so. This might arise because a pro bono practitioner might not have the time or resources available to undertake the necessary research to equip them to make the certification (particularly where tight statutory deadlines for lodging applications apply).

We note the argument that lawyers acting pro bono should provide the same level of professional service as lawyers being paid for their work. Irrespective of this, however, is the chilling effect of provisions that have the potential to 'blow out' the resources involved in appearing in a matter. Even if the pro bono practitioner is satisfied of the reasonable prospects of the matter, they may be deterred from representing the party by the prospect of incurring time and expense in having to subsequently justify their view to the court. A further concern has been raised that the amendments contemplated would discourage test case litigation where the prospects are not clear but nevertheless it is in the public interest that the matter be considered by a court.

It may also be worth noting that recent UK research about costs orders against lawyers indicated that that the "wasted costs jurisdiction" (as the jurisdiction for recovering costs against lawyers is there known) is flawed for many reasons, including the evidence that it

is mostly used against lawyers representing legally aided litigants.<sup>31</sup> On this basis it would seem that introducing such impediments may, indirectly, have a disproportionate detrimental effect on disadvantaged clients. This is accentuated by the fact that those litigants are not in a position to fund further inquiries (such as opinions from counsel) unlike clients of greater means.

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<sup>31</sup> See Hugh Evans, “The Wasted Costs Jurisdiction” (2001) 64 MLR 51, quoted by Lord Hobhouse in *Medcalf v Mardell* [2003] 1 AC 120 at [57-58]; see also research in this area in the USA: see “Plausible Pleadings: Developing Standards for Rule 11 Sanctions, (1987) 100 *Harvard Law Review* 630.