



National Pro Bono Resource Centre

**Submission to the Senate Legal and
Constitutional References Committee
Inquiry into Legal Aid and Access to
Justice**

1. Summary

This submission is made by the National Pro Bono Resource Centre (“the Centre”) to the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice.

The submission considers the capacity of current legal aid and access to justice arrangements to meet community needs from the Centre’s experience as a legal resources and research organisation which aims to encourage and support the provision of quality pro bono services. We discuss the limited information available about the amount of pro bono work that is undertaken, outline some of the ways in which pro bono is currently delivered, and point to some of the gaps and limitations in the provision of pro bono services.

Australian lawyers provide a significant amount of pro bono legal services to low income and disadvantaged Australians and there is room for some growth in and/or increase in the effectiveness of such services. However, pro bono services are not and cannot be a substitute for publicly funded legal services. Pro bono services can only supplement them. Neither the continued existence of the voluntary contributions of lawyers nor any reasonably achievable increase in such contributions, can make up for any shortfall in necessary or desirable levels of funding for legal aid and community based legal services.

In summary, the Centre concludes that:

1. Insufficient funding for legal aid, community legal centres and Indigenous legal services – as well as restrictions on the availability of legal aid for particular areas of law - has resulted in increased demand for pro bono services.
2. Australian lawyers make a very significant contribution to providing access to justice by way of pro bono legal services.
3. There are significant areas where barriers to providing pro bono are endemic. These barriers include: expertise, conflicts of interest, size or complexity of matters, geographic location of clients and needs, disbursements, costs and the limited resources of some firms, most particularly, smaller law firms.
4. There are core areas of legal need where pro bono services are particularly difficult to obtain - such as criminal law and family law and some civil law matters.
5. Pro bono services are less likely to be available in certain regions and for certain client groups, such as Indigenous people. Accessing pro bono services in regional, rural and remote areas is extremely difficult.
6. There is some scope for extending and enhancing pro bono services through, for example, more organised and structured programs, new and enhanced referral schemes, more efficient referrals, cooperative partnerships, training, mentoring, and developing systems for sharing expertise. However, there is unlikely to be capacity to undertake additional

in-house pro bono work in smaller solicitor practices, especially those in rural areas.

7. The effective and enhanced operation of pro bono services in large part depends upon a well-funded and resourced legal aid and community legal sector.
8. Given the above and the unmet legal needs of low income and disadvantaged people, a significant injection of funding for legal aid, community legal services and Indigenous legal services is urgently required.

2. The National Pro Bono Resource Centre

The National Pro Bono Resource Centre was established by the Public Interest Advocacy Centre in partnership with several partner organisations and with financial support from the Commonwealth Government and the Law Faculty of the University of New South Wales.

The Centre is an independent, non profit organisation that aims to:

- encourage pro bono legal services,
- support lawyers and law firms to make it easier for them to provide high quality pro bono legal services, and
- work with the profession and the community sector to match services with the clients and groups most in need of assistance.

The Centre promotes and supports pro bono by publishing information and undertaking other activities. Details of the Centre's publications, current activities and projects in development are available at www.nationalprobono.org.au.

In planning its activities the Centre has drawn on recommendations and reports prepared by others, in particular the *National Pro Bono Task Force Report*. The Centre has established an Advisory Council and consults widely with the legal profession, community sector, and other relevant people and organisations.

3. The Centre's submission to the Committee's Inquiry

Given the Centre's aims and focus, we have chosen to comment on those aspects of the Committee's inquiry which specifically relate to pro bono service delivery as a mechanism for facilitating access to justice for low income and disadvantaged people.

There is little doubt that the reductions in funding to some parts of the legal aid system have resulted in an increase in demand for pro bono legal services.¹ While it is generally accepted that pro bono services should complement, rather than substitute, publicly funded legal services, there is a level of cynicism in the profession about recent government interest in pro bono and a concern that their pro bono contributions may allow current or future State or Commonwealth governments to avoid fully meeting their responsibilities to people in need. That is, people in need have a *right* to assistance which should not be dependent on the availability or willingness of someone to provide their services on a voluntary basis.

¹ See Jill Anderson and Gordon Renouf, 'Legal Services "for the public good"' (2003) 28(1) *Alt LJ* 13 at 16.

However, the reality is that the state does not provide, and has not provided for some time, adequate levels of publicly funded legal assistance. It is in the context of this difficult reality that the Centre makes the following submission.

The purpose of this submission is to provide the Committee with information about the amount and nature of pro bono legal services being undertaken in Australia and outline some of the gaps and limitations in the provision of pro bono services to show the efficacy of existing services to adequately meet needs.

4. Quantitative information on pro bono legal services in Australia

There is limited information available comprehensively quantifying the amount of pro bono work undertaken by the legal profession in Australia. In its most recent survey of the legal services industry² the Australian Bureau of Statistics (ABS) estimated that in 2001-2002 solicitors and barristers in Australia provided: 866,300 hours of legal services without expectation of a fee; 123,100 hours of involvement in free community legal education and/or law reform; and 536,700 hours of legal services for a reduced fee. On average, Australian lawyers each undertake approximately 42 hours of pro bono per year. Based on the limited data available, it appears that the amount of free legal work contributed by the profession is in the range of 10 – 30% of the amount of work funded by the taxpayer through legal aid commissions, public defenders, community legal centres and Aboriginal and Torres Strait Islander legal services.

5. Qualitative information on pro bono legal services

The provision of free legal assistance to those who cannot afford it has a long history in Australia. Some of the arrangements, including the establishment of community legal centres by volunteers, have been subsumed into government-funded programs.

The pro bono field is constantly evolving. In some areas innovative schemes, partnerships and networks have been implemented to facilitate pro bono legal services which complement and supplement the work of other parts of the legal aid system. The diversity of forms of voluntary contribution of the legal profession to pro bono is clearly significant. The first part of this section looks at some of the models of pro bono service delivery. This information will provide the Committee with an overview of the diversity of pro bono legal services currently available.

However, the Centre also notes that there are still many areas of need where pro bono legal services are less likely to be available. The second part of this section identifies some of the shortfalls for many disadvantaged people in accessing justice and the legal services they require, and problems that have been identified by the Centre in the course of its consultations with the legal sector and community groups in relation to pro bono services for these people. This section will provide the Committee with empirical information on what has been identified by the profession as some of the more pressing limitations inherent in the provision of pro bono legal services.

5.1 Mapping pro bono legal services – models, partnerships and schemes

Pro bono legal services take a number of forms including legal services provided ‘in house’, that is, in the course of the lawyer’s normal practice, through volunteer

² See, Australian Bureau of Statistics 8667.0 *Legal Practices Survey 2001-02* (hereafter ABS Survey).

arrangements, especially at community legal centres,³ through secondment of staff and outreach services, mentoring and other support arrangements and through multi-faceted partnerships between legal practices and community organisations.

Models of law firm pro bono practice

Attached as Annexure 1 is information on current models of pro bono services provided by law firms.

Multi-tiered partnerships

A number of law firms have formed multi-tiered relationships with community legal organisations, whereby firms provide a range of legal and non-legal pro bono assistance, to the organisation.

Attached as Annexure 2 is a paper providing details and case studies of such relationships.

Pro bono referral schemes

Recent years have seen the development of pro bono referral schemes operated by legal professional organisations, as well as the creation of pro bono Public Interest Law Clearing Houses (PILCHs) in Queensland, NSW and Victoria. In addition, some courts have established pro bono referral schemes. It is generally accepted that there are an increasing number of self-represented litigants appearing before the courts. While a certain number of those litigants may in fact choose to litigate without legal representation, it would be fair to assume that for the majority of those litigants, it is the unavailability of publicly funded legal services, or the incapacity to afford to pay for legal services, that forces them to represent themselves in litigation. Some lawyers question whether the proliferation of pro bono referral schemes – and calls for greater participation in pro bono generally – unfairly stretches the profession’s goodwill beyond merely “complementing” publicly funded legal services.

It should be noted that some referral schemes, in particular the PILCHs play a developmental role in addition to referring individual cases. PILCH in Victoria has developed the Homeless Persons Legal Clinic, one of the most significant innovations in legal service delivery in recent years. A Homeless Persons Legal Clinic has also been established in Brisbane by QPILCH and NSW PILCH is currently looking into the feasibility of such a clinic for Sydney.

Data from these schemes is tabled below.

The following general comments can be made about the schemes:

- the schemes receive far more applications than they are able to refer;
- all schemes have recorded substantial increases in the numbers of inquiries for assistance;⁴

³ In the single month of June 2002, 1,325 solicitors and barristers provided volunteer services at community legal centres in Australia: see ABS Survey.

⁴ In some jurisdictions, the increase is as high as 600%: see NSW Bar Association, *Annual Report 2003*. An exception to this trend are Order 80 referrals made in the NSW District Registry of the Federal Court. This decline is, at least in part, thought to be due to the existence in NSW of the Department of Immigration, Multicultural and Indigenous Affairs’ legal assistance scheme which provides free initial advice to refugees considering Federal Court applications.

- not all schemes provide free legal assistance: assistance under some schemes may be provided on a speculative, reduced fee, no fee or negotiated fee basis;
- apart from the schemes listed below, there are many other less formal pro bono schemes which run with the cooperation and/or assistance from professional organisations and courts and tribunals.

Statistics of Schemes' Inquiries and Referrals 2002-2003 financial year.

Scheme	Inquiries	Referrals
PILCH (Vic)	423	144
Law Institute of Victoria Legal Assistance Scheme*	407	91
Victorian Bar Legal Assistance Scheme	281	91
PILCH (NSW)	246	90
NSW Law Society Pro Bono Scheme	345	98
NSW Bar Association Legal Assistance Referral Scheme	358 **	189
PILCH (QLD)	111 **	40
Federal Court		89
Federal Magistrates Service		90 ***
NSW Supreme Court		11
NSW District Court		5/6 ****
Law Society of Western Australia	116**	data not available at time of writing

* from 14 October 2002 – 30 June 2003

** figure reflects formal applications only, does not include informal enquiries

*** approximate

**** since 2000

Attached as Annexure 3 is some further information on pro bono referral schemes.

5.2 Gaps and limitations in the provision of pro bono legal services

The Centre has identified a number of limitations on the availability and provision of pro bono legal services.

Areas of law and legal needs

It has clear that there is far more demand for pro bono assistance than is always possible to appropriately meet with pro bono assistance. The extent of unmet needs

are clearest where there are gaps in publicly funded legal services, and for people who fall outside legal aid means and/or merits tests and who do not have sufficient means to pay for private legal assistance. Even firms with wide-ranging pro bono programs report that their work has little effect on the huge unmet demand for assistance from people without means.

Most commercial law firms do not have expertise in the core areas of legal aid work. Given firms' (and lawyers' generally) reasonable concerns about the risks associated with taking on work for which they don't have the requisite expertise, and are unable to appropriately supervise, it is inappropriate to assume that pro bono service providers should pick up what have been traditionally core areas of legal aid.

Firms report that they are often asked by pro bono referring agencies (such as legal aid or CLCs) to reconsider whether they will take on matters outside their stated areas of expertise. While the high demand for pro bono assistance in some areas of need may, on occasion, be addressed by training (see below), it is the Centre's belief that pro bono training should be at best a complementary or supplementary measure, and not the optimum solution to meeting unmet needs. Where there is unequivocal evidence for demand (as is clearly the case in family law) there should be a concomitant commitment from government to consider ways it can directly increase assistance.

Conflicts of Interest

Firms and referral agencies have identified conflicts of interest as a serious issue which sometimes prohibits them from supplying pro bono services.

The areas in which conflict of interest are likely to arise vary according to the size and location of the legal practice but can include immigration, family law, professional negligence matters (against doctors and lawyers) and matters against banks and insurance companies. There is also evidence that conflicts may pose a particular problem in rural, regional and remote areas where there are a smaller number of available practitioners to take on pro bono matters.

Many firms have identified conflicts as a particular issue when asked to provide pro bono assistance in matters against government – at local, state and commonwealth levels. The Centre, in consultation with the profession, has written to the Commonwealth Attorney-General asking the Government to adopt and implement a protocol designed to minimise the perception that lawyers undertaking pro bono work against government may be prejudiced in securing government legal work. The Attorney-General has agreed that legal service providers should, subject to conflicts rules, be given the same level of consideration in relation to the provision of tender bids for legal services, regardless of whether those lawyers have acted pro bono for clients against the Commonwealth. At the time of writing, the Attorney-General's Department is considering how best to address this issue. The Centre intends to pursue adoption of the protocol at a state and territory level.

The proposed Protocol is attached as Annexure 4.

Rural, regional and remote

The relative lack of access to legal services for disadvantaged people in rural, regional and remote areas is well-accepted.⁵ Rural, regional and remote CLCs report on a huge need for advice and representation in areas such as family law, contract and debt matters, criminal law, domestic violence, employment and discrimination, and guardianship and estate matters. To date, pro bono services are disproportionately provided in cities.⁶ Moreover, it is likely that many rural firms, like other small firms, are already providing significant levels of pro bono legal services and have limited capacity to provide additional pro bono assistance.⁷ It is also likely that many of these smaller practices are finding conditions harder as a result of difficulties in rural areas generally, and as a result of the so-called ‘tort-reforms’ and resultant restrictions on an important traditional area of practice. As mentioned above, conflicts of interest are also more likely to occur in small practices and communities. Disbursements are also likely to be higher for rural pro bono clients, especially travel and telephone costs. There is also evidence that referrals for pro bono assistance for people from rural, regional and remote areas are likely to be for matters which are more serious.

Disbursements

Even where pro bono legal assistance is available for a litigant, the liability to pay disbursements may represent a significant hurdle to people asserting their rights. Disbursement funding schemes in some jurisdictions around Australia provide disbursement assistance to litigants in some areas of civil litigation. However, the availability of funding is limited, the disbursement funds apply means and merits tests and assistance may well be limited to cases involving the likelihood of recovering damages. Clearly there are many deserving cases that do not result in compensation. There is a clear need for disbursement assistance to be more widely available for pro bono matters.

Attached to this submission as Annexure 5 is information on current disbursement assistance schemes.

Costs and risks

Risks of adverse costs orders may have a prohibitive effect on whether a matter will be taken up on a pro bono basis.

⁵ See, for example, Access to Justice Advisory Committee, *Report of the Access to Justice Advisory Committee 1995* AGPS Canberra and Women’s Legal Resources Centre NSW, *Quarter Way to Equal, A Report on Barriers to Access to Legal Services for Migrant Women*, 1994

⁶ The Centre will shortly commence on a project (with funding assistance from the NSW Law and Justice Foundation) which aims to assist CLCs and their clients in rural, regional and remote areas of NSW gain access to pro bono legal services .

⁷ see 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 p.273. See also ABS Survey statistics that indicate that: lawyers located outside capital cities undertake, on average, more than twice the amount of pro bono work than lawyers in capital cities; and lawyers in small practices, particularly those with only one principal, did significantly more pro bono than lawyers in practices with 10 or more principals/partners.

Complex litigation

Those working in pro bono (including firms with pro bono practices, community legal centres and referring agencies including public interest law clearing houses) note the difficulty of finding pro bono assistance for complex or lengthy litigation. It is noted that this is all the more difficult where the matter has progressed some way into the litigation process without legal assistance, or with a fractured history of legal assistance. The resource implications of committing to these kinds of matters often make it difficult for pro bono assistance to be obtained for these matters. The Centre has heard anecdotal stories of firms taking on one significant matter which effectively exhausts their annual pro bono budget.

Public interest test

Some pro bono programs are restricted to matters that have a 'public interest'. While this criteria facilitates assistance for matters that may have a broader public benefit, it is perhaps indicative of the finite nature of pro bono services that some providers see the need to prioritise and confine pro bono accordingly. This finite nature of services can make it difficult to obtain pro bono assistance in matters that have no or little impact beyond the importance of the matter to an individual client.

Expertise

The mis-match between the expertise of private pro bono lawyers, particularly in the larger firms where the potential for expansion of pro bono programs exists, and the most common areas of legal need (and to some extent the reluctance to accept instructions in matters involving significant levels of litigation) are key reasons why pro bono services are unlikely to make any significant dent in the demand for publicly funded legal services in key areas of need including criminal and family law.

Nor are pro bono legal services likely to be able to provide routine assistance in many areas of civil law, especially those that require high levels of specialisation in the law and practice of the relevant area such as social security law, consumer credit law and migration law. It cannot be assumed that pro bono service providers will have the requisite level of expertise, capacity or resources, to take on any kind of matter, on a pro bono basis, at any given time.

Firms can, and do, provide or organise training (often in partnership legal aid bodies or CLCs) to enable lawyers to take on matters in which they do not have expertise, and for which there is a clear demand for, and short supply of, assistance (for example, assistance with defended domestic violence applications and victim's compensation matters. See the attached as Annexure 6, a copy of Issue 2 of *Pro Bono News*, the Centre's eNewsletter, for a short item on training of pro bono lawyers.

There is no doubt that there are clear benefits of this kind of skilling up: information sharing creates expertise which others can call upon, training in new areas of law increases job satisfaction for lawyers and creates new pro bono opportunities. However, the expectation that pro bono providers should, as a matter of course, rely on those organisations whose resources are already stretched to keep up with their own in-house demand for assistance in core areas of legal aid (such as family and criminal law) may not be the best, nor fairest, use of resources or expertise.

The Centre is undertaking a project to adapt the US web site Pro Bono Net (www.probono.net.au) for use in Australia. The purpose of the site is to provide a

high quality means for pro bono and publicly funded lawyers to share expertise and other information to assist them deliver services to clients.

The need for a well-funded community legal sector

Most pro bono programs rely on the assistance of the community legal sector and legal aid bodies for referrals of pro bono matters. Pro bono programs operate in tandem with these organisations: community legal centres and legal aid bodies are the best placed to identify and make informed pro bono referrals of matters of real need. Pro bono program coordinators report that the most successful programs are a result of close and ongoing working relationships with the community legal sector. Without well-resourced legal aid and community legal services, pro bono programs would not be effective.

conclusion

In sum, the availability of pro bono legal services fails to provide real answers to address the problems caused by inadequate funding of legal aid and community legal services. This lack of funding and the constraints of pro bono legal services, in our view, exacerbates the weaknesses of the legal system in enabling poor and otherwise disadvantaged people to defend or assert their rights. In the absence of sufficient state legal funding, pro bono legal services are relied on as an important means to enhance, supplement and extend the reach of legal services.

October 2003