



Pro bono legal services in family law and family violence

Understanding the limitations and opportunities

Final Report - Executive Summary

October 2013

National Pro Bono Resource Centre
The Law Building, University of New South Wales
UNSW Sydney NSW 2052



UNSW
AUSTRALIA

Website: www.nationalprobono.org.au
Tel: +61 2 9385 7381 Fax +61 2 9385 7375
Email: info@nationalprobono.org.au

EXECUTIVE SUMMARY

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

The capacity constraints of family law practitioners

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

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

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

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

The constraints faced by large and mid-sized law firms

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

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

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

- 1) the compatibility of the unmet legal need with the legal assistance available based on the **scope of a firm's pro bono policy**,
- 2) whether the law firm and/or lawyer has **expertise** in the relevant area of law,
- 3) whether the law firm and/or lawyer has the **capacity** to take on the matter,
- 4) whether the matter is a **discrete task**, and
- 5) the **willingness and interest** from lawyers within the firm to undertake the work.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For example, despite the availability of legal aid funding in the area of family violence, many pro bono coordinators think work in the area of family violence fits within the **scope of a firm’s pro bono policy**. This may be because the factors in the Framework are weighted differently in the area of family violence.

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

Further research could provide a better understanding of:

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

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

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

It is also, because it is the area of law by means of which most people will come into contact with it, the area by which the legal system will be judged by most people.¹

¹ Justice Rosie Abella of the Supreme Court of Canada, as quoted by The Honourable Diana Bryant, Chief Justice of the Family Court of Australia in her speech, 'Walrus and the Changing Shape of Family Law in Australia', November 2008, http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Speeches/FCOA_NZ_Speech.