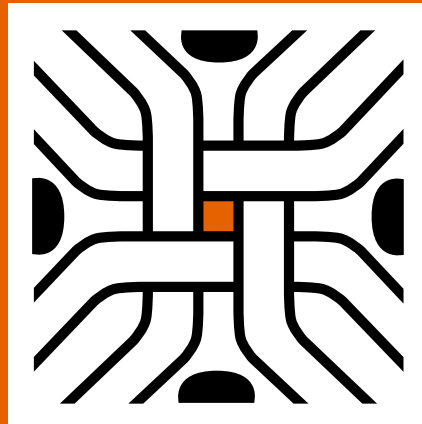




# PRO BONO IN AUSTRALIA

*An introduction for Practical Legal Training students*



**National Pro Bono Resource Centre**  
[www.nationalprobono.org.au](http://www.nationalprobono.org.au)





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Published by

**National Pro Bono Resource Centre**

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## Abbreviations

ACLA	Australian Corporate Lawyers' Association
CLC	Community legal centre
FLS	Fitzroy Legal Service
LAC	Legal Aid Commission
NACLC	National Association of Community Legal Centres
the Centre	National Pro Bono Resource Centre
PLS	Prisoners' Legal Service
PBSS	Pro Bono Secondment Scheme
PILCH	Public Interest Law Clearing House
RASSA	Refugee Advocacy Service of South Australia
VLA	Victoria Legal Aid

*“Self-evidently, it is desirable that Australian law firms should include in their services a sizeable pro bono component. The advantages of doing so go far beyond salving the ‘social conscience’ of lawyers. It affords a variety of challenges to the highly talented young lawyers who need occasional rotation from a six trolley commercial dispute. It reminds them of the imperative demand for justice that may originally have sparked their interest in the profession of law. The righting of wrongs. The redress of discrimination. The protection of the underdog. Upholding the law against the strong and the powerful. Is this not why we were all, one day long ago, attracted to the law? We must make sure that we do not lose our direction and forget that original impulse.”*

The Hon Justice Michael Kirby ‘Law Firms and Justice in Australia’ Address at Australian Law Awards, 7 March, Sydney, 2002.

# 1. Introduction/overview

Lawyers and others have long been concerned that significant numbers of people are unable to afford the legal services necessary to assert or protect their rights and interests. Access to legal assistance is seen as inextricably linked to access to justice. One response has been for lawyers individually or collectively to provide 'pro bono' legal services to poor or disadvantaged people.<sup>1</sup> Pro bono is generally understood to refer to legal services provided on a free or reduced fee basis: see section 2 below. Other responses include advocacy for reform of the legal system or particular laws, welfare state funding of legal services, developing alternatives to the formal legal system and working for more fundamental social change.

The provision of free legal assistance to those who cannot afford it has a long history in Australia and elsewhere. Historical examples include informal court-based arrangements for advocates to appear on behalf of people accused of criminal offences, local solicitors responding to requests for assistance, and the establishment of community legal centres by volunteers. Some of these arrangements have been subsumed into government-funded programs such as legal aid, but the tradition of free provision of legal services continues.

In Australia, the United States, the United Kingdom and other countries there has been, in recent years, an explosion of interest in the provision of free legal services by lawyers employed in the for-profit sector.

Concern has been expressed in Australia and the United Kingdom that the provision of pro bono services in core areas of legal aid will allow governments to renege on their funding commitment. Pro bono cannot and should not be a substitute for publicly funded legal services (such as legal aid services, community legal centres and Indigenous legal services). Pro bono services operate to complement publicly funded services and are part of a framework of services provided to meet the needs of low-income and disadvantaged people. Regardless of the level of government funding there will always be unmet legal need and the pro bono work of the profession only meets a small part of this unmet demand.

Pro bono has, of course, always been a part of the everyday workload of law firms, particularly those who have general legal practices.<sup>2</sup> But what is new is the increase of structured and coordinated pro bono programs by firms and by professional

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1 Pro bono is generally understood to refer to legal services provided on a free or reduced fee basis, see p. 5.

2 According to the Australian Bureau of Statistics (ABS) survey, *Legal Practices 2007-08*, the estimated value of pro bono legal work undertaken by barristers and other legal services businesses (law firms) during the 2007-08 financial year was \$238.2m. Law firms accounted for the majority of this amount. Qualified legal staff spent an estimated 955,400 hours in undertaking pro bono work during the 2007-08 financial year.  
See: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/8667.0>

associations. This has coincided with the advent of large national firms and an increased globalisation of the delivery of legal services. State and federal governments have also become involved by:

- encouraging the private profession in its pro bono efforts through incentive schemes, and
- providing funding for the National Pro Bono Resource Centre (the Centre) whose function is to support pro bono through its independent role as advocate, broker, coordinator, researcher and resource provider.

In recent years, many larger firms have significantly increased their commitment to pro bono and have expanded their pro bono programs. Most large firms have dedicated in-house pro bono coordinators, and four firms have a dedicated pro bono partner.<sup>3</sup> Their pro bono practices involve a significant numbers of lawyers within the firm, and they work closely with community legal centres and other community organisations in accepting referrals and targeting particular areas of need.

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<sup>3</sup> This is quite a recent development, with four of the partners having been appointed during the past three years.

## 2. Definition of Pro Bono Legal Services

‘Pro Bono Publico’ is a phrase derived from Latin meaning ‘for the public good’.

There is no universally accepted definition of what is meant by ‘pro bono’ although several definitions have been influential in developing pro bono practices. Most definitions focus on legal assistance provided to disadvantaged or marginalised clients who could not otherwise access legal assistance or to clients whose cases raise a wider issue of public interest. The term often includes legal services provided to organisations working for disadvantaged groups or for the public good. Many definitions include lawyers engaging in free community legal education and/or law reform. All definitions of pro bono include services that are provided without a fee being charged, and many include work done for a reduced or substantially reduced fee. There is general consensus that pro bono work should not be seen as a substitute for publicly funded legal services and that pro bono work complements these services. This is often reflected in definitions of pro bono work, sometimes as a criterion for acceptance of a pro bono referral.

Here are a few definitions that are used widely in the everyday practice of pro bono legal work:

### Law Council of Australia

The Law Council of Australia in 1992 defined pro bono work as situations where:

1. A lawyer, without fee or the expectation of a fee or for a reduced fee, advises and/or represents a client in cases where:
  - (i) a client has no other access to the courts and the legal system; and / or
  - (ii) the client’s case raises a wider issue of public interest; or
2. The lawyer is involved in free community legal education and/ or law reform; or
3. The lawyer is involved in the giving of free legal advice and/or representation to charitable community organisations.

This definition is used by many firms.<sup>4</sup> It is broad – it covers not only legal advice and representation but also law reform and community legal education. However, it is limited to work done by lawyers and does not cover some kinds of assistance that firms may wish to include in their pro bono programs, such as secondments of non-legal staff and/or the provision of financial or in-kind assistance to community organisations (such as community legal centres and Public Interest Law Clearing Houses) which undertake activities that enhance access to justice.

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<sup>4</sup> In the 1999 Victoria Law Foundation / Voluntas survey of Victorian practitioners, 80 per cent of respondents reported that they used the law council definition: N. Gration, Voluntas, *Pro Bono Survey Report*, June 1999 Victoria Law Foundation.

## Victorian Government Legal Services Contract

In 2002, 33 law firms in Victoria were successful in securing panel contracts for the provision of legal services to the Victorian Government. Each of the firms was required to commit to providing legal services on a pro bono basis to 'approved causes' (or to make payments in lieu) equivalent in value to a nominated percentage (between 5% and 15%) of the fees it generates under the panel arrangements. For the purposes of these contracts, the Government has defined an 'approved cause' as:

The provision of any services by lawyers or other staff based in Victoria which will enhance access to justice for disadvantaged persons or organisations and/or promote the public interest including circumstances where a Panel Firm:

1. without fee or without expectation of a fee or at a reduced fee, advises and/or -represents a client in cases where:
  - (a) a client has no other access to the courts and the legal system and/or
  - (b) the client's case raises a wider issue of public interest;
2. is involved in free community legal education and/or law reform;
3. is involved in the giving of free legal advice and/or representation to charitable and community organisations;
4. provides staff (legal or other) on secondment to a community organisation; or
5. provides financial or in kind assistance (for example, equipment, sponsorship etc) to a community organisation.

This definition is clearly broader than the one discussed above yet contains some important limitations. It does not cover work performed for organisations or people who would otherwise be able to afford the services. Nor does it cover 'no win – no fee' commercial business arrangements.<sup>5</sup> The provision of financial and in-kind assistance to community organisations is covered only where it will 'enhance access to justice for disadvantaged persons or organisations and/or promote the public interest'. It does, however, underline the need for firms who wish to tender for contracts to be able accurately to record and to report on their pro bono involvement.

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<sup>5</sup> Attorney-General, State of Victoria 'Policy Guidelines for the Delivery of pro Bono services for an Approved Cause under the Government Legal Services Contract', March 2003.



## The National Pro Bono Resource Centre

The definition adopted by the Centre for the purposes of The National Pro Bono Aspirational Target<sup>6</sup> ('the Target') and the Centre's national surveys<sup>7</sup> is based closely on the Law Council of Australia definition of 1992 but clarified some 'grey areas'. Some of these 'grey areas' include whether time spent sitting on boards of community organisations, or legal assistance given to family or friends without reference to whether he/she can afford to pay for that assistance, should be considered pro bono legal work. Community service work, which more broadly could be said to be 'pro bono' (i.e. for the public good), is specifically excluded as the Centre wanted to define pro bono legal work for the purposes of the Target. The Centre's definition of pro bono legal work is time spent by lawyers giving legal assistance for free or at a substantially reduced fee to:

- Low income or disadvantaged individuals who do not qualify for legal aid; or
- Not-for-profit organisations which work on behalf of low-income or disadvantaged members of the community or for the public good;
- Doing law reform or policy work on issues affecting low income or disadvantaged members of the community or public interest matters; and
- On secondment at a community organisation or at a referral service provider.

The following is not considered pro bono legal work:

Giving legal assistance:

- To any person for free or at a reduced fee without reference to whether they can afford to pay for that legal assistance or whether the case raises an issue of public interest (e.g. legal assistance to family and friends);
- Free first consultations with clients who are otherwise billed at a firm's normal rates;
- Legal assistance performed under a grant from Legal Aid;
- Contingency fee arrangements or other speculative work which is undertaken with a commercial expectation of a fee;
- The sponsorship of cultural and sporting events, work undertaken for business development and other marketing opportunities; and
- Time spent by lawyers sitting on the board of a community organisation (including a community legal organisation) or a charity.

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6 See below p. 34.

7 For more information on the surveys, see <http://www.nationalprobono.org.au/page.asp?from=8&id=175>

This definition has been adopted by the Commonwealth of Australia under the Legal Services directions which requires all agencies to take into account a law firm's pro bono contribution when purchasing legal services.<sup>8</sup>

The pro bono policies of many law firms describe kinds of work that do not fall within a strict definition of pro bono. This is useful to give further clarity to the firm's definition and remove room for argument in cases where there may be doubt. Work that is often specifically excluded from the definition of pro bono includes work done without fees or at reduced rates for staff acquaintances or family members or for existing or prospective clients for 'business development' reasons. Another exclusion might be 'work performed for private schools, clubs or other organisations (such as arts and cultural organisations) with which a lawyer has an association', meritorious as these activities may be. Some firms may choose to make clear in their policies that pro bono work does not include legally aided work and, where appropriate, that it does not include speculative work performed on a no win – no fee basis. This will depend in part on the size of the firm and its client base as well as the views of staff within the firm and the firm's capacity to provide pro bono services.

A number of firms with pro bono programs also do other work that benefits the community – for example, donations programs, sponsorships, community directorships and non-legal volunteering with charities. These sorts of activities are not only beneficial to the community but also give the firm's non-lawyers the chance to be involved in community work. There are also synergies that can arise from combining pro bono work with community service work. Nevertheless, firms may wish to delineate their pro bono programs from their other community service work in order to keep the focus of the firm's pro bono work on activities that enhance access to justice. Lawyers and law firms are in a unique and, in most cases, monopolistic position to undertake such activities.

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See: [www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment\\_LegalServicesDirections2005](http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_LegalServicesDirections2005), especially Legal Services Amendment Directions (No 2) Explanatory Statement.

### 3. Why should lawyers do pro bono work?

*“Why then, should lawyers do pro bono work? Because they are under a moral obligation arising from the work they have chosen to do. Conveniently, it may also be in their best interests.”*<sup>9</sup>

There are a number of reasons for a lawyer to do pro bono legal work. Lawyers have long been involved in delivering legal services to the disadvantaged and marginalised because it is seen as a professional obligation. Lawyers are privileged members of society, well educated and articulate. However, the professional obligation or ethical duty derives from the fact that lawyers have exclusive access to the justice system and the courts – the state forbids unauthorised practice of the law. Lawyers therefore have an important role to play in facilitating access to justice for all but particularly those who have no other access to the legal system.

The most pressing reason for a lawyer to do pro bono work is the great unmet need for legal services within disadvantaged communities. There are more practical reasons as well. Doing pro bono work assists in the professional development of lawyers, and offers young lawyers especially the chance to broaden their knowledge. And it’s not just the core legal skills that will improve, but also the rarer qualities of leadership, judgment, project management and client relationships. These qualities will be useful for career development as well as life outside of the office.

In surveys conducted by the Centre, Australian solicitors and barristers indicated that the primary reasons that they undertake pro bono work are to help people who are socially disadvantaged or marginalised and out of a sense of professional responsibility.<sup>10</sup>

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9 Parker, S (2001): *Why Lawyers Should Do Pro Bono Work*, Law in context, Vol 19; For the Public Good, Federation Press 2001.

10 National Pro Bono Resource Centre, report on the pro bono work of individual Australian Solicitors, December 2007 and Report on the pro bono work of Australian Barristers, November 2008, both available at <http://www.nationalprobono.org.au/page.asp?from=3&id=36>.

## 4. Who delivers pro bono?

There is no comprehensive national analysis of the breakdown of the legal profession by employment sector. The Law Council of Australia estimates the legal profession to be made up of 50,000 legal practitioners.<sup>11</sup> An analysis of the employment sector of solicitors in New South Wales indicated that private practice solicitors make up around 69%, in-house (corporate) solicitors 14.6% and government lawyers around 10.8%<sup>12</sup>.

### 4.1 Structured law firm pro bono programs

In recent years, many of the larger law firms have increased their commitment to pro bono and have expanded and formally structured their pro bono programs. Some of the larger, national firms in Australia have active in-house as well as external pro bono secondment programs.

Some of these firms have full-time or part-time pro bono coordinators, and may additionally employ, or have on rotated placements, lawyers who undertake pro bono work on a full-time basis on behalf of the firm. Pro bono coordinators function as a contact point for external agencies referring work. Their roles typically involve some casework, as well as administrative tasks such as screening pro bono cases and allocating, coordinating and supervising pro bono work throughout the firm.<sup>13</sup>

The presence and support of a ‘specialist’ pro bono lawyer may make it easier for other lawyers to do pro bono work as the pro bono specialist can seek out matters that fit within the existing interests of the firm’s lawyers. They can also train others in the firm and develop resources relevant to pro bono practice. Ideally, the employment of a specialist pro bono lawyer is accompanied by a policy making it clear that the responsibility for pro bono is shared and fostered broadly within the firm.

The transition from ad hoc to structured pro bono practices in larger firms provides benefits to both the firms and recipients of pro bono assistance. For example, firms with a structured pro bono program are better able to manage the level of their pro bono commitment, to track and record output, to provide pro bono opportunities for all lawyers within the firm and to better target those in need of pro bono assistance.

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11 Law Council of Australia’s (LCA) estimate of Constituent Body membership numbers as at January 2008 – communications with the LCA, September 2008.

12 See Law Society of NSW, Profile of Solicitors in NSW: [www.lawsociety.com.au/page.asp?partID=934](http://www.lawsociety.com.au/page.asp?partID=934)

13 For more information of law firms’ pro bono programs, see the Pro Bono Practices Guide – a national guide to the pro bono practices of 30 Australian Law Firms, [www.nationalprobono.org.au](http://www.nationalprobono.org.au)

## 4.2 Individual solicitors

A recent survey into the pro bono legal work of individual Australian Solicitors conducted by the Centre<sup>14</sup> showed that about \$250 million of work was undertaken on a pro bono basis by Australian solicitors in 2007. The Centre's survey measured the activities of individual solicitors in carrying out their pro bono legal work, both as volunteers and as part of their paid employment. The survey results showed that solicitors spent an average of 42.5 hours doing pro bono work in the past year, with 60% undertaking more than 35 hours of pro bono work in the past 12 months. Results also indicated an increase in the pro bono work being done, and highlighted the fact that despite the growth of structured pro bono programs in law firms, solicitors still undertake significant amounts of pro bono work in their own time.

## 4.3 Barristers

Barristers are generally organised into State and Territory associations and within groups of chambers. Bar associations in NSW and Victoria have formal legal assistance referral schemes that coordinate some of the pro bono work done by barristers in those states. Elsewhere arrangements are less formal but nevertheless barristers provide pro bono legal services in all jurisdictions. The majority of pro bono referrals from the court-based schemes are to barristers, often in cooperation with the barristers' professional associations. Whilst there is information available on the matters referred through the legal assistance referral schemes, data about the nature and amount of the informally referred work is very limited.

The Centre has conducted a national survey into the pro bono legal work being done by Australian barristers, the results of which were published in July 2008.<sup>15</sup> The survey showed that barristers are committed to pro bono, with nearly 90% of respondents having done pro bono legal work in the past 12 months. The survey also indicated an increase in the amount of pro bono work undertaken by barristers.

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14 National Pro Bono Resource Centre, report on the pro bono work of individual Australian Solicitors, December 2007 available at <http://www.nationalprobono.org.au/page.asp?from=3&id=36>.

15 See [www.nationalprobono.org.au](http://www.nationalprobono.org.au)

## 4.4 Law students

Law schools can play an important role in shaping and defining the ethics and aspirations of individual lawyers.<sup>16</sup> Research in the USA indicates that students who undertake pro bono, including mandatory pro bono work, display a significantly heightened interest in making pro bono part of their professional practice after graduation.<sup>17</sup>

Australia's 29 Law schools have taken a range of initiatives in this direction. Most of the law schools run clinical legal education programs in conjunction or partnership with community legal centres (CLCs). There are also programs in association with Legal Aid Commissions (LACs), the courts and even directly with a law firm! Public Interest Law Clearing Houses (PILCHs) in New South Wales, Victoria and Queensland have created and negotiated an innovative range of programs with law schools and students. A number of law schools have introduced social justice programs for students to experience the practice of law 'in the public interest' by coursework and short-term placements within public interest organisations and in law firms with pro bono programs. Kingsford Legal Centre at the University of New South Wales publishes an annual guide to Australia's clinical legal education programs.

A number of law schools have also established Pro Bono Students Australia (PBSA), which was first developed by the National Pro Bono Resource Centre in conjunction with the University of Western Sydney (UWS), and based on the successful Pro Bono Students Canada (PBSC) model. PBSA combines education and public service, enabling law students to develop their legal skills and broaden their education while providing critical legal services to a broad range of community organisations that are involved in delivering services to disadvantaged people. Its emphasis is on community service and is open to all but first year law students.

## 4.5 Legal academics

It is unclear how much pro bono work is being undertaken by legal academics in Australia. Anecdotally, it appears to be dependent on the personal initiative of individual academics and to a lesser extent the culture of the particular law school. Although some academics are actively and visibly involved in pro bono work, there does not appear to be any clear policy or any guidelines to direct academic resources towards pro bono work.

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16 See, Esther F. Lardent, 'Introduction: Symposium on Innovations in Pro Bono Practice' in *Pro Bono in Motion* (2004) Vol 1, Issue 9.

17 Ibid.

## 4.6 Government lawyers

There are significant numbers of government lawyers in Australia. National statistics are difficult to state definitively but government lawyers make up 16% of the Australian Corporate Lawyers' Association's (ACLA) membership.

Pro Bono work can be problematic for government lawyers who may face conflict of interest restrictions, limitations on the use of office resources and statutory restrictions constraining their ability to perform pro bono work. There are also issues including practising certificate limitations, insurance, expertise and training in areas of law in which pro bono clients are likely to have need.

There are 'work-arounds' to practising certificate and insurance issues, such as volunteering at an agency where the legal work is done under the practising certificate of the principal solicitor (most commonly with a CLC) and within the bounds of that agency's professional indemnity insurance policy. There are also other legal pro bono activities, such as delivering training or community legal education seminars to not-for-profit organisations that don't raise issues. Many government lawyers undertake volunteer work at CLCs, most commonly at evening advice sessions.

In June 2009, The Centre introduced a Professional Insurance Indemnity Scheme to encourage lawyers that work in corporations and government to undertake pro bono legal work. The policy works as a "safety net" policy, where cover will extend to circumstances (unlike those described above) where no other PI insurance covers an approved project. Lawyers may seek cover under the policy by submitting an application to the Centre. For an application to be approved it must describe a proposed project that conforms to the Law Council of Australia's definition<sup>18</sup> of pro bono legal work. Once approved, the Policy will provide insurance cover, subject to terms and conditions, for all lawyers and paralegals that work on that project.<sup>19</sup>

Government lawyer pro bono work seems to be mainly an individual pursuit rather than part of the machinery of government departments or agencies ('agency pro bono') although agencies can support their lawyers to undertake pro bono work. For example, the Legal Aid Commission of New South Wales facilitates flexible 'leave without pay' arrangements for staff to work with Aboriginal Legal Services on 'secondment'. The Australian Government Solicitor (AGS) has developed a pro bono program and is a signatory to the National Pro Bono Aspirational Target.

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18 See p. 5.

19 For more information on the Centre's PI Policy, please see: <http://www.nationalprobono.org.au/page.asp?from=8&id=236>

## 4.7 Corporate lawyers

Again, there are no conclusive national statistics for corporate lawyers in Australia. The ACLA estimates that there are about 6,750 in-house lawyers in Australia which, if correct, indicates that in-house lawyers constitute around 13% of the lawyers in Australia. Despite these numbers, it appears that there is little pro bono activity among corporate lawyers in Australia.

There is untapped potential for corporations to become involved in pro bono, particularly in providing advice or doing work for not-for-profit community organisations, assisting them with public interest objectives. There is also scope for law firms with pro bono practices to encourage and guide their corporate clients to undertake pro bono work, or to provide guidance to their corporate clients who may be interested in undertaking community service work and/or making philanthropic contributions as part of their corporate social responsibility aspirations or commitments.



## 5. How is Pro Bono Delivered?

### 5.1 In-practice / in-firm pro bono

Pro bono legal work takes many forms. The archetypal form of pro bono is a lawyer or firm accepting instructions to advise or represent an individual as part of their usual legal practice. Client instructions are accepted and services provided in the same way as for a paying client. The only difference is that the client pays nothing or pays an agreed, but substantially reduced, amount.

Firms and lawyers also provide ‘transactional’ assistance which may directly or indirectly improve disadvantaged clients’ access to justice through the provision of legal assistance to community-based welfare, legal or other advocacy organisations.

This typically involves helping organisations with governance and company structure issues, such as formalising constitutions or obtaining charitable concessions. It may also involve assistance with leases or intellectual property matters. For example, law firm Blake Dawson offers transactional assistance to Lou’s Place, a day centre in inner Sydney for women in crisis and their children. Blake Dawson provides administrative assistance, as well as advice on organisational issues such as privacy law compliance, occupational health and safety matters, and tax. Much of the work filtered to law firms through the Public Interest Law Clearing Houses (PILCHs) across Australia involves this kind of work.<sup>20</sup>

In-house pro bono advice and representation might involve initial advice only or in an on-going capacity. Representation may involve court or tribunal appearances, as well as mediations and negotiations. Representation work may be for clients, while other work may involve participating in schemes with community legal centre’s (CLC’s) for example, participating as duty lawyers on court rosters for clients of the Women’s Domestic Violence Court Assistance Schemes in NSW.

### 5.2 Co-counselling arrangements with CLCs

Co-counselling arrangements are a relatively recent development where firms and CLC’s work together on a matter – either for an individual client or as a law reform initiative. Under this arrangement the CLC typically does the initial work establishing the merits of a case or issue and maintains the client relationship. The firm may then give written advice, do background research and draft court documents as required. This may involve the firm or CLC being the solicitor on the record. In some cases

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20 See Annual Reports of PILCH (NSW), PILCH (Victoria) and QPILCH. PILCH (Victoria) has established PilchConnect – a service that provides legal assistance to community organisations. For more details, see: [http://www.pilch.org.au/contact\\_pilchconnect/](http://www.pilch.org.au/contact_pilchconnect/)

where a quick result is sought, the pro bono firm may use its letterhead for pre-litigation correspondence, or go on the record for court documents. In other cases, the CLC will act as solicitor on the record, with the firm providing advice and drafting assistance, preparing witness statements as well as advising on strategy, if required.

Co-counselling arrangements work well. They may allow the CLC to be the public face of the litigation campaign while harnessing the resources of pro bono lawyers for ‘behind the scenes’ assistance which a CLC may not have the expertise or resources to manage alone.

Examples of co-counselling arrangements include:

- Prisoners’ Legal Service (PLS) in Brisbane, with the assistance of Blake Dawson, mounted a High Court challenge to Queensland legislation that allowed the Attorney-general to apply to detain a prisoner convicted of a serious sexual offence indefinitely beyond the original sentence.<sup>21</sup> Under the co-counselling arrangements, Blake Dawson took on a ‘project management’ role in partnership with PLS and others to provide the prisoner with legal and other assistance. The matter was ultimately not successful before the High Court. However, the legal team has assisted the client with a review under the legislation and is exploring strategies, including approaching the United Nations.
- Law firm Herbert Geer and Rundle has worked together with Fitzroy Legal Service (FLS) to assist a client with shoplifting and related compensation matters. FLS acted for the client on the criminal charge and the law firm assisted FLS with the civil claim, which included advice on the merits and an opinion brief on discovery. FLS remained the solicitor on the record and did the client liaison work. It is likely that without the assistance and expertise from both the CLC and the pro bono firm, the matter would not have proceeded.

Freehills has developed a different pro bono service model as an alternative to co-counsel arrangements, whereby the law firm acts in a ‘mentoring’ capacity on a specific case at the request of a CLC solicitor who, for example, may be running a matter in a new jurisdiction or requires advice on questions of practice and procedure. This model provides the knowledge and resources of the law firm to the CLC, without formal co-counsel arrangements.

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21 See *Fardon v attorney-General of Queensland* (2004) 210 ALR 50; see also Blake Dawson Waldron Annual Report 2004-2005 at. 24.

### 5.3 Community legal education and law reform

Pro bono lawyers also contribute to community legal education and law reform projects. For example, some firms have organised seminars for representatives from several community organisations rather than advising individual organisations. These have included sessions for not-for-profit organisations on topics including directors' duties, risk management, employment, structuring, taxation, privacy and contracts.<sup>22</sup> Others have organised continuing legal education seminars for CLCs on areas of law relevant to CLC practice such as consumer protection, defamation and discrimination.<sup>23</sup> Lawyers participating in pro bono initiatives with the community sector, such as the Homeless Persons' Legal Service Clinics (in Sydney, Melbourne and Brisbane) sometimes contribute to law reform/policy initiatives, often informed by the experiences of clients of those services.

A number of lawyers also contribute to pro bono publications such as state editions of *The Law Handbook*, a plain English guide to the law.

Some lawyers use their expertise to assist public advocacy organisations with law reform proposals or to comment on other proposals, including government proposals. These submissions effectively combine the significant knowledge, expertise and resources of community organisations with the skills of private firm lawyers.

Further, several firms with active pro bono practices independently prepared submissions to and gave evidence before the 2003 Senate Legal and Constitutional Reference Committee's inquiry into Legal Aid and Access to Justice. In brief, these firms submitted that their programs work most effectively with properly resourced and functioning CLCs and legal aid bodies, and that more funding is required to sustain the leverage obtained from services provided by the private profession.

Some legal professional associations also provide community legal education through speakers' bureaus or through Law Week initiatives. Others have also offered continuing legal education/professional development opportunities to CLCs, often in the context of training seminars. Some of these are effectively done during CLC conferences, to take advantage of the greater regional representation of CLC workers on these occasions. There are many examples of this kind of assistance, including the training provided by Freehills and Blake Dawson, mentioned above. Also, Harmers Workplace Lawyers has provided mandatory continuing legal education on legal practice issues to CLC workers at NSW CLCs' state conferences.

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22 For example, Freehills has organised a number of well-attended seminars on various aspects of tax law for not-for-profit organisations (see Freehills Pro Bono Annual Reports).

23 Training organised by Blake Dawson Waldron for CLC workers, see Blake Dawson Waldron Annual Report 2005.

## 5.4 Outreach services

Outreach services involve lawyers providing legal advice, and sometimes ongoing assistance at outreach locations, usually at the premises of a community organisation or a CLC. The legal assistance may be part of a discrete project of limited duration, or ideally, a partnership arrangement on an ongoing basis.

A number of CLCs, such as the Arts Law Centre and the Refugee Advice and Casework Service (RACS) in Sydney have arrangements with a number of firms that provide solicitors (and migration agents in the case of RACS) to give advice to their clients. Other firms send lawyers to community centres. For example, Minter Ellison sends lawyers on a weekly basis to a community centre in Claymore in Sydney's south-west to provide advice, information and referrals.

Some outreach services involve the provision of non-legal, as well as legal, assistance. Blake Dawson's assistance to Lou's Place includes the provision of facilities (such as offices and transport).

## 5.5 Secondments

Secondments to community based organisations can be an effective way for firms to involve themselves in pro bono activities in the community. While there may not always be a clear distinction between secondments and outreach services, secondments generally involve the secondee being supervised by a community solicitor at the community organisation.

Secondments may be:

- full-time or part-time and for a fixed period (for example for three, six or twelve months). A fixed period secondment may be part of a single firm or multi-firm rotation that ensures the position is always available to the community legal organisation;
- sessional (for example, a firm solicitor attends a community legal organisation to operate an advice clinic one afternoon each week);
- short-term locums to cover staff shortages; or
- specific secondments for example, for the duration of a particular project or initiative of a community organisation).

Secondments generally place pro bono lawyers with community legal organisations. Through secondments, firms and individual lawyers develop and strengthen their relationships with the organisations they work with.

Secondments also have collateral benefits. They contribute to the professional development of staff and raise awareness of social issues within law firms. Seconded solicitors bring back to the firm enhanced legal, communication and managerial skills.

Firms can benefit from improved employee morale where secondees have an increased sense of professional satisfaction. Secondments also increase the visibility of law firm pro bono programs and can engender an improved sense of community within a firm and continuing commitment to pro bono work.

## 5.6 The Victorian Pro Bono Secondment Scheme – Attorney-General’s Community Law Partnerships

The Pro Bono Secondment Scheme (PBSS) commenced in Victoria in 2002. It was a state-wide secondment scheme, originally coordinated by Victoria Legal Aid (VLA), the Federation of Community Legal Centres (Vic), the Department of Justice and the Law Institute of Victoria. The PBSS involved an initial feasibility assessment by a Working Group, then a 12-month pilot project in 2002-2003 in which six law firms provided ten lawyer secondees to eight community legal centres and one section of VLA. The secondments were primarily full-time positions for six month periods.<sup>24</sup>

The Victorian Pro Bono Secondment Scheme Report documents some of the experiences of the community/legal aid sector and law firm participants.<sup>25</sup> The report notes that the experience of secondees was positive: the secondment was enjoyable and important legal work was undertaken and new skills developed. Community organisations reported that having a secondee allowed them to increase some elements of their service delivery program. For example, by undertaking more complex casework or allowing centre staff to pursue long-standing plans for community legal education or law reform work.

The six firms involved in the scheme stated that they were satisfied with their involvement in the pilot and that it had met the firm’s expectations. Firms gave two significant reasons for being involved. The first was the desire to become more directly involved in community legal service provision and structured pro bono schemes. Secondly, two firms mentioned that it assisted them in meeting obligations under the Government Legal Services Panel.

## 5.7 Specialist legal services

Lawyers individually, or in partnership with firms, create or contribute to specialist legal services. Individual firms typically contribute funds, resources and staff to establish and/or maintain a community-based service. Examples of this kind of specialist services include the homeless persons’ legal clinics that now exist in Melbourne, Brisbane, Sydney and Adelaide, Shopfront Youth Legal Service (Shopfront) in Sydney and the Youth Legal Service in Melbourne.

24 See [www.justice.vic.gov.au](http://www.justice.vic.gov.au)

25 See Pro Bono Secondment Scheme: Report on the 2002-2003 Pilot Scheme (April 2004).

## 5.8 Multi-tiered relationships and non-legal assistance

Pro bono assistance can be broader than providing advice, assistance and representation. Firms are increasingly forming partnerships with CLCs and other community organisations, combining the skills, knowledge and resources of CLCs and private firms and barristers. These may be in the form of ‘multi-tiered’ relationships and partnerships where pro bono assistance involves not only direct legal assistance but other kinds of non legal assistance to facilitate access to justice. These partnerships between firms and community organisations create close connections between both parties, leading to a greater trust, familiarity, responsiveness and willingness to extend assistance innovatively and more effectively than one-off referrals.

Partnerships between law firms and community organisations are an area of increasing focus in pro bono. Many firms have developed and sustained ongoing partnerships with organisations. For example, Gilbert + Tobin has had a relationship with the Kimberley Land Council for over ten years, and Arnold Bloch Leibler with the Yorta Yorta people since 1993. Recognising the scale and diversity of resources available to firms to deliver a variety of services and the increasing evidence of the benefits of partnerships, the National Pro Bono Resource Centre is often approached by firms and community organisations alike to help broker relationships.

## 5.9 Volunteering

Many lawyers choose to volunteer at advice sessions at community organisations, particularly CLCs which provide referrals, advice and assistance to around 400,000 people across Australia, free of charge, each year.<sup>26</sup> CLCs have managed to attract and maintain significant volunteer support and pro bono legal assistance from the private legal profession. The National Association of Community Legal Centres (NACLC) conservatively estimated that in one year, volunteers made an in-kind contribution of over \$21.5 million to CLCs.<sup>27</sup>

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26 *Community Legal Centres – An Investment in Value, Investing in Community Law* (National Association of Community Legal Centres, August 2003).

27 National Association of Community Legal Centres, Budget Submission to the Commonwealth Government 2004-2007, *Community Legal Centres – An Investment In Value* (2003).

## 6. Pathways to pro bono

So what are the pathways used by people needing pro bono legal assistance? These people are, almost by definition, those who are socially or economically disadvantaged or marginalised. Recent Australian research on pathways to justice indicates that when groups of people in this broad category are faced with problems, most do not initially go to a lawyer for assistance. Rather, some do nothing, some deal with the issue themselves and some seek advice and assistance from non-legal sources and services.<sup>28</sup>

The means of referral to pro bono assistance are usually by way of:

- personal contacts;
- links between law firms or their staff and non-legal community agencies;
- referral by legal aid agencies, community legal centres (CLCs) and indigenous legal organisations;
- referral by a pro bono referral scheme;
- referral by other community organisations and agencies.

Apart from the formal pro bono referral schemes, there are schemes which refer matters in a particular area of law or for a particular class of clients. Most of them are part of other projects such as one of the independent Public Interest Law Clearing House (PILCH) or court-based projects.

This section discusses some of the formal pro bono schemes coordinated or established by professional associations, courts and PILCHs around Australia.

Each pro bono referral scheme has different criteria or guidelines by which eligibility or referrals for assistance can be assessed. These are sometimes determined by means and merits considerations (for example, some bar and lawyer association schemes apply a means and merits test) and/or jurisdictional considerations (court-based schemes) or public interest criteria (some clearing house schemes).

There are also differences in the way pro bono referral schemes operate. For example, the NSW Law Society's Pro Bono Scheme refers most of its matters to smaller firms while the PILCHs tend to refer to larger law firms. PILCHs also require firms to pay membership fees while professional schemes do not attract fees. Some PILCHs actively work with affiliated law schools and have ongoing student programs.

The schemes referred to do not represent every pro bono referral service. There are other schemes, of varied formality, under which pro bono assistance is provided. For example, some local professional associations (such as the City of Sydney Law Society) or groups of firms operate pro bono duty lawyer schemes at particular courts. Some

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<sup>28</sup> See Christine Coumarelos, Zhigang Wei, Albert Z. Zhou: Justice Made to Measure, NSW Legal needs Survey in Disadvantaged Areas (March 2006), available at [www.lawfoundation.net.au/](http://www.lawfoundation.net.au/)



courts have informal arrangements for making referrals with professional bodies or firms. For example, the Sydney and Adelaide registries of the Federal Magistrates Court have arrangements with a panel of solicitors who provide initial advice and, in appropriate cases representation at hearings.

## 6.1 Professional association legal assistance schemes

Some professional associations coordinate pro bono legal assistance schemes. The following general comments can be made about these schemes:

- eligibility for assistance is assessed under each scheme's own guidelines;
- assistance under the schemes may be provided on a without fee, reduced fee or conditional fee basis;
- assistance will generally not be provided under the schemes if there is another form of assistance available (such as legal aid, or assistance from a CLC);
- the schemes are discretionary and there is no right to assistance;
- some schemes exclude certain kinds of matters;<sup>29</sup>
- the schemes generally apply a means test,<sup>30</sup> and a merits test;<sup>31</sup>
- applicants must complete an application form, provide information about their case, and detailed information and documentation about income, assets and expenditure;
- the schemes do not themselves provide disbursement assistance for matters referred. See below for further information about separate disbursement assistance schemes.

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29 For example, the New South Wales Law society Scheme excludes certain types of matters, including family law property settlements and maintenance matters and defended apprehended violence orders.

30 The New South Wales Bar Association Legal Assistance Referral Scheme (LARS) aims to provide legal assistance for free or at reduced rates to persons who would otherwise not be able to obtain legal assistance without suffering severe financial hardship. While its guidelines state that applicants will not be eligible for assistance where their gross income exceeds \$1000 per week, the test is flexibly applied and the applicant's outgoings and dependents will be considered. Under the New South Wales Law Society Pro Bono Scheme, assistance will normally be granted to applicants who 'would otherwise be unable to meet the full costs of legal representation'. The Law Institute of Victoria scheme applies the test that the applicant 'cannot afford to pay for legal assistance'.

31 Most schemes use the 'reasonable prospects of success' merits test.



The following schemes are currently operating (all contact details provided herein are accurate as at November 2009. For an up-to-date list of contacts, please see [www.nationalprobono.org.au](http://www.nationalprobono.org.au).)

**Law Society of the Australian Capital Territory**

ACT Pro Bono Clearing House  
GPO Box 1562  
Canberra ACT 2601  
Phone: (02) 6247 5700  
Fax: (02) 6247 3754  
Email: [mail@actlawsociety.asn.au](mailto:mail@actlawsociety.asn.au)  
Internet: <http://lawsocact.asn.au/content/public2/public2.asp/>

**Law Society of New South Wales**

The Pro Bono Scheme  
170 Phillip Street  
Sydney NSW 2000  
or DX 362 Sydney  
Phone: (02) 9926 0364  
Fax: (02) 9231 5809  
Email: [cad@lawsocnsw.asn.au](mailto:cad@lawsocnsw.asn.au)  
Internet: [www.lawsociety.com.au](http://www.lawsociety.com.au)

**New South Wales Bar Association Legal Assistance Referral Scheme**

Selborne Chambers  
174 Phillip Street  
Sydney NSW 2000  
or DX 1204  
Phone: (02) 9232 4055  
Fax: (02) 9221 1149  
Email: [legalassist@nswbar.asn.au](mailto:legalassist@nswbar.asn.au)  
Internet: [www.nswbar.asn.au](http://www.nswbar.asn.au)

**Law Society Northern Territory**

Northern Territory Pro Bono Clearing House  
GPO Box 2388  
Darwin, NT 0801  
Phone: (08) 8941 5104  
Fax: (08) 8941 1623  
Email: [porp@lawsocnt.asn.au](mailto:porp@lawsocnt.asn.au)

### **Bar Association of Queensland**

Chief Executive Officer  
Level 5, 107 North Quay  
Brisbane QLD 4000  
Phone: (07) 3238 5100  
Fax: (07) 3236 1180  
Email: [qldbar@qldbar.asn.au](mailto:qldbar@qldbar.asn.au)

### **Law Institute of Victoria Legal Assistance Scheme<sup>32</sup>**

PO Box 13121 Law Courts  
Melbourne VIC 3000  
or DX 38227 Flagstaff  
Phone: (03) 9225 6675  
Fax: (03) 9225 6678  
Email: [livlas@pilch.org.au](mailto:livlas@pilch.org.au)  
Internet: [www.liv.asn.au/public](http://www.liv.asn.au/public) or [www.pilch.org.au](http://www.pilch.org.au)

### **Victorian Bar Legal Assistance Scheme<sup>33</sup>**

GPO Box 13121 Law Courts  
Melbourne VIC 3000  
or DX 38227 Flagstaff  
Phone: (03) 9225 6687  
Fax: (03) 9225 6686  
Email: [vblas@pilch.org.au](mailto:vblas@pilch.org.au)  
Internet: [www.vicbar.com.au](http://www.vicbar.com.au) or [www.pilch.org.au](http://www.pilch.org.au)

### **Law Society of Western Australia**

Law Access Public Law Clearing House  
Level 4, 89 St George's Terrace  
Perth WA 6000  
Phone: (08) 9322 4911  
Fax: (08) 9322 7544  
Email: [info@lawsocietywa.asn.au](mailto:info@lawsocietywa.asn.au)  
Internet: [www.lawsocietywa.asn.au/access.html](http://www.lawsocietywa.asn.au/access.html)

Some state and territory professional associations coordinate reduced fee legal advice programs.<sup>34</sup> Individual lawyers or law firms interested in participating in these programs should contact the relevant association in their area.

32 Administered by PILCH Victoria.

33 Administered by PILCH Victoria.

34 For example, the Law Society of South Australia organises a consultation scheme several evenings a week. Customers pay \$22 for 20 minutes with a lawyer (or \$10 for concessions).

## 6.2 Public Interest Law Clearing Houses and Pro Bono Clearing Houses

Independent Public Interest Law Clearing Houses (PILCHs) have been established in New South Wales, Queensland, Victoria and South Australia. PILCHs' operations are substantially funded by fees from member legal practices. PILCHs refer public interest matters to member law firms and other members (for example, barristers and some corporations' legal departments). PILCHs receive and assess requests for assistance and then contact member firms to see if they will accept a referral.

Members pay annual membership fees (for firms, calculated on a per-partner basis). Each member firm generally receives a small number of referrals each year and is under no obligation to accept referrals. Referrals include matters requiring the provision of legal advice or transactional work as well as litigious matters and acceptance is usually based on a member's interest, expertise and available resources. Firms can also directly assist PILCHs by providing secondees, financial and in-kind assistance.

Firms can also participate in specific PILCH projects such as the Homeless Persons' Legal Clinics operating in Adelaide, Brisbane, Melbourne and Sydney. There are many advantages for firms in being involved in PILCH referral schemes. PILCHs solicit enquiries and requests for legal assistance and screen those inquiries against the relevant PILCH criteria, including any merits criteria. PILCHs may also prepare factual and legal memoranda and collect relevant documents, refer matters to PILCH members with relevant expertise and capacity to accept the referral, facilitate initial conferences between pro bono clients and PILCH members and monitor the progress of the referrals. PILCHs may also be able to coordinate advice and/or representation from counsel where appropriate, and draw on the expertise of academics and other relevant professionals.

The West Australian Law Society's Law Access Scheme (contact details above) operates a Public Interest Law Clearing House for the purpose of making referrals to firms that have indicated interest in undertaking pro bono matters. It does not involve membership or fee payments by firms.

The Law Society of the Australian Capital Territory (ACT) launched the ACT Pro Bono Clearing House in November 2004 (contact details above). The aim of the scheme is to match people and organisations that are in genuine need of pro bono legal assistance with legal service providers able to provide that assistance. Access to the scheme is not restricted by a public interest test, although it will deal with such matters. The scheme does not involve membership by way of fee payments from lawyers, but practitioners can become members by participating in assessment of Clearing House matters, and by undertaking work referred by the Clearing House.

The Northern Territory Pro Bono Clearing House was established in November 2008 (contact details above). It is operated by the Northern Territory Law Society's Access to Justice Committee. Much like its counterpart in the Australian Capital Territory, access to the scheme is not restricted by public interest test, but it will refer such matters on. Law firms and legal practitioners can become members by undertaking work referred by the scheme. No membership fees are charged.

South Australia's first Pro Bono Clearing House, JusticeNET SA Incorporated, was launched in July 2009. JusticeNET will be a conduit for pro bono work in South Australia, and it will refer pro bono work to existing pro bono service providers throughout South Australia where possible. JusticeNET facilitates pro bono representation from member firms and barristers in cases being assessed as being of merit where the gaps in current legal services deliver would otherwise have left the client without representation. The scheme does not apply a strict public interest test, but applications for assistance will be means and merit tested in accordance with guidelines. Law firms and legal practitioners are encouraged to become members of JusticeNET.

**PILCH (NSW)**

GPO Box 863  
Sydney NSW 2001  
Phone: (02) 9114 1793  
Fax: (02) 9114 1792  
Email: [info@pilchnsw.org.au](mailto:info@pilchnsw.org.au)  
Internet: <http://www.pilchnsw.org.au/>

**QPILCH**

GPO Box 3631  
Brisbane South BC QLD 4101  
Phone: (07) 3846 6317  
Fax: (07) 3846 6311  
Email: [contact@qpilch.org.au](mailto:contact@qpilch.org.au)  
Internet: [www.qpilch.org.au/](http://www.qpilch.org.au/)

**PILCH (Victoria)**

17/461 Bourke St.  
Melbourne VIC 3000  
or DX 128 Melbourne  
Phone: (03) 9225 6680  
Fax: (03) 9225 6686  
Email: [admin@pilch.org.au](mailto:admin@pilch.org.au)  
Internet: [www.pilch.org.au/](http://www.pilch.org.au/)

**JusticeNET (South Australia)**

c/- The Law School,  
Ligertwood Building  
The University of Adelaide  
North Tce, Adelaide SA 5005  
Phone: (08) 8233 0628  
Fax: (08) 8233 0699  
Email: [info@justicenet.org.au](mailto:info@justicenet.org.au)  
Internet: [www.justicenet.org.au](http://www.justicenet.org.au)

All contact details provided are accurate as at November 2009. For an up-to-date list of contacts, please see [www.nationalprobono.org.au](http://www.nationalprobono.org.au).

### 6.3 Court-based pro bono referral schemes

Some courts have established formal pro bono referral schemes under their rules of court. The purpose of the schemes is to facilitate and encourage the provision of legal assistance to litigants who are otherwise unable to obtain it and where it is in the interests of the administration of justice. An advantage of taking a matter under a court-based scheme is that the rules usually guarantee an order for costs in favour of the applicant if the matter is successful. Referrals under the schemes are generally made by the court to a registrar of the court for referral to a barrister or solicitor. Court registries maintain lists of lawyers and firms who have agreed to participate in the schemes.

There is no stated means or merit test. However, the court may take into account the litigant's means and capacity to obtain legal assistance, the nature and complexity of the proceedings and any other matter it considers appropriate. Referrals are not intended to be a substitute for legal aid, nor is a referral an indication that the court has formed an opinion on the merits of the litigant's case.

There are only a few referrals made to each firm or barrister each year, and firms are under no obligation to accept a referral. Details of schemes and their contact details follow, for any firms or barristers interested in receiving referrals under those schemes.

#### **Federal Court Legal Assistance Scheme**

Referrals under Order 80 of the Federal Court Rules are made by the court or judge to registrars of the court who maintain a panel of lawyers who have agreed to participate in the scheme. (The majority of referrals to date have been in immigration matters.)

Firms interested in participating in this scheme should contact the registry in their state or territory: see [www.federalcourt.gov.au](http://www.federalcourt.gov.au).

#### **Federal Magistrates Service Legal Assistance Scheme**

The court can refer a party to a registrar for referral to a lawyer on the pro bono panel, under Part 12 of the Federal Magistrates Court Rules. Registrars in each registry of the court maintain lists of lawyers who agree to participate in the scheme. Firms interested in participating in this scheme can contact Adele Byrne on (03) 8600 4470, or by email to [adele.byrne@fms.gov.au](mailto:adele.byrne@fms.gov.au).

#### **Supreme Court of New South Wales Legal Assistance Scheme**

Referrals for legal assistance are made by the court or judge pursuant to Part 66A of the Supreme Court Rules (NSW). Firms interested in participating in this scheme should contact: The Prothonotary, Supreme Court of New South Wales, GPO Box 3, Sydney NSW 2001 or DX 829 Sydney, or telephone (02) 9230 8071, fax (02) 9230 8628; email [Supreme\\_Court@agd.nsw.gov.au](mailto:Supreme_Court@agd.nsw.gov.au) or visit the court's website at [www.lawlink.nsw.gov.au/sc/sc.nsf/pages/scpractice](http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/scpractice).

### **District Court of New South Wales Legal Assistance Scheme**

Referrals for legal assistance are made by the court pursuant to Part 28C of the New South Wales District Court Rules. Firms interested in participating in this scheme should contact Assistant Registrar at the District Court on (02) 9377 5862, PO Box K1026, Haymarket 1240, or DX 11518 Sydney Downtown.

### **Local Court of New South Wales Legal Assistance Scheme**

The New South Wales Bar Association operates a Duty Barrister scheme in the local court of NSW. Barristers are rostered each day on site. For further information on the scheme and how to participate, visit the bar associations website at: [http://www.nswbar.asn.au/docs/legal\\_assist/duty\\_barrister.php](http://www.nswbar.asn.au/docs/legal_assist/duty_barrister.php) or contact the Manager of the Legal Assistance Referral scheme on 02 9232 4055.

### **South Australian Magistrates Court Pre-lodgement Scheme**

In an attempt to divert people away from potentially expensive and time-consuming litigation, the South Australian Magistrates Court has developed the 'Pre-lodgement electronic scheme'. Under this scheme, which has been operating since 1999, those seeking to recover small debts without proceeding to litigation can utilise the Magistrates Court's website to download 'notices' informing respondents that debt recovery is being sought. One of the options for dispute resolution under this scheme is to use the court's free mediation service whereby consenting parties are referred to pro bono mediation coordinated by the court.

The court maintains a panel of mediators (lawyers and non-lawyers) who have done approved mediation training to conduct the mediations. While the numbers of matters which proceed to mediation are quite small, the pro bono mediation is recording a high, and rising, success rate. Around 70% of mediations lead to a resolution of the matter. For more information about the Pre-lodgement Scheme, see [www.courts.sa.gov.au/courts/magistrates/index.html](http://www.courts.sa.gov.au/courts/magistrates/index.html).

All contact details provided are accurate as at August 2009. For an up-to-date list of contacts, please see [www.nationalprobono.org.au](http://www.nationalprobono.org.au).

## **6.4 Court duty lawyer schemes**

A number of courts and tribunals operate duty lawyer schemes. The schemes are sometimes coordinated by the courts or tribunals which maintain a roster of lawyers available to give limited assistance to unrepresented litigants. Some of these schemes are assisted and/or coordinated by professional associations. Lawyers or firms interested in participating in these kinds of schemes should contact their local professional association. Other informal schemes are coordinated by interested lawyers, to assist the court. For example, a roster of pro bono lawyers assists self-represented

litigants in the Sydney Registry of the Family Court. However, the introduction of a legal aid duty roster will probably mean the scheme is scaled down. Another example of a less formal scheme is the pilot being run at the Administrative Appeals Tribunal's Sydney Registry whereby a pro bono solicitor assists self-represented litigants in migration matters.

## 7. Disbursement assistance

The cost of disbursements and the procedures for applying for disbursement assistance can act as a barrier for litigants trying to access the justice system and assert their rights, even where pro bono assistance is available. Disbursements may include the costs of obtaining expert reports or transcripts of proceedings, the cost of counsel and interpreters fees.

The lack of funds to pay disbursements associated with pro bono matters is a commonly cited barrier to pro bono. Although many practitioners are willing to act pro bono, they may not be willing or able to meet the costs of disbursements associated with the matter. Hence where an individual does not have the capacity to pay these disbursements and cannot obtain disbursement assistance, it is unlikely that the matter will proceed.

Although the court fee waiver scheme (detailed below) allows most fees to be waived where a party can demonstrate financial hardship, disbursement funding currently available, if any, differs between jurisdictions. Some states and territories have a fund that can be utilised, however the availability of funding is limited, and applications for assistance can sometimes be made only once the disbursement has been incurred and there are often significant exemptions (such as, for example, the exclusion of counsel's fees) and caps on the amount that can be recovered. Some funds also have application fees, apply means and merits tests, and limit assistance to cases where damages are likely to be recovered.

Some funds have limitations that reduce their accessibility, such as an application fee, or a condition that an application can only be made once the disbursement has been incurred. Other limitations include caps on the amount that can be recovered, means and merits tests, and conditions that limit assistance to cases where damages are likely to be recovered. Practitioners comment that obtaining funding for reimbursement of 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>35</sup>

Firms and lawyers undertaking litigious pro bono matters should also consider whether exemptions or waivers are available in respect of court or tribunal fees, such as filing fees and, in some cases, setting down and daily hearing fees. The Acts, regulations or rules for some courts and tribunals expressly provide for fee exemption,

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<sup>35</sup> National Pro Bono Resource Centre, Australian Pro Bono Manual (2005)  
<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=11>



waiver, remittal or postponement of fees.<sup>36</sup> Even if there is no express provision, a waiver may nonetheless be available. For example, the Supreme Court of South Australia has no express fee waiver provisions in its Act or Rules, but people may apply to the court for waiver, using prescribed forms.

Persons liable to pay fees in Commonwealth courts (the High Court, the Federal Court of Australia, the Federal Magistrates Court and the Family Court) and the Administrative Appeals Tribunal are eligible for an exemption from those fees if they:

- have been granted legal aid;
- are holders of particular benefit or concession cards;
- are an inmate of a prison or are lawfully detained; or
- are under 18 years of age or are in receipt of a youth allowance, Austudy or Abstudy payment.

If none of the above applies, a person may nevertheless apply to the registrar for waiver of fees. Fees can be waived if the registrar is of the opinion that payment of the fee would cause financial hardship, having regard to the applicant's income, day-to-day living expenses and liabilities and assets.<sup>37</sup>

As mentioned above, some state and territory courts and tribunals, upon application (generally accompanied by a supporting affidavit or statement of financial affairs), provide for waiver of the payment of fees, either pursuant to a general discretion or specifically in the case of financial hardship.<sup>38</sup> Each court and tribunal has its own criteria for assessing applications for waiver and they generally have their own application forms. For example, in the Supreme Court of South Australia, an application for a fee waiver must set out, among other things, whether assistance might be available from friends or relatives and provide details of any requests that have been made in that regard.

In New South Wales, in addition to general waiver provisions, pro bono-specific provisions have been inserted in regulations for the Supreme Court, Land and

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36 See for example reg. 11 Federal Court of Australia Regulations 2004 (Cth) which provides for exemptions for filing, setting down and hearing fees and regs 4, 4A, 5 High Court of Australia (Fees) Regulations 1991 (Cth) which provide specific exemptions for filing and hearing fees.

37 In the Migration Review Tribunal application fees can be waived if payment has caused or is likely to cause 'severe financial hardship' to the applicant: reg 4.13 Migration Regulations 1994 (Cth).

38 Some regulations confer a general discretion to waive, postpone or remit fees: *see*, for example, cl 11(4) Supreme Court Regulation 2000 (NSW). Other rules or regulations specifically refer to financial hardship (and sometimes to specific matters such as income and day-to-day living expenses) or to the applicant's financial position. For example, in the Queensland Supreme, District and Magistrates Courts, the Uniform Civil Procedure Rules 1999 allow for an exemption from payment of a relevant fee if, having regard to the individual's financial position, it is clearly in the interests of justice to exempt the individual from payment of the fee.

Environment Court, District Court and Local Court.<sup>39</sup> Pursuant to these provisions, the payment of fees by ‘a pro bono party’ is postponed until judgment is given, and fees are not payable at all if:

- judgment is against the pro bono party; or
- judgment is in their favour but damages are not awarded (or only nominal damages are awarded) in their favour and costs are not awarded in their favour<sup>40</sup>.

A ‘pro bono party’ is defined as a person who is being represented under the pro bono scheme of the Law Society of New South Wales or the New South Wales Bar Association. The solicitor or barrister acting for the party must 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.

Information and forms for fee exemption and/or waiver may be obtained from court and tribunal registries and also from guides contained in the website of the National Pro Bono Resource Centre, where the following guides are available:

- PILCH (Vic) has produced a fee exemption and waiver guide that covers federal courts and the AAT and Victorian courts and the Victorian Civil and Administrative Tribunal. Relevant application forms are included.
- QPILCH has produced a fee exemption and waiver guide that covers federal courts and the AAT and all Queensland courts and key tribunals. The guide includes copies of relevant forms.
- PILCH (NSW) has produced a fee exemption and waiver guide that covers federal courts and the AAT and all NSW courts and key tribunals.

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39 See cl 7 Supreme Court Regulation 2000 (note it applies to filing fees for initiating processes or cross claims and hearing allocation fees); cl 6 District Court Regulation 2000 (in the same terms, except does not refer to hearing allocation fees); cl 6 Land and Environment Court Regulation 2000 (filing fees); cl 5 Local Courts (Civil Claims) Regulation 2000 (any fee in respect of the business of a court).

40 Similar provisions exist in some regulations for pensioners or persons assisted by community legal centres liable to pay fees: see, for example, cl 8 Supreme Court Regulation 2000 (NSW).

## 8. Ways forward – the future of pro bono

### 8.1 Better coordination of pro bono services

There has been significant growth in pro bono activities in the past decade. One of the great challenges the pro bono sector faces is how to better match the needs of the clients to the services provided. Currently there are several key operators in the fields – Legal Aid, CLCs, lawyers and firms. Better communication, cooperation and coordination is needed to ensure the efficient use of resources to bridge any gaps in service delivery.

One of the key advantages of pro bono work is its flexibility. Pro bono service providers do have certain guidelines for accepting cases and areas of specialisation, but rarely apply strict means and merits tests. Pro bono legal work can therefore easily be used for bridging the gaps in legal services to the disadvantaged and marginalised where CLCs or Legal Aid may be bound to more strict guidelines.

At present there is an abundance of different referral schemes, programs and services in all states and territories. The type of assistance available is unclear to many who work within the legal sector, let alone to the community sector. Whilst there has been some effort to address this, better organisation is needed to coordinate and perhaps even consolidate services.

### 8.2 Involvement of government and corporate lawyers

In-house corporate and government lawyers are a significant part of the profession, as much as 25% of all legal practitioners. While many corporations have active community service programs, few Australian corporate legal departments have become involved in pro bono legal work. Some notable exceptions are the National Australia Bank, Tabcorp and the Victorian Transport Accident Commission.

There is also scope for governments to proactively support pro bono service delivery by the lawyers they employ. The National Pro Bono Resource Centre is encouraging Attorneys-General across Australia to develop pro bono policies to cover their agencies and staff.

### 8.3 Working with other professionals

Finding funds to pay for the costs of experts in litigation matters, such as the cost of medical or environmental reports, is a perennial problem in pro bono service delivery but there have been some developments in this area. The Environmental Defender's Office (EDO) has developed an expert Register of scientific and technical experts willing to help the EDO on a pro bono basis in public interest environmental matters. Many CLCs keep their own informal registers of experts. QPILCH coordinates a panel of psychiatrists who are willing to provide free services on public interest legal matters.

According to feasibility study conducted by Voluntas<sup>41</sup> there are a number of professional associations that recognise the need for professionals to assist lawyers doing pro bono work, but consider this as a matter for individual members. However, the study also found that there were professional associations willing to 'accept a more formal role in the performance of pro bono work'.<sup>42</sup>

### 8.4 Government arrangements and incentives

In 2002, the Victorian Government introduced a tender scheme for the provision of legal services to government. The tender scheme led to the formation of a general panel, consisting of nine law firms, and the allocation of a further 24 firms to nine specialist panels. Currently the panel has 35 law firms as panel members. The Victorian Government Solicitor's Office (VGSO) remains the Victorian government's core legal adviser but competes with panel members.

The unique aspect of the tender scheme is that it calls for firms to dedicate themselves to pro bono work<sup>43</sup> and follow model litigant principles and the Victorian Bar Association's Model Briefing Policy. The 'pro bono condition' requires firms to commit 5-15% of the revenue obtained from Government to pro bono legal work or else make up the difference. These social justice obligations are an innovative feature of the panel arrangements and demonstrate the indirect ways in which government can use its contractual weight to promote better outcomes.

A survey into the Victorian tender scheme's pro bono condition<sup>44</sup> showed an increase in pro bono legal work undertaken by the panel member firms, and further showed the 'pro bono condition' to be a factor in the increase. However, the mandatory nature of pro bono legal work under the tender scheme has met with criticism, as being

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41 Victoria Law Foundation: *Future of Pro Bono in Victoria, Report from round table series, 2001.*

42 Victoria Law Foundation: *Future of Pro Bono in Victoria, Report from round table series, 2001.*

43 See 'Approved Causes' under Chapter 2, p. 6.

44 Survey conducted by the National Pro Bono Resource Centre in April 2008.

contrary to the voluntaristic ethic of pro bono. There has also been concern for the privatisation of what should be a government responsibility – appropriately funded legal services for the disadvantaged and marginalised.

In September 2008 the Commonwealth Government amended its Legal Service Directions, which are binding on all Commonwealth Government agencies, to require each agency, when procuring ongoing legal services, to take into account the amount and type of pro bono work the law firm has carried out or will carry out, and whether the firm is a signatory to the National Pro Bono Aspirational Target.

### 8.5 Aspirational target

In April 2007 The National Pro Bono Resource Centre (The Centre) launched the National Pro Bono Aspirational Target.<sup>45</sup> Currently over 3,000 lawyers across Australia are covered by the Target, which sets a voluntary target of 35 hours of pro bono legal work per lawyer per year, with an obligation to report to the Centre annually on performance, but no sanction or penalty for non-compliance.

The aspirational nature of the Target recognises that lawyers at different times and in different circumstances may only contribute what they are able to, and they do this out of the goodwill and in recognition of their professional duty to help disadvantaged people otherwise unable to get assistance.

The figure of 35 hours per lawyer is based on consultations with members of the profession and the Centre's national survey findings, and reflects what many lawyers are already doing. It represents a minimum number of hours of pro bono legal work that all lawyers should aspire to undertake.

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<sup>45</sup> See <http://www.nationalprobono.org.au/page.asp?from=8&id=169> for more information on The Aspirational Target.

## 9. Case studies – pro bono at work

Below are a few case studies to highlight the important role that pro bono plays in assisting the disadvantaged and marginalised. Pro bono assistance can vary from taking on cases where a substantial miscarriage of justice has taken place, to assisting community organisations with law reform and corporate governance work. Pro bono assistance can, both directly and indirectly, have a huge impact on the lives of disadvantaged and marginalised people.

### **A miscarriage of Justice – the Andrew Mallard case<sup>46</sup>**

In 1995, Andrew Mallard was convicted of the murder of Pamela Lawrence, and sentenced to 30 years' imprisonment.

Andrew Mallard suffered from psychiatric issues. During the course of the murder investigation, the police conducted two interviews with him. The first interview was conducted on the same day Mallard was discharged from a psychiatric hospital. It lasted for eight hours, and inexplicably was not videotaped. A week later a much shorter interview took place, which was videotaped.

Andrew Mallard apparently thought he was assisting the police. He speculated wildly about what the murderer might have done, and suggested that the murder weapon may have been a wrench. He also suggested that the murderer may have washed his clothes in the salt water of the Swan river to remove traces of blood.

During the course of the investigation, tests were conducted by striking a pig's head with a wrench, an anode and an iron bar. None of these tools produced injuries in the pattern sustained by Pamela Lawrence. At the trial, the prosecutor asked the forensic expert whether an anode or an iron bar could have been the murder weapon. No questions were asked about the wrench. The police had also tested Andrew Mallard's clothes for any traces of salt water. There were none. However, the chemist who had conducted the tests omitted any reference to a salt water analysis in his report. At the original trial, Andrew Mallard's defence team was unaware that either of these tests had ever been conducted. The prosecution also failed to produce two witness statements, which had described a different person from Andrew Mallard in the vicinity of the crime.

In 1998, a journalist looked into the Mallard case and started reporting on the inconsistencies within the prosecution's case. The law firm Clayton Utz and barristers Malcolm McCusker and Jamie Edelman took Mallard's case on a pro bono basis, first

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46 See Clayton Utz Pro Bono program:  
[http://www.claytonutz.com/our\\_community\\_work/maincontent.asp?pageID=505&siteTabID=3](http://www.claytonutz.com/our_community_work/maincontent.asp?pageID=505&siteTabID=3) and the Sydney Morning Herald, 'When the Law Provides no Justice, Call a Reporter' 10/10/2008.

representing him in the Court of Criminal Appeal of Western Australia, where the matter was unsuccessful. A special leave to appeal to the High Court was obtained in 2004. On November 15th 2005 after more than 2000 hours of pro bono work by the lawyers involved, the High Court handed down its decision *Mallard v The Queen* and unanimously quashed Andrew Mallard's conviction. The court found that the prosecution had failed to disclose evidence of significant forensic value, causing a substantial miscarriage of justice.

Following the trial, the lawyers working on the case prepared a comprehensive submission to the Western Australian Director of Public Prosecutions as to why there should be no re-trial. In February 2006 the DPP announced that there was no sufficient evidence to proceed with a re-trial. The charges against Andrew Mallard were dropped and he was released from gaol after having been in custody for 12 years.

### **Law reform – Human rights on an international scale**

The Public International Law & Policy Group (PILPG) is a non-governmental organisation that provides legal and political counsel to peace negotiations, war crimes tribunals, and in post-conflict constitutional drafting processes.

PILPG has assisted in preparing, drafting and implementing the new constitution in Iraq during the past four years. In 2007, several lawyers from the law firm Baker & McKenzie assisted PILPG in reviewing and suggesting amendments to the Iraqi constitution.

Among the tasks was a thorough review of the draft for logical and effective sequencing of constitutional provisions and for inconsistencies in concepts, such as the constitutional recognition of women and in the use of words. The lawyers working on the matter also drafted a new electoral law for Iraq, which was adopted. Electoral law establishes rules and procedures to govern the administration of elections and among other aspects may aim to achieve fair representation among minority groups.<sup>47</sup>

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See Baker & McKenzie:

<http://www.bakernet.com/BakerNet/Firm+Profile/Pro+Bono/Feature+Stories/LegalReform.htm>

### **Victim's compensation – Michelle's story**

“Michelle” (not her real name) had been the victim of domestic violence throughout her five-year marriage. She was assaulted, thrown down stairs, threatened with death if she was seen with another man, dragged by her hair and held underneath a hot shower. On one occasion, when Michelle said that she wanted a divorce, her husband produced a gun and said to their three-year-old son, “Let’s shoot mummy”. He then placed the child’s hand on the trigger.

Michelle was eventually able to leave her husband and obtain an Apprehended Violence Order. She has since remarried. However, she remains clinically depressed with severe Post Traumatic Stress Disorder and is unable to work. Lawyers acting pro bono prepared and filed an application with the Victim’s Compensation Tribunal (VCT), supported by expert medical opinion, as to the chronic and severely disabling nature of the injury caused to Michelle through domestic violence. In April, the VCT awarded Michelle \$35,621 in compensation.<sup>48</sup>

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See Clayton Utz: [http://www.claytonutz.com/our\\_community\\_work/maincontent.asp?pageID=505&siteTabID=3](http://www.claytonutz.com/our_community_work/maincontent.asp?pageID=505&siteTabID=3)





























# PRO BONO IN AUSTRALIA

*An introduction for Practical Legal Training students*

'Pro Bono Publico' – for the public good – has always been a feature of legal service delivery in Australia. Our lawyers have an admirable history of providing pro bono services to disadvantaged and marginalised people.

This publication is an introduction of pro bono legal work in Australia. It provides a comprehensive overview of pro bono service delivery for PLT students and graduate lawyers with an interest in access to justice. The publication provides information on who delivers pro bono services, the ways in which pro bono services are provided and also details the pathways to accessing pro bono across Australia.

Published by

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