NATIONAL PRO BONO RESOURCE CENTRE

SIGNPOSTS IN THE PRO BONO LANDSCAPE: ASPECTS OF PRO BONO LEGAL SERVICES IN AUSTRALIA

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Plenary 2: Communities, Needs and Pro Bono Legal Services

There are many different pro bono service models operating in Australia. Each model is a response to an implicit or explicit assessment of the legal needs of a disadvantaged group within the community. What are the most effective methods for assessing the legal needs of disadvantaged Australians? How should the pro bono legal service providers engage with the community and existing community services to respond to those needs?

Abstract

The interest of government and legal profession bodies in pro bono legal services has increased markedly in the past 10 years. This paper describes the **key features of the pro bono landscape** in Australia and summarises what is known about the **quantity of pro bono work** undertaken by the Australia legal profession. It then presents information about the **diversity of pro bono models and pro bono projects** and notes the **increasing importance of partnerships between legal practices and community based and legal aid organisations in extending the reach and effectiveness of pro bono legal services**.

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4. General characteristics of pro bono legal services and the legal service environment
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Introduction

The purpose of this paper is to present a description of pro bono legal services in Australia and the environment in which they operate. I will try to answer the following questions:

- how much pro bono legal services are provided in Australia and by whom?
- what kinds of pro bono legal services are provided?
- what are the general characteristics of pro bono legal services and the environment in which they operate?
- what are the some of the general characteristics of the pro bono landscape in Australia?
- what have been the innovations in pro bono legal service and what seem to be effective strategies for using pro bono legal services to increase access to justice?
- what are the limitations inherent in pro bono as part of legal services in Australia and what barriers are there to effective pro bono?
- what are likely and promising future directions for the development of pro bono in Australia?

How much pro bono?

In general terms we know how many lawyers work for publicly funded legal services, and we know how much money is spent by government on legal aid, community legal centres, and Indigenous legal organisations. But we don't know with any certainty how many lawyers or law firms provide pro bono services, how many hours of pro bono legal services are provided or the cost of those services.

If we are to understand the current effect and future potential of pro bono it seems at least highly desirable to have an understanding of the relative significance of pro bono legal services. In theory we could ask: what proportion of the legal needs of people who cannot afford to pay for legal services are met pro bono? This question is too difficult for what I think are obvious reasons.

Alternatively we could ask: how significant is the level of pro bono legal services compared to legal services paid for by the taxpayer?

Sources of Information

Sources of information about the amount of pro bono work undertaken in Australia include the following:

- The three yearly ABS surveys of the legal profession
- A NSW Law Society survey of the NSW profession

- Statistics from Pro Bono Referral Agencies
- Information from the National Association of Community Legal Centres on the number of lawyers and students volunteering at CLCs
- Direct reports from firms about their pro bono programs

Data Accuracy

There are a number of problems with the reliability and comparability of the information available.

Australian Bureau of Statistics Surveys

The 2001-2002 Australian Bureau of Statistics survey of the legal services industry reported on lawyers' estimates of pro bono work.[2] The ABS asked solicitors and barristers to report pro bono legal services provided without expectation of a fee, pro bono legal services provided at a reduced fee, pro bono community legal education and law reform work, and legal aid work done at a reduced fee. The definition of pro bono excluded contingency arrangements, free first consultations, and incentive discounts for regular clients.

Taking only work that appears to have been done unpaid or without expectation of a fee, solicitors reported 786,100 hours of pro bono work and barristers 203,300 hours for a total of 989,400 hours. Of this just over 12% (123,100 hours) was made up of community legal education and law reform work with the balance presumably comprising advice, transactional work and representation provided to individuals or groups.

Comparison to Publicly Funded Legal Assistance

The same ABS survey reports 1,323 solicitors/barristers working for legal aid commissions, public defenders, community legal centres and Aboriginal and Torres Strait Islander legal services. Making the conservative assumption that these lawyers provide 30 chargeable hours per week for 45 weeks per annum this delivers 1,786,050 hours of legal services provided by solicitors and barristers employed by publicly funded agencies. In addition, around 30-40% of total legal aid funding is spent on matters briefed out[3]. If we assume that the taxpayer gets roughly the same amount of work per dollar when matters are briefed out the total should be increased by 40-60% to an amount in the order of 2,500,000 hours.

In addition to the ABS reported sampling and non-sampling errors there are a number of reasons to treat both estimates with caution. First, as noted below, the parts of the legal profession that report the highest level of pro bono generally do not keep contemporaneous records of how much is done and are relying on their memory at the end of the year to report. On the other hand there is a great deal of reduced fee work undertaken by the profession which has been excluded (primarily as there is no

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[2] Australian Bureau of Statistics, *Legal Practices 2001-2,* 8667.0.

[3] In 2000/2001 the NSW Legal Aid Commission (LAC) spent 42% of its budget (excluding funding of CLCs) on payments to private practitioners. NSW LAC Annual Report http://www.legalaid.nsw.gov.au/ar2002/year.html

information by how much the fee is reduced on average). The comparison also relies on the probably false assumption that chargeable hours is a comparable concept in the public and private sector. The ratios of legal to non legal staff, and the variety of staff employed are also likely to vary between the sectors and have an effect on the level of benefit achieved through each form of service.

Nevertheless it is more than likely that pro bono legal services amount to somewhere between 10% and 40% of the amount of free or nearly free legal services provided by publicly funded lawyers. This result leads us to conclude

- that pro bono legal services make a significant contribution to access to justice
- that there is no prospect that pro bono legal services will make up for the signficant shortfall in legal aid funding or even the decline in per capita funding over the past 10 or so years.

Pro bono referrals

There are a number of organisations which refer pro bono matters, however the number of pro bono matters that pass through clearinghouses is a very small proportion of the total of pro bono matters.

How do pro bono clients find pro bono lawyers? In general, means of referral include:

- personal contacts;
- links between firms or their staff and non-legal community agencies;
- referral by legal aid agencies including CLCs and ATSILs;
- referral by a pro bono referral scheme.

The main pro bono referral agencies are listed in Table 1, together with information on their inquiries and referrals. Excluding the WA Law Access Public Law Clearing House scheme, about 940 matters were referred through these agencies in 2002-3.

Table 1: Referral Schemes Inquiries and Referrals 2002-2003

Scheme	Inquiries	Referrals
PILCH (Vic)	423	144
Law Institute of Victoria Legal Assistance Scheme*	407	91
Victorian Bar Legal Assistance Scheme	281	91
PILCH (NSW)	246	90
NSW Law Society Pro Bono Scheme	345	98

NSW Bar Association Legal Assistance Referral Scheme	358 **	189
PILCH (QLD)	111 **	40
Federal Court		89
Federal Magistrates Service		90 ***
NSW Supreme Court		11
NSW District Court		/6 ****
Law Society of Western Australia	116**	data not available at time of writing
TOTAL	**incomplete**	**939**

* from 14 October 2002 – 30 June 2003
** figure reflects formal applications only, does not include informal enquiries
*** approximate
**** approximate, since 2000

Which Firms Provide Pro Bono

The 2001-2 ABS survey estimates that the 7,462 solicitors employed by firms with only 1 principal/proprietor provided an average of 40 hours 'free'[4] pro bono per annum each as against 16 hours per annum each for the 10,431 solicitors employed by the 91 largest firms (those comprising 10 or more principals/partners)[5]. The trend of smaller firms providing more pro bono services than larger firms is also reflected in data in the UK.[6]

The 1998 ~~Australian Bureau of Statistics~~ABS survey produced a similar result. The figures are not strictly comparable as the division of firms into different sizes was based on the number of people employed at a practice rather than the number of principals/partners as in 2001/02. The 1998 ABS estimates are that the 8,312 solicitors employed by firms employing less than 10 people provided an average of 58 hours 'free'[7] pro bono per annum each as against 13 hours per annum each for the

[4] That is, not including 'reduced fee' pro bono. If reduced fee pro bono had been included the comparison would be 63hours per annum by each solicitor working in a small firm against 19 hours per annum for the larger firm's solicitors.
[5] Calculations based on comparisons of Table 2.8 and 2.9 in ABS, *Legal Services Industry 2001-2002*, Report No 8667.0, 25 June 2003.
[6] See *The Pro Bono Work of Solicitors, Findings from Omnibus Survey Nine* (2002, The Law Society UK) which reported that firms with between 2 and 4 partners were most likely to have undertaken pro bono work in the previous year – 30% of solicitors compared to 16% of firms with between 11 and 25 partners.
[7] That is, not including 'reduced fee' pro bono. If reduced fee pro bono had been included the comparison would be 126 hours per annum by each solicitor working in a small firm against 18 hours per annum for the larger firm's solicitors.

7,878 solicitors employed by the 76 largest firms (those employing more than 99 staff)[8].

We need to be fairly careful with this data. In addition to the significant potential sampling errors, small firm practices may report more pro bono than larger firms because of the way in which the data is collected. Firms were asked after the relevant year had been completed how many hours legally qualified staff in their practice had spent on pro bono work during the previous year year. . While some firms keep accurate records of the hours of pro bono they undertake many do not and presumably make an estimate based on their recollection of the past year. Note that while our experience is that the very largest firms do now keep accurate records this may not have been the case in 2001, or may not have been the case in relation to the sample chosen by the ABS. It is in fact the larger firms that the ABS identified as those that do not keep accurate records.

Moreover large firms have precise definitions of pro bono which typically clearly limit their work to matters for disadvantaged clients or public interest causes. Small firms typically do not have restrictive definitions.

We attempted to compare this data with data collected by the largest firms. Firms seemed somewhat reluctant to provide this data, however, the small number of responses indicate average pro bono contributions of 28-39 hours per lawyer.

Nevertheless, to the extent that the ABS figures showing a disparity between small and large firms are correct then they indicate a very uneven pattern of pro bono work as between larger firms. The 2000/2001 ABS figures group firms in terms of size of the partnership. There are 91 firms with 10 partners or more. These firms had an average of 115 solicitors each and 166 non legal staff for an average total staff of 281. The largest firm (Minters) now has 1042 solicitors and 297 partners (globally).[9]

We asked several of the more prominent large pro bono firms to report the number of pro bono hours undertaken per lawyer in either 2001/2002 or 2002/2003 if earlier figures were not available. Averaging the XC firms that responded gave T hours pro bono per lawyer in comparison with the ABS average of D hours. If the ABS figures are correct this implies that a number of the other firms with 10 partners or more are doing relatively small amounts of pro bono. It may be that it is here that there is a some room for improvement in the supply of pro bono. If the average contribution of the 91 or so largest firms was increased from 16 hours per lawyer to the standard of around 25 [to be confirmed] set by the three leading firms who provided information to us, this would mean an extra 9 x 10,431 = 93,879 pro bono hours. Even so this would only be a 9.5% increase in pro bono hours and a 1-3% increase in the total amount of free legal work available to the public.

This informal survey revealed that lawyers from these firms undertook, on average, 34 hours of pro bono per annum (Freehills), a figure very different from the ABS statistics…..

[8] Calculations based on comparisons of Table 2.8 and 2.9 in ABS, *Legal Services Industry 1998-99*, Report No 8667.0, 18 August 2000.

[9] See *Legal Profiles* at www.legalprofiles.com.au.

Is the level of pro bono work increasing?

The 2001-02 survey estimates show a *lower* level of pro bono work than in 1998-9, but this is thought to reflect the methodological changes made to the collection of the data as well as the incidence of non-sampling error (in relation to legal practices no keeping records on the number of pro bono hours worked, and providing instead estimates).[10]

Regional Variation

The 2001-2 ABS report also indicated a higher level of pro bono work being undertaken outside capital cities (including reduced fee as well as free pro bono, capital city practices undertook an average of 48.2 hours per lawyer compared to 109.4 hours by lawyers elsewhere).[11] The same tendency is reflected in the recent NSW Law Society practising certificate survey.[12]

Type of pro bono work

Pro bono work varies according to the service model, whether it involves transactional or litigious work, the area of law , the size of matters, whether clients are organisations or individuals and so on.

There is very little known about the type of work that is undertaken pro bono. and included in solicitors' reports to the ABS.

Litigation or transactional work?

Much of the work undertaken by publicly funded lawyers[13] involves litigation or advice in contemplation of litigation (figures?). We do not know the proportion of pro bono work that involve litigation matters, but our sense is that it would be less. While the Centre is aware of significant participation in litigation by pro bono lawyers working for larger firms, we have only limited anecdotal information about pro bono activities of smaller firms. While that would suggest that such pro bono frequently does include litigation, there is not enough information to draw any kind of conclusion.

[does the NSW Law Society survey include any data on this? – still waiting for PC results (JL, 10/10)

[do earlier reports? Check NSW LJF [GR: Legal Needs (exec summary now available online, and in Mapping directory – reports anecdotally on family law need) & the appendices to the task force report] [GR: Task Force survey mentions briefly family law need]. Can we say that

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[10] See ABS, *Legal Services Industry 2001-2002*, Report No 8667.0, 25 June 2003, endnotes 12 and 24.

[11] See ABS, *Legal Services Industry 2001-2002*, Report No 8667.0, 25 June 2003, at 13

[12] percentages of firms doing pro bono work: 71% country, 56% suburban and 47% city, see *Law Society of NSW Practising Certificate Survey 2003-04* (October 2003)

[13] That is, legal aid commissions and ATSILs.

Service Models

What kinds of pro bono activities are being undertaken in these XX hours? As noted above the ABS reports about 12% of reported free pro bono is in the form of community legal education and law reform.

The balance presumably comprises mainly or entirely direct legal services for clients. It would be reasonable to assume that in the case of barristers the vast majority will be work undertaken as part of their normal practice as a barrister.

But for solicitors employed by firms, there are a number of forms of pro bono work. In the Australian Pro Bono Manual we group pro bono work into the following types

Pro bono work takes many forms: while much of it involves legal advice and representation of individual clients in the course of normal practice, there are other ways in which pro bono legal services can be provided.

Discussed very briefly below are some of the models of pro bono service delivery. These service models are not an exhaustive representation of pro bono service delivery, and many lawyers (for a more in-depth discussion of solicitor pro bono, see Manual…). – GR – summarise (adding, bar stuff where known, Models of PB here??? JL]

The models of pro bono practice discussed here include:

- In-firm pro bono
- Outreach services
- Secondments
- Specialist services
- Volunteering
- Multi-tiered relationships
- Other

In-firm pro bono

The archetypal form of in firm pro bono consists of individual client advice and or representation with the client paying nothing, or an agreed but substantially reduced fee for the legal services provided. In-firm pro bono can also involve 'transactional' work, for example where a firm assists a community organisation whose charter involves assisting disadvantaged clients. Firms can also involve themselves in law reform or community legal education initiatives. Some firms have employed specialist pro bono solicitors who can, amongst other things, administer and coordinate the firm's pro bono activities as well as undertake casework.

Outreach services

Outreach services involve lawyers providing legal assistance at outreach locations, usually in the premises of a community organisation. The assistance may be part of a discrete project or limited duration (for example, G+T's provision of solicitors to attend advice clinics in remote north-western NSW with WLRC, with travel assistance from the Law & Justice Foundation of NSW) or a partnership arrangement on an ongoing basis (for example, BDW provides a lawyer to Lou's Place, a day centre forwomen in crisis and their children; or the HPLC in Melbourne and Brisbane whereby firms provide a roster of lawyers to attend various nightly clinics).

Secondments

Secondments, unlike outreach services, generally involve a firm lawyer being supervised by the seconding (community) organisation. Secondments may be on a full-time, part-time, for fixed position (on a rotating basis), sessional (eg, weekly attendance at a CLC advice clinic) or on a short-term locum basis.

Specialist services

Firms sometimes individually, on in partnership with other firms or organisations, create or contribute to a specialist legal service. Some firms contribute funds, resources and staff to establish or maintain a service (eg, Shopfront Youth Legal Service in Sydney and the Youth Legal Service in Victoria). An example of a partnership is the First Stop Legal and Referral Service for Young People in the ACT (a partnership of CU, LAC (ACT) and the Youth Coalition of the ACT and the ANU Law Students' Society). An innovative model is the establishment of HPLCs in Melbourne and Brisbane (a Sydney clinic is currently being explored). HPLCs are organised by PILCH (Vic) and QPILCH and involve member law firms (and in-house counsel) providing assistance and advice to homeless people in various clinics throughout the cities.

Volunteering

Many lawyers volunteer at CLCs or other community organisations at advice clinics, often in the evenings. Volunteer lawyers (and students) are supervised by CLC staff solicitors.

Multi-tiered relationships

Multi-tiered relationships involve a combination of the models of service delivery, and include valuable non-legal andin-kind assistance. Multi-tiered relationships are discussed in further detail above.

Other pro bono models

While yet to be fully explored in Australia, establishing pro bono partnerships with corporate clients provides an opportunity to expand pro bono initiatives. The partnership may entail training the corporate client's in-house counsel so that they can participate in the firm's pro bono program, eg, training in-house counsel in DV so that they can participate in a court pro bonoDV roster.

Another partnership model involves firms and community organisations joining forces and expertise to people who may be adversely affected by particular events, eg, the Jabiluka and S-11 protests and the Olympics. The specific-purpose relationships tend to be of a limited duration and can include training and legal education as well as advice to, and representation of, individual clients.

We can make very rough estimates for volunteering at CLCs, secondments, outreach services, and for the Homeless Persons Legal Clinics which is one of the more significant elements of multi tiered programs which are not themselves secondments or in house pro bono. This will give us a rough idea about the proportion of pro bono which is undertaken as in house pro bono. My guesses are as follows

Table ?: Estimates of Types of Pro Bono Undertaken by Solicitors

Type of Pro Bono	Estimated Hours per annum
In House*	
Volunteering at CLCs	100,000 – 200,000
Secondments & Outreach (25 FTE)	40,000
Selected Multi-tiered Relationships[14]	11,000
Other	?
CLE & Law Reform	
Total	

* In House estimated by deducting other estimates from total.

Areas of Law

There is little concrete information available on what areas of law pro bono services are being provided. This is unfortunate, as information of this kind would assist (firms, and the NPBRC) in ensuring need is appropriately and effectively targeted and met.

However, it is possible, from research the Centre has undertaken to date, to give an outline of some of the areas where pro bono is being provided. These include:

There are important differences between the types of work undertaken by publicly funded lawyers and pro bono lawyers. More than 50% of work undertaken by lawyers paid from public funds is devoted to criminal law work[15]. We do not know the proportion of pro bono work made up of criminal law matters, but we can be sure it is a lot less than 50%. Conversely, we estimate that civil law makes up a large proportion of pro bono work but a much lower proportion of work undertaken by publicly funded services.

Certainly, the profession has identified a need for pro bono legal services in family law, but few law firms practice in this area,[16] and the lack of legal services in this area are a common barrier for people who are socially and economically disadvantaged.[17] It may be useful for the ABS to consider seeking information at least at the level of

[14] (Homeless Persons Clinic Victoria – 6000 hours pa, HPLC – Brisbane, 1,000 hours pa, Shopfront Legal Service (3 fte), Sussex St CLS (1 fte), Youth Legal Service (2 fte) – 6 person years = 11,000)

[15] In NSW in 2000/2001, 50% of the funds passing through LAC including those that were allocated to community legal centres were spent on criminal law. If the funds paid to CLCs were excluded, the percentage would be higher.

[16] See 'Pro Bono Survey Report', June 2001, reported in *Report of the National Pro Bono Task Force to the Commonwealth Attorney-General* (June 2001, Commonwealth of Australia) at Appendix G.

[17] see *Access to Justice and Legal Needs, A project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Stage 1: Public Consultations* (August 2003, Law & Justice Foundation of NSW)

crime/family/civil & as to whether work involved litigation, advice or transactional work.[18]

????? GR – ıI I made these up – what do you think?ı

- domestic violence matters (WDVCAS schemes, etc)
- credit & debt matters
- ???

Type of Client

Again, there is not much information available to the Centre. NSW PILCH reports about 50% of its referrals involve transactional work for community organisations. It is reasonable to assume that a high level of work for community organisations [across ??? can't read this]

General characteristics of pro bono legal services and the legal service environment

Add intro …

The following are some of the general characteristics of pro bono in Australia

- Draw conclusions from quantitative data including . . .

Increase/growth in pro bono

While there appears to be a marked increase in recent years illustrated by growth in PILCH schemes, legal assistance schemes by rules of court, formalisation of pro bono schemes and policies in some mid-large firms, the two recent ABS surveys do not depict a significant overall increase in the amount of pro bono.

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There are diverse perspectives on the benefits of an increase in pro bono.

However, support for the rise in pro bono activity is not universal. Ideally, pro bono schemes provide complementary assistance in cases which may not otherwise get publicly funded legal assistance. Pro bono schemes and programs provide opportunities for the profession to donate its time and expertise, but they can present a dilemma. The rise in organised and government auspiced pro bono is considered by some as a "slide back" to the charity model of dealing with legal assistance for disadvantaged people,[19] and as such may be antithetical to the modern day system of

[18] In its 2002 report on the pro bono work of solicitors, the UK Law Society reported that the most frequent area of law being provided on a pro bono basis in the previous 12 months was employment law (32%), followed by family law (31%) and housing and business/commercial (29% each respectively). See *The Pro Bono Work of Solicitors, Findings from Omnibus Survey Nine* (2002, The Law Society UK) at 5.

[19] See S Biondo and C Field, 'Legal Aid in the 1990s – the slide back to charity', (1996) 8 Just Policy 39, Victoria Council of Social Services.

legal aid.[20] The observation that the growth in organised pro bono is occurring concurrently with the decline in state commitment to legal aid, raises suspicions that pro bono is either manifestly or latently being used as a substitute for legal aid.[21] This trend raises issues of particular concern to CLCs, including whether CLCs will be able to continue to attract volunteers who may be under pressure to undertake in-house pro bono, and whether the nature of in-house pro bono constitutes the same dedication to social justice and social change as CLCs? [22]

From a policy perspective, the growth in referral schemes, in particular court referral schemes, may not be the best use of valuable pro bono resources. The establishment and implementation of some court schemes (but not all) are sometimes ad hoc: parallel court schemes may inadvertently provide overlapping support which may indicate a lack of a coordinated or national approach, nor adequate consideration of resource/policy implications.

From a law firm perspective, some firms have complained about inappropriate referrals from some of the court referral schemes. This may be because some registrars with little experience or knowledge about the type of work a firm has expertise to undertake, are tasked with placing matters. Furthermore, the rules of some court schemes sometimes make it difficult for a firm to cease to act once a matter has been referred. There is also some anecdotal evidence that in many cases the same pro bono providers are being called upon again and again, most notably, barristers who have placed themselves on court schemes' registers.

Absence of an accepted definition of pro bono

There is no universally accepted definition of what is meant by pro bono. The 1992 Law Council of Australia definition has some obvious drawbacks. Of those proposed since, none has been by a national body or ostensibly for a national purpose. It may be useful for the Centre and the Law Council of Australia to work together on a definition ensuring various sized law firms and other ???? have a say.

Australia does not have any aspirational targets nor National Model Rules wrt pro bono-

let alone *ethical* aspirations. Most, if not all USA states have provisions in their professional conduct rules that affirm the responsibility of each lawyer to provide pro bono services. Many of these states have adopted the American Bar Association's Model Rule which sets out the responsibility of lawyers to seek to provide 50 hours of pro bono services per year.[23] . There is an absence of National Model Rules– no national statement or resolution reflected in professional rules or guidelines (a discreet project – what do law societies/association say about pro bono?) – *cf* USA ABA Model Rules, however, some law societies have policy statements wrt pro bono.

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[20] See Fitzroy Legal Service, *Submission – Inquiry into Legal Aid and Access to Justice* (September 2003) at http://www.aph.gov.au/Senate/committee/legcon_ctte/legalaidjustice/submissions/sublist.htm at p 33.
[21] ibid
[22] see above, notes 7 and 8, for a discussion of the implications of organised pro bono on CLCs.
[23] See American Bar Association Standing Committee on Pro Bono and Public Service and the Model Rules 6.1 at http://www.abanet.org/legalservices/probono/rule61.html

Paucity of govt policy wrt pro bono

Australian governments rarely have any explicit policy on pro bono or on the relationship between pro bono and legal aid, with the exception, to an extent being perhaps Victoria [24]and the Commonwealth.

Comparatively little recognition of pro bono in the profession, *cf* USA initiatives: the "pro bono challenge" or awards, ; - noting that awards are not the only form of recognition or even the best

Data lacks consistency –

As is clear from the discussion about the amount of pro bono being undertaken in Australia, the lack of consistency of data – no generally accepted definitions, few comparable longitudinal studies etc – means that few conclusions can be drawn about what is being done, when it's done, how it's done and who's doing it. Consistent and accurate recording and reporting of pro bono would benefit not only pro bono practitioners and firms (in terms of their supervisory, budgetry and resource allocation considerations), but such data would clearly assist to ground and implement any industry-wide policy initiatives. Expanding on the work of the ABS seems likely to be the most effective and ????. At a minimum, it would be useful for the ABS to ask legal practitioners to try to report or estimate the types of assistance provided (eg, advice, litigation, transactional), the areas of law (crime, family, civil) and the client type (individual or organisation)

Innovation in Australian pro bono

Pro bono assistance need not be restricted to the provision of legal advice, assistance and representation of clients. There are a variety of ways in which firms can offer their expertise and resources to promote access to justice for low-income or disadvantaged people and groups in the community.

Themes

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Partnerships & multi-tiered relationships

One of the innovative ways pro bono services can be delivered may involve forming 'multi-tiered' relationships with community organisations whereby pro bono assistance involves not only direct legal assistance, but other kinds of non-legal assistance that facilitate access to justice.

This might include any of the following:

[24] where law firms tendering to provide legal services to the Victorian government are required to commit to providing between 5% and 14% of the value of the tender.

- providing legal advice and representation to clients referred by the community legal service, including litigating on their behalf;
- providing legal advice and/or assistance to a community legal service in relation to a particular client matter, including undertaking legal research or drafting documents;
- researching and drafting law reform submissions and other policy documents;
- undertaking other legal research;
- full-time, part-time or sessional secondments of staff to community legal services and short-term locum secondments;
- preparing or updating community and other legal education materials, such as fact sheets and training materials;
- advising and/or drafting work in relation to internal management issues of community organisations (for example, taxation, incorporation and organisational structures, employment law, tenancy law, intellectual property, privacy or occupational health and safety);
- providing training to community organisations (for example, on changes to tax law or industrial relations issues) or to staff of community legal services (for example, on changes to personal injury law);
- mentoring arrangements between senior law firm staff and solicitors at community legal services;
- support for co-counsel arrangements, for example, an experienced litigator undertaking a discrimination matter at hearing level with the community legal service solicitor as co-counsel;
- encouraging legal staff to volunteer at community legal centres (for example, by organising rosters of staff volunteers, providing billable hours credit, city parking, travel allowance or taking staff members' volunteer service into account in performance appraisals); and
- working with the service to promote particular law reform proposals, for example, jointly meeting with a government working party.

In addition, multi-tiered pro bono relationships might involve forms of non-legal assistance such as:

- administrative services, including word processing (for example, transcribing tapes for a community legal service) and photocopying (for example, photocopying training manuals, induction manuals, appeal books);
- accounting and bookkeeping services;
- information technology services, including access to precedents and advice on IT issues, developing databases and intranet systems;
- assistance with design and/or publication and printing of hard copy or on-line resources and materials (for example, reports, newsletters, brochures or business cards);
- mail-outs (for example, mailing out a centre's annual report);

- human resource management advice and assistance (for example, revising personnel manuals);
- secondment of non-legal staff, including on a part-time or occasional basis;
- training for administrative staff;
- access to law firm facilities (for example, rooms, equipment and catering for meetings, conferences and training seminars);
- donations by the firm or individual staff including cash donations to support the service or a particular position in it or for specific activities (for example, holding conferences, paying for conference attendance or for the translation of CLE materials) and donations of equipment (such as computers or furniture);
- access to library resources including the on-line library resources of the firm and research by librarians;
- assistance with fundraising events and conferences (including providing premises and administrative support, hosting events, organising speakers and designing and printing invitations and brochures); and
- assisting in the management of the service through membership of the service's board or management committee.

Training

One commonly identified barrier to the provision of pro bono services is the mismatch that sometimes arises between the skills and knowledge of lawyers willing to undertake pro bono and the skills necessary to provide the legal and related services typically required by pro bono clients. There are a number of possible responses to this dilemma. First, the mismatch is less serious than sometimes supposed – lawyers have a range of generic and specialist skills that can be adapted and built upon. Moreover there are opportunities for firms to start from their existing skill base to identify ways in which those particular skills may be of use to disadvantaged communities. Second, there are some areas where it is relatively easy to acquire the necessary skills and knowledge through research, training or supervised practice. Third, it is possible to explore models of pro bono practice that involve complementary partnerships between pro bono lawyers with particular skills and community legal sector or legal aid staff with different skills.

For example, firms can organise training for their lawyers to participate in particular pro bono services, for example, to provide advice and assistance at a community legal centre (CLC) or at some other community advice clinic, or to provide assistance in a particular area of law, for example, migration law or child-protection proceedings. And the Homeless Persons' Legal Clinics in Melbourne and Victoria provide training to participating lawyers on relevant areas of poverty law including social security, mental/health legal issues, housing and tenancy, victims of crime assistance and fines and infringements notices.

Firms may also make their pro bono training available to lawyers in other firms, as well as to their own lawyers. For example, Blake Dawson Waldron has twice designed and organised training programs, each attended by around forty lawyers from several firms, to equip participants with the skills necessary to represent clients in defended applications for domestic violence orders.

Referral schemes

[GR – can we just summarise the pro bono referral schemes from the Manual – but add some discussion/assessment of these, including pros/cons? – JL]

Informal referral arrangements

Apart from the above formal schemes, there are numerous informal schemes under which pro bono services are provided

Many of these arrangements are relatively invisible to mainstream pro bono, and as such, often not considered to be pro bono. However, these kinds of arrangements can be just as effective access to justice as the more formalised schemes. DISCUSS

The relative informality of these arrangements means they are invisible – they are not publicised in firms' pro bono programs.

Limitations on pro bono & barriers to pro bono

[GR - below is a summarised merge of JA's and NPBRC's submission - JL]

It is clear that there is far more demand for pro bono assistance than is always possible to appropriately meet with pro bono assistance. Declining levels of legal aid and consequential gaps in legal aid services have increased the demand on the private profession to provide pro bono services. As mentioned above, Australian lawyers already provide substantial pro bono services, including acting for individual clients and volunteering in community legal centres. These pro bono services cannot, and should not, be a substitute for publicly funded legal services: they can, at best, supplement such services.

The following are some of the limitations and issues identified as barriers to pro bono

Areas of law and legal needs

The extent of unmet needs are clearest where there are gaps in publicly funded legal services, and for people who fall outside legal aid means and/or merits tests and who do not have sufficient means to pay for private legal assistance.[25] Most commercial law firms do not have expertise in the core areas of legal aid work. Given lawyers' reasonable concerns about the risks associated with taking on work for which they don't have the requisite expertise, and are unable to appropriately supervise, it is

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

difficult to argue that pro bono service providers should pick up what have been traditionally core areas of legal aid.

Conflicts of Interest

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

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

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

Rural, regional and remote access to pro bono services

The relative lack of access to legal services for disadvantaged people in rural, regional and remote areas is well-accepted.[26] Rural, regional and remote CLCs report on a huge need for advice and representation in areas such as family law, contract and debt matters, criminal law, domestic violence, employment and discrimination, and guardianship and estate matters. Legal practices are disproportionately provided in cities.[27] Moreover, it is likely that many rural firms, like other small firms, are already providing significant levels of pro bono legal services and have limited capacity to provide additional pro bono assistance.[28] It is also likely that many of these smaller practices are finding conditions harder as a result of difficulties in rural areas generally, and as a result of the so-called 'tort-reforms' and resultant restrictions on an

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

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

[28] see M Gawler, 'Pro Bono in the Suburbs and Country', Paper given at the First National Pro Bono Conference, August 2000, cited in Victorian Parliament Law Reform Committee, *Review of Legal Services in Regional and Rural Victoria,* May 2001 at p.273. See also ABS Survey statistics that indicate that: lawyers located outside capital cities undertake, on average, more than twice the amount of pro bono work than lawyers in capital cities; and lawyers in small practices, particularly those with only one principal, did significantly more pro bono than lawyers in practices with 10 or more principals/partners.

important traditional area of practice. As mentioned above, conflicts of interest are also more likely to occur in small practices and communities. Disbursements are also likely to be higher for rural pro bono clients, especially travel and telephone costs. There is also evidence that referrals for pro bono assistance for people from rural, regional and remote areas are likely to be for matters which are more serious.

Disbursements

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

Costs and risks

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

Complex litigation

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

Public interest tests

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

Expertise

The mis-match between the expertise of private pro bono lawyers, particularly in the larger firms where the potential for expansion of pro bono programs exists, and the most common areas of legal need, a key reason why pro bono services are unlikely to make any significant dent in the demand for publicly funded legal services in key areas of need including criminal and family law.

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

Firms can, and do, provide or organise training (often in partnership with legal aid bodies or CLCs) to enable lawyers to take on matters in which they do not have expertise, and for which there is a clear demand for, and short supply of, assistance (for example, assistance with defended domestic violence applications and victim's compensation matters.

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

The Centre is undertaking a project to adapt the US web site Pro Bono Net (www.probono.net.au) for use in Australia. The purpose of the site is to provide a high quality means for pro bono and publicly funded lawyers to share expertise and other information to assist them deliver services to clients.

Client casework cf business partnership models

It has been suggested that the business model of corporate philanthropy and social partnership may be a more appropriate approach to pro bono for large corporate firms than the traditional model of providing case assistance to individuals in need,[29] and that firms' core services are not accessible to individuals needing assistance with criminal or family law matters. Attending the business partnership model is the trend of forming "social partnerships" with CLCs, charities, academic research units or public interest groups and the like which may involve a law reform or community development objective rather than individual client assistance.

While these partnerships are without doubt a positive development in pro bono (for example, some law firm sponsored public interest legal centres with charters to engage in policy research, education and law reform with the potential to have significant policy benefits for individuals), the possibility that partnerships are established at the expense of much-needed client casework could signal a further decline in basic access to justice for many individuals.

That such a dichotomy is considered at all is perhaps indicative of the finite nature of pro bono service delivery – both in terms of available resources and also the commitment that pro bono should not substitute publicly funded legal aid.

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[29] See C Arup, 'Pro Bono in the Post-Professional Spectrum of Legal Services', in C Arup and K Laster, *For the Public Good: Pro Bono and the Legal Profession in Australia* (The Federation Press, Sydney 2001) at p 197-198.

The need for a well-funded community legal sector

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

Future directions for pro bono in Australia

This section discusses *some* of the ways in which pro bono could be

developing better understanding of what is happening – improve ABS process? Definition?

Geographic spread of pro bono – WA & SA; RRR

It appears that most structured pro bono is carried out in Australia's eastern states, and in the capital cities therein (by structured, we mean…) . As mentioned above, there is little hard data on exactly who is doing pro bono, and while the ABS data points to smaller firms doing more pro bono per solicitor

Pro Bono and Indigenous communities and clients

GR – what to say here???

Promoting pro bono to law students

Leaving aside the debate as to whether law students doing pro bono as part of their credited study is 'real' pro bono, there have been a number of innovative pro bono programs undertaken by law students, as well as a number of proposed programs which provide three prime benefits.

- The community can access legal advice or legal representation for free or at a minimal cost;
- The programs provide an educational role for students to learn how the law operates outside of textbooks and exams, as well as provide information about how to deal with and relate to clients; and
- Such programs aim to encourage an enhanced awareness among law students that a vast majority of the community is unable to access legal advice or legal representation and this awareness will hopefully translate into a willingness to provide pro bono work later in their careers.

The following programs are examples:

The Global Alliance for Justice Education (GAJE) brings together legal academics, law students, jurists, advocates and legal practitioners from around the world with the

common goal of achieving justice through legal education. In Australia, GAJE have established the Refugee Advoacy Volunteer Network (RAV'N) consisting of law students and professionals who have been undertaking refugee casework, detention centre visits and campaigning on refugee rights. GAJE organized training for the students in basic immigration law and its application with the assistance of a barrister, a lawyer at the Refuge Advice and Casework Services and refugee activists. It is envisioned that after the training days the students will work in groups on assigned cases and will be in regular contact with their supervising lawyers.

Parkway Legal Advice Centre was founded in 1977 by law students at the University of Western Australia. The centre is operated solely by law students and overseen by an academic advisor from the law faculty. Parkway operates a weekly legal advice session during the University Semester. The legal advice is provided by qualified practitioners from a variety of Perth Law firms who volunteer their time. Law students at the University of WA are invited to sit in on the consultation and to give assistance where possible. Parkway also operates a number of other initiatives that aim to bring law to the community via legal education activities on and off campus, often by way of carrying out legal education talks to interested groups in the community. The Centre also co-ordinates "Law in the Raw." Written, produced and presented by UWA law students, the series aims to educate and entertain its listeners by exploring topical legal issues.

KLC coordinates a student advocacy scheme where final year students appear in Waverley Local Court on guilty pleas where legal aid is not available. So far the students have all achieved great results for clients.

Proposed innovative law student pro bono programs include an Amicus Litigation Clinic Faculty of Law, University of Sydney. This course will involve students in devising and running an Amicus Curiae intervention in an appellate case that raises an important issue of principle in a matter of public interest. The students will be given the task of finding a case that is suitable for an amicus intervention on appeal. Only one case will be selected from this pool and proceeded with, based on what was practical and on the availability of a partner organisation who is likely to achieve standing. The course will be assisted by several partner organisations, who will be the named body in the intervention and who will have appropriate standing on the issue at hand. Once a case is selected, all the students will then be given responsibility for research tasks as part of the process of writing submissions. The submissions will be drafted by faculty and/or pro bono solicitors and finalised in consultation with counsel.

Kingsford Legal Centre (KLC) is proposing to conduct a public policy clinic intensive clinic designed to teach public policy and systemic advocacy in a non-litigation context on behalf of disadvantaged communities. Students will be given the responsibility of managing their own public policy project under the supervision of the KLC public policy clinical supervisor and in partnership with a community organisation.

Using technology to share expertise

Improved referral systems -> conference session

Concluding remarks

The availability of pro bono legal services does not provide a conclusive solution to address the needs of legal consumers who are ineligible for publicly funded legal aid, cannot get assistance from a community legal centre (either because of means and/or merits tests, or non availability of legal services for particular areas of law) and who cannot afford to pay for legal services themselves. Inadequate funding and consequential limits on the availability of legal assistance and the constraints of pro bono legal services exacerbates the weaknesses of the legal system in enabling poor and otherwise disadvantaged people to defend or assert their rights. In the absence of sufficient state legal funding, pro bono legal services can only be relied upon as a supplementary, but important, means to enhance and extend the reach of legal services.

Given the comparatively small size of the profession, Australian lawyers' contribution to pro bono is encouraging. The clear and growing commitment to pro bono, and the scope to deliver pro bono in innovative form is promising.