

Legal Services 'for the public good'

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Pro bono is a key source of legal assistance for the disadvantaged in the absence of an adequately funded legal aid system.



Lawyers and others have long been concerned with the inability of significant numbers of people to afford the legal services necessary to assert or protect their rights and interests. One response has been for lawyers individually or collectively to provide free legal services to poor or disadvantaged people. 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/or 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.¹ 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, but the tradition of free provision of legal services continues.

In Australia, the USA, the UK 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. Despite some criticism of the term,² this interest has been developed under the label of 'pro bono publico' (literally 'for the public good'), or 'pro bono' for short. A number of definitions of pro bono have been developed,³ and working parties, referral schemes and bodies to support and promote pro bono established. The latter include the Pro Bono Institute and probono.net in the USA, and in Australia Voluntas at the Victoria Law Foundation and the National Pro Bono Resource Centre.

Pro bono legal services interact with and promote the public interest in two ways. First, it is in the public interest that low income and disadvantaged people have greater access to legal services. Second, much pro bono legal service provision relates to matters that have a public interest quality. This article is primarily concerned with the former aspect.

The moral or political basis for a decision to provide free assistance will of course vary with the individual and the times in which they live. Motivations may be based on charity, a sense of professional obligation, a conception of legal assistance as a right, an explicit social change agenda or some combination of these. There are also commercial considerations that may influence a lawyer or law firm undertaking to provide free or reduced cost legal services and the types of services offered.

It is not our purpose in this article to explore these issues but to consider how, given the current operation of the legal system and levels of support for publicly funded legal services, the commitment to providing and improving pro bono legal services can be channelled in the most effective way.

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Questions worth addressing include:

- what is the further potential for pro bono legal services to improve access to justice?⁴
- what are the most effective types of relationships between pro bono legal services and publicly funded legal services?
- how can pro bono legal services be supported and promoted so that they most effectively improve access to justice?

Pro bono legal services

There is no universally accepted definition of 'pro bono' legal services. Most definitions focus on legal assistance provided to clients who cannot afford ordinary market rates, or to clients whose case raises a wider issue of public interest. The term includes legal services provided to organisations working for disadvantaged groups or for the public good. Pro bono can also involve lawyers and others engaging in free community legal education, law reform and other activities. All definitions of pro bono include services that are provided on a without-fee (or without expectation of a fee) basis. Some definitions go further and incorporate work done on a reduced-fee,⁵ or substantially reduced-fee basis.

There is a tendency to conceive of pro bono legal services as comprising, in the main, fairly *ad hoc* decisions by an individual practitioner to provide advice or undertake a litigious matter for an individual client as part of their normal practice. While such activities continue to form an important core of pro bono work, there are ways in which this model is not (and probably never was) an accurate depiction of the range of pro bono legal services. As practised today, pro bono legal services have the following features:

- clients include groups, classes of individuals and community organisations;
- 'legal services'⁶ include advice, transactional services,⁷ negotiation, representation, assistance with mediation, community legal education and the preparation of policy submissions;
- pro bono service providers include lawyers employed by small and large private practices, corporations' in-house counsel, lawyers working for government agencies and others;
- decisions whether or not to provide a pro bono service are not only made by individual practitioners but also by firms' pro bono partners/committees/coordinators according to established policies, criteria and pro bono budgets;
- pro bono legal services are increasingly provided at locations other than solicitors' offices or the courts. Locations include community legal centres (by secondees from firms as well as volunteers), on the premises of non-legal community service providers and in outreach premises established by a firm for the purposes of providing a shopfront legal service;
- pro bono contributions are increasingly being made as part of 'multi-tiered' partnerships between firms and community legal services;
- practitioners are no longer on their own in locating pro bono cases, setting priorities and screening for appropriate matters. There are now a number of formal pro bono referral schemes operated by the Public Interest Law Clearing Houses, legal professional bodies and the courts.⁸ There is also a network of informal arrangements

that results in pro bono referrals, especially arrangements between community legal centres and specific firms and counsel.

Government involvement

In recent times governments in some jurisdictions have taken a greater role in encouraging pro bono. The Federal Attorney-General's initiatives are discussed below. In Victoria, law firms tendering to provide legal services to government were recently required to commit to providing pro bono legal services to the value of between 5% and 14% of the value of the tender.⁹ Ultimately 33 law firms were successful. The pro bono commitments in the contracts are to commence on 1 January 2003. Various matters have not been settled at the time of writing including whether work done at a reduced fee, or on a 'no win, no fee' basis should count in discharging a pro bono commitment; whether work done benefiting causes outside of Victoria (for example for refugees in South Australia or Indigenous organisations in the Northern Territory) should count; and whether non-legal assistance provided by firms should be counted.

Current pro bono practice

Pro bono has long been a part of the every day workload of the smaller law firms, particularly in the suburbs and further afield. It has been observed that rural and regional practitioners in particular have carried a disproportionate burden and that for these practitioners, 'pro bono is not usually a matter of choice. Rather, it is done on a daily basis'.¹⁰ The 1998 Australian Bureau of Statistics survey of the legal services industry reported on lawyers' estimates of pro bono work. The ABS estimates that the 8312 solicitors employed by firms employing fewer than 10 people provided an average of 58 hours 'free'¹¹ pro bono a year each as against 13 hours a year each for the 7878 solicitors employed by the 76 largest firms (those employing more than 99 staff).¹²

It is likely that this gap has narrowed somewhat in recent years as many larger firms have significantly increased their commitment to pro bono and have expanded their pro bono programs. Some firms have active in-house pro bono practices, involving significant numbers of lawyers within the firm, and work closely with community legal centres and other community organisations in accepting referrals and targeting particular areas of need. At least seven now employ full-time pro bono coordinators.

A number of the firms second lawyers to community legal centres (CLCs) and/or one of the Public Interest Law Clearing Houses. The most common secondment arrangements involve full-time placements for three to six month periods. Other arrangements include two-week placements by every new solicitor joining the firm; the provision of a lawyer on a one day a week basis to deal with particular kinds of cases (for example, credit and debt or family law); or a roster of lawyers to staff particular advice sessions at a CLC. In Victoria some secondments have resulted from a pilot scheme initiated at the request of the Victorian Attorney General and overseen by an implementation group. An evaluation of the pilot is due in June 2003.

Acceptance of case referrals and staff secondments are two aspects of what can in practice prove to be a multi-tiered relationship between a particular firm and a particular

community legal centre. Such relationships may involve firms providing assistance such as: developing community legal education materials; providing training to CLC workers (legal and non-legal); developing (and/or making available) precedents; participating in a court duty lawyer scheme; non-legal assistance of a secretarial, accounting, information technology, public relations, or library nature; donating equipment such as computers, desks, telephone systems; use of meeting rooms, catering and other facilities; financial assistance and assistance with fundraising; printing materials and reports.

Combining efforts

The idea of joining forces to provide pro bono services is not new. Community legal centres have since their inception commonly involved solicitors and barristers working together, pro bono, in a community location to provide services to low income and disadvantaged people. More recently, larger firms and some in-house counsel have combined forces, sometimes with community organisations, in an effort to address particular areas of unmet need. For example, in 2001 a Homeless Person's Legal Clinic was established in Melbourne as a joint project of the Public Interest Law Clearing House (PILCH) and the Council to Homeless Persons. The Clinic is staffed by a part-time coordinator and over 150 pro bono lawyers from seven law firms and one corporate legal department. These lawyers attend and provide advice and assistance to homeless people at eight community locations, such as crisis accommodation centres and welfare agencies. Lawyers participating in the Clinic have also undertaken law reform and policy work, in particular by preparing submissions on issues such as vagrancy laws and homeless people's right to vote. A similar clinic was launched in Brisbane in December 2002 by QPILCH. Ten Brisbane law firms have committed to providing lawyers to staff the clinics, in partnership with welfare agencies.

There has been a significant pro bono effort in response to changes to government policy in relation to the legal processing of applications for asylum in Australia and the limited publicly funded legal assistance that is available to applicants who wish to seek Federal Court review of Refugee Review Tribunal decisions. Partnerships to coordinate pro bono assistance have been developed between different sectors of the legal profession, volunteer refugee assistance organisations, the courts and others. An example is the PILCH (NSW) project that brought together over 150 PILCH member lawyers to provide assistance to temporary protection visa holders. These volunteer lawyers attended information and training programs coordinated by the Refugee Advice and Casework Service. Other partnership arrangements have included using email networks to share resources and expertise and to match willing practitioners with people in need of service — including across state boundaries. This effort has also seen the creation by volunteers of two new community legal assistance organisations.¹³

The contribution of pro bono legal services to access to justice

Pro bono work makes up a significant part of the legal services delivered to low income and disadvantaged people. In 1998–99, law firms estimated that approximately 1.8 million hours were spent on pro bono work, comprising

826,600 hours providing legal services without a fee, 835,200 hours providing legal services at a reduced fee and 120,300 hours of involvement in free community education and law reform work. Barristers estimated spending 489,000 hours doing pro bono work.¹⁴

By way of rough comparison the number of 'billable hours' worked by lawyers employed by Australian legal aid commissions is in the order of 1.2 million a year.¹⁵ This amount would be increased many times if it included the work of public defenders, lawyers employed by community legal centres, Aboriginal and Torres Strait Islander Legal Services, Indigenous family violence legal projects and native title representative bodies, and of private lawyers paid by legal aid. Moreover there are a number of ways in which one could quibble about this estimate of pro bono hours. Nevertheless it is clear that the pro bono contribution to legal services is already significant.

Some areas of the legal profession already commit significant resources to pro bono. It is often suggested that in relation to most small firms it would be unreasonable and unrealistic to expect a greater contribution of time. Building further on this contribution to access to justice is likely to involve making links, sharing knowledge, improving case selection, improving access to resources and support and overcoming barriers to undertaking particular kinds of cases or acting for particular classes of clients.

In other parts of the legal profession there appears to be scope for an increased pro bono contribution. As noted above, not only have a significant number of larger and capital city firms increased their commitment to pro bono, many have improved the way in which their pro bono commitment is planned and administered. There are other city firms that are now considering how they can follow suit. Similarly there is a growing awareness of pro bono possibilities by in-house counsel in legal departments of some major corporations and potential to extend this to others. The rise of the new pro bono referral schemes indicates a recognition of need by, and willingness on the part of, solicitors and barristers to expand their pro bono contributions in a formal way. The cooperative work underlying recent asylum seeker initiatives is an example of a less formal expression of this commitment.

Two particular limitations of note apply to pro bono casework undertaken by larger city firms. The first is that, while many smaller firms have expertise in criminal and family law — two significant areas of unmet legal need — larger firms generally do not. There is room for debate as to the role of pro bono in such core areas of publicly funded legal aid. Second, firms' willingness to undertake matters in administrative law, an area where disadvantaged clients have significant need and firms do have expertise, can be diminished due to perceived 'commercial conflicts of interest' — firms may fear repercussions in securing government legal work in future. There is a need for government to adopt a protocol aimed at minimising this obstacle to the delivery of pro bono services.

Despite these limitations large firms have a lot to offer. There is potential for exploiting their flexibility, resources and expertise in new ways. For example it may be possible to make links between better resourced city firms, lawyers with particular expertise (counsel, CLC and legal aid experts) and lawyers in rural, regional and remote areas as a way of extending services. There are partial precedents to be built on: city lawyers have conducted rural outreach services,

acted for clients in rural areas and provided advice and assistance to rural community legal service providers, sometimes in partnership with local organisations or specialist community legal centres. There is perhaps further potential for increases in effective assistance to clients through regional cooperative arrangements between local and specialist CLCs, the local Aboriginal and Torres Strait Islander Legal Service, legal aid offices and private firms and one or two large city firms allocated to each region.

Maximising the contribution of pro bono legal services to increased access to justice should be considered in the context of the legal needs of disadvantaged communities and debates about the most effective ways of meeting those needs. The key question is: how can the skills of the pro bono service provider best serve the interests of a particular disadvantaged group or community? As commentators are increasingly noting, the answer will not always involve the provision of casework legal services:

... the time has come to recognise that many of the most promising pathways to justice [may] be outside the court and tribunal system. In particular, they are to be found in ... programs designed to empower people to make 'effective choices about legal issues.' Perhaps access to justice has got much less to do with lawyers and courts than most of us have realised.¹⁶

Pro bono service providers have access to a range of skills not available to disadvantaged communities. The skills of a lawyer or a law firm could benefit those communities in diverse ways. Transactional legal services to support key community organisations and community development initiatives, and community legal education and/or law reform activities in cooperation with local organisations and community leaders are examples of pro bono activities that have been undertaken to date, albeit not as often as might be desirable. There is potential for even greater results through pro bono service providers developing deeper ongoing relationships with particular client groups directly or through community-based service and advocacy organisations, just as effective relationships with corporate clients deepen the ability of the firm to meet its clients' needs.¹⁷

Pro bono and publicly funded legal services

Pro bono services are an adjunct to publicly funded legal services, such as legal aid services, community legal centres and Indigenous legal services. The linkages and interactions are obvious — and it is no surprise that reductions in funding to some parts of the legal aid system over recent years have resulted in a large increase in demand for pro bono services.¹⁸ Pro bono cannot and should not be a substitute for publicly funded services. Rather, pro bono complements them and is part of a framework of services provided to meet the needs of low income and disadvantaged people.

Concern has been expressed in Australia and the UK that provision of pro bono service in core areas of legal aid will allow governments to renege on their funding commitment.¹⁹ The current Commonwealth Attorney-General has several times stated that the Commonwealth Government will not use pro bono support in this way.²⁰ It is often argued that adequate access to legal services is both a moral or legal right and a prerequisite to the proper functioning of the rule of law in a democratic society.²¹ The state thus has an obligation to ensure that there are sufficient publicly funded legal services. There is a tension between advocacy for the state to

fulfil these obligations and responding to the consequences of the reality that it does not currently do so. While access to legal services should not depend on the variable capacity and willingness of the private profession to volunteer free legal services, the fact is that, even in the days of a healthier legal aid system, there have never been adequate levels of publicly funded legal assistance.

In many areas it is important to consider pro bono and publicly funded legal services together. Much of what is good for one — such as better ways to share expertise — will also be good for the other. In the same way, clients in similar circumstances ought not face different barriers to access to justice according to whether they are receiving publicly funded or pro bono legal services. For example changes to court rules which grant fee exemptions should generally apply equally to cases brought pro bono and those where a publicly funded legal aid body provides representation. Similarly, the provisions of the NSW Legal Aid Commission Act that provide some protection to litigants against costs orders might be extended to appropriate classes of pro bono cases.

Each type of service can support the other by making use of the particular skills and strengths of each, including by coordinating referrals or training in areas of specific expertise. For large firms, CLCs also provide a means of accessing disadvantaged communities, identifying needs and targeting their pro bono resources most efficiently.

The role of the National Pro Bono Resource Centre in supporting and promoting pro bono in Australia

The first National Pro Bono Conference in Australia was held in August 2000.²² Following the conference the Attorney-General, Daryl Williams QC, established the National Pro Bono Task Force, which reported in June 2001. The Task Force identified five key actions to support and promote pro bono in Australia and, as part of Action 1, recommended the establishment of the National Pro Bono Resource Centre (the Centre). The Task Force allocated a coordinating or supporting role to the Centre in relation to each of the recommended Actions, however it stressed that the Centre should not play a clearinghouse or referral role, a task generally best left to existing or potential state-based agencies.²³ The Commonwealth has since provided funding for the Centre for a three-year period. The Centre has been established by the Public Interest Advocacy Centre and partner organisations and was launched on 15 August 2002. In opening the Centre, the Attorney drew attention to the need for the Centre to, amongst other things, promote pro bono to the profession and the broader community, to address a range of obstructions to the delivery of pro bono services and to address issues to enhance the contributions of government lawyers to pro bono.

The Centre has commenced work on several projects including the production of a Good Practice Guide and Resource Kit for firms and individual lawyers interested in pro bono, and papers documenting the diverse range of pro bono activities and pro bono relationships in Australia. The Centre is working with a range of organisations to promote the coordination of referrals both generally and in particular areas of need. The Centre will use the web to promote and support pro bono, by publishing, in due course, a directory of pro bono referral agencies, a directory of pro bono opportunities for lawyers, practical information for pro bono

lawyers, and research reports and papers prepared by the Centre and others. The Centre will also use the web to support networks and facilitate sharing expertise in particular areas of pro bono and legal aid practice.

The Centre will shortly publish a Paper, *Supporting and Promoting Pro Bono in Australia*. The purpose of the Paper is to report on the particular activities and projects that the Centre is engaged in or otherwise believes would assist pro bono legal service providers to further contribute to increased access to justice in Australia, and to inspire others to contribute to those projects.

In accordance with the Task Force Report the Centre will also play the lead role in coordinating the Second National Pro Bono Conference to be held late in 2003.

Conclusion

There is considerable potential for pro bono services to further contribute to increasing access to justice for low income and disadvantaged people in Australia. Legal professionals who have long been providing services for free are recognising the advantages of better coordination, organisation and targeting of their resources. Others who have been less active appear to be looking at pro bono with new interest. Pro bono referral schemes, the appointment of pro bono coordinators in large law firms, better sharing of information and closer ties with communities and community organisations are all developments likely to improve the effectiveness and quality of pro bono legal services.

Some firms and lawyers choose to target what they identify as public interest work; others regard it as in the public interest that any indigent person has access to required legal services. Regardless of the approach taken, pro bono is likely to remain a key source of legal assistance for disadvantaged communities given the unlikely prospect of an adequately funded legal aid system. The most effective results will be achieved through all the agencies in the legal system — whether public or private — focusing on needs and cooperatively sharing resources and ideas to meet those needs. The National Pro Bono Resource Centre will play an important role in fostering and supporting these activities.

References

- See Robertson, D., 'Pro Bono as a Professional Legacy' in C. Arup and K. Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia*, The Federation Press, 2001.
- A competition was recently organised in England by Lord Chief Justice Lord Woolf to find a suitable plain English translation for 'pro bono publico'. The winning entry was 'law for free'.
- See generally Mcleay, F., 'Defining Pro Bono — Exploring the Parameters', (2002) 76 *Law Institute Journal* 51.
- Access to justice has become a somewhat woolly term. As a working definition we mean the ability of individuals and groups to protect and assert their rights and interests, including through participation in the process of public policy development and law reform as well as participating in adjudicatory procedures including the courts.
- For example, the definition adopted by the Law Council of Australia in 1992.
- For discussion of the benefits of viewing legal services broadly see Renouf, G., 'A Client Centred Approach to Access to Justice', NSW Law and Justice Foundation, Access to Justice Workshop, July 2002 forthcoming at <<http://www.lawfoundation.net.au/access/workshop.html>>.
- Including drafting services in relation to contracts, funding agreements, regulatory matters, corporate structure and tax issues, mainly for non-government organisations providing welfare, legal or other community services.
- Formal referral schemes include those operated by or on behalf of the professional associations in NSW (Law Society, Bar Association), Victoria (Law Institute and Bar Association) and Western Australia (Law Society). In addition there are now Public Interest Law Clearing Houses (PILCH) making pro bono referrals in Victoria, NSW and Queensland and proposals to create a PILCH in South Australia. In Western Australia the Law Society's Law Access scheme has a public interest component. The Victoria Law Foundation publishes a directory of pro bono opportunities and the National Pro Bono Resource Centre will shortly list referral agencies on its web site.
- Alternatively firms can pay that percentage to the state, which will then be applied in some as yet unspecified way to legal services for the disadvantaged.
- Gawler, M., '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, p.273.
- That is, not including 'reduced fee' pro bono. If reduced fee pro bono had been included the comparison would be 126 hours a year by each solicitor working in a small firm against 18 hours a year for the larger firms' solicitors.
- 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.
- The Refugee Advice Service of South Australia and the Asylum Seeker Resource Centre in Victoria.
- ABS, *Legal Services Industry 1998-99*, Report No 8667.0, 18 August 2000, Table 2.9.
- In 1998 there were 747 solicitors employed by the eight legal aid commissions (ABS, *Legal Services Industry 1998-99*, Report No 8667.0, 18 August 2000, Table 4.1). We assumed seven billable hours a day and 230 working days in the year. This is an extremely rough estimate and is relevant only in relation to the order of magnitude. Of course many legal aid lawyers would work in excess of seven billable hours a day.
- Sackville, R., 'Access to Justice: Assumptions and Reality Checks', NSW Law and Justice Foundation, Access to Justice Workshop, July 2002 at <<http://www.lawfoundation.net.au/access/workshop.html>> citing J. Giddings and M. Robertson, 'Informed Litigants With Nowhere To Go': Self-Help Legal Aid Services in Australia', (2001) 25 *Alternative Law Journal* 184. See also Renouf, G., above, ref 6 and reference there cited.
- These ideas are explored at greater length in Renouf, G., above, ref 6. The National Pro Bono Resource Centre will publish, in the first half of 2003, a review of different models of legal service provision.
- For example, in the *Survey of Pro Bono Activities of Victorian Barristers* in 1999 (A. Roberts, *Voluntas*, June 2000) 68% of the barristers who practise criminal and family law believed that cuts to legal aid funding in the previous three years had resulted in a large increase in demand for pro bono services: Victorian Parliament Law Reform Committee, *Review of Legal Services in Regional and Rural Victoria*, May 2001, p.279.
- Cooper, J., 'Free Advice From Barristers and Solicitors', John Cooper's Legal Focus, *Justis*, 19 March 2001, <http://www.justis.com/news/jc_010319.html>.
- The Hon D. Williams QC, 'Opening Address, the First National Pro Bono Law Conference: For the Public Good', 4 August 2000; 'Launch of the National Pro Bono Resource Centre and Opening of the Pro Bono Workshop' 15 August 2002.
- See eg Connellan, G., 'The Rule of Law: Access to Justice is Not Optional', in Victoria Law Foundation (ed.), *A Just Society: What Access to Justice Means to Twelve Australians*, Victoria Law Foundation Publishing, Melbourne, 1999, and Renouf, G., above, ref 6.
- Selected papers are published in Arup and Laster, above, ref 1.
- Such as those listed in ref 8.