



24<sup>th</sup> AIJA Annual Conference 2006  
Adelaide 15-17 September 2006

Funding Litigation: The Challenge

John Corker  
Director

The Law Building  
University of New South Wales  
UNSW Sydney 2052

Ph: 02 9385 7381 E: [info@nationalprobono.org.au](mailto:info@nationalprobono.org.au) Web: [www.nationalprobono.org.au](http://www.nationalprobono.org.au)

## Contents

Introduction .....	2
Background .....	2
Overview of pro bono work done in Australia.....	4
Barriers .....	5
Initiatives – ways forward .....	10
What Should/Could the Courts Do and Not Do? .....	12

## Introduction

The role of pro bono in the access to justice landscape is becoming increasingly visible and it is now clear that pro bono legal services are playing an important role in increasing access to justice. However the extent to which they can assist in litigation is quite limited and this paper seeks to set out some of the reasons why and suggest some measures that could perhaps be taken to improve the situation.

## Background

When the 1994 Access to Justice Advisory Committee, chaired by Justice Ronald Sackville, reported to the then Attorney-General, there was no explicit mention of the role of pro bono legal services in increasing access to justice.<sup>1</sup> This is not to say it didn't exist but since that time, increasing attention has been given to the pro bono contribution of the legal profession and its role in facilitating access to justice.

The evolving “pro bono industry” in recent years is well-illustrated by the relatively recent establishment of:

- formal pro bono referral schemes run by legal professional associations<sup>2</sup>
- Public Interest Law Clearing House schemes largely funded by contributions from their law firm members.<sup>3</sup>
- legal assistance schemes created by rules of court<sup>4</sup>
- structured pro bono programs in law firms
- informal rosters of pro bono lawyers in courts and tribunals taking on a duty lawyers role.
- dedicated pro bono projects<sup>5</sup> and resources<sup>6</sup>
- questions about or analysis of pro bono in surveys<sup>7</sup> and inquiries<sup>8</sup>

---

<sup>1</sup> Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (AGPS, Canberra 1994)

<sup>2</sup> These exist in the ACT, NSW, Victoria, and Western Australia.

<sup>3</sup> These exist only in NSW, Victoria and Queensland. See

<http://www.nationalprobono.org.au/documents/ReferralSchemeshistoryreportfinal.pdf> for details.

<sup>4</sup> Order 80 pro bono referral scheme, Federal Court of Australia; Order 12 pro bono referral scheme, Federal Magistrates Court; Rule 66A legal assistance referral scheme, Supreme Court of NSW; Rule 28C legal assistance referral scheme, District Court of NSW.

<sup>5</sup> for example, the Victoria Law Foundation supports a Pro Bono Secretariat; and Young Lawyers, a committee of the NSW Law Society is producing a report which outlines the pro bono output of law firms for law school graduates.

<sup>6</sup> See <http://www.nationalprobono.org.au/publications/legalguide/index.html>

- pro bono awards<sup>9</sup>
- articles in the press about pro bono<sup>10</sup>
- the discussion of pro bono at conferences<sup>11</sup>
- the National Pro Bono Resource Centre ('the Centre')

The Centre was established in 2002 in line with a recommendation made by the Task Force established by the then Attorney-General, Darryl Williams. Its role is to promote and support the legal profession in delivering pro bono legal services. Some key activities of the Centre have been to publish the Australian Pro Bono Practice Manual, conduct two national conferences about pro bono and to broker relationships between legal centres that provide services to disadvantaged and marginalised people, (such as community legal centres and indigenous legal service providers), particularly in regional, rural and remote areas and city based law firms. The Centre is presently conducting a national survey of the legal profession and intends to launch an aspirational pro bono target for Australian lawyers later this year. We are actively seeking support for this initiative from the legal profession. For further details see [www.nationalprobono.org.au/target](http://www.nationalprobono.org.au/target) .

The Final Report of the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice<sup>12</sup> (the "2004 Senate Report") devoted an entire chapter to pro bono services, which 'covered:

- developments in pro bono legal service provision;
- the lack of data on pro bono legal services;
- the question of whether pro bono legal services are a substitute for legal aid funding;
- the effect of a mismatch of legal skills and community need;
- the impact of lawyers' conflicts of interests on the provision of pro bono legal services;
- limitations of lawyers' resources; and
- reducing the costs of litigation.

---

<sup>7</sup> for example, the inclusion of questions about pro bono in the Australian Bureau of Statistics survey of the legal profession in 1998.

<sup>8</sup> For example, the specific inclusion of the impact on pro bono services of the capacity of the legal aid and access to justice arrangements to meet community need for legal assistance in the 2004 Legal and Constitutional References Committee in Legal aid and Access to Justice, see [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/)

<sup>9</sup> for example, the awards sponsored by the Victoria Law Foundation (see <http://www.victorialaw.org.au/Probono.asp>) and the Law and Justice Foundation of New South Wales Justice Awards at [http://www.lawfoundation.net.au/justice\\_awards/](http://www.lawfoundation.net.au/justice_awards/)

<sup>10</sup> The Centre has noted a marked increase in articles about pro bono in legal journals and the mainstream press over time, including regular columns dedicated to pro bono news and events in some legal journals, for example, *The Law Institute Journal* in Victoria.

<sup>11</sup> Sessions exploring pro bono are now routinely included in 'access to justice' conferences, symposia and workshops.

<sup>12</sup> [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/ch09.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/ch09.htm)

The *2004 Senate Report* commended the increased provision of pro bono legal services however noted that the Government cannot rely on pro bono services as an answer to the current level of legal aid or as a panacea to overcome the current gaps in legal aid's provision of access to justice.<sup>13</sup>

Relevant to this topic was Recommendation 52 of that report as follows:

The Committee recommends that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation.

See the discussion on 'Costs' below.

## **Overview of pro bono work done in Australia**

The topic of this session is Funding Litigation – The Challenge. While a significant amount of the pro bono work done by the legal profession is representation, much of the work is advice, transactional (meaning advice on matters such as corporate governance, tax, intellectual property to organisations that assist disadvantaged people or that are involved in public interest activities), law reform and continuing legal education. Providing advice rather than litigation may be more of a known quantity, in that the scope of the work is more discrete, than litigation and are therefore more digestible to pro bono lawyers. In a recent survey of members of the Queensland law society undertaken by the Centre the most common pro bono legal service provided was advice (48%) followed by litigation, representation and transactional services (each 9%). Anecdotally we know that that a number of large law firm programs spend less than 50% of their total pro bono hours on litigation.

Whilst there is no conclusive data, one would expect a higher level of representation rather than advice services being provided by barristers. The NSW Bar Association 2005 Annual Report indicates that since the scheme's inception in 1994, barristers have provided over 25,000 work hours on pro bono matters.<sup>14</sup> The ABS survey of legal practices in 2001-2002 indicated that 78% of barristers reported doing some sort of pro bono work in the survey period. However the definition of pro bono used by the ABS survey was broad and included legally aided services.

It is worth noting that the Victorian government stand out as one that has actively facilitated the legal profession in its State to provide pro bono legal services and has provided an incentive to firms in the form of a condition to their Law Firm Panel Services contract that requires the firm to spent a percentage (suggested by the law firm in the tender process but usually 10-15%) of the amount they receive in legal fees from government on pro bono legal services.

From what is known about the pro bono output of the profession, the areas of litigation where solicitors and barristers have been willing to take the matter on a pro bono basis are quite broad but I note that the call for assistance has been answered widely in those

---

<sup>13</sup> [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/ch09.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/ch09.htm) at p 179.

<sup>14</sup> NSW Bar Association Annual Report 2005 at 41.

cases where unmet legal need is clear, notably in migration cases. The Chief Justice of the High Court, the Hon. Murray Gleeson, recently noted the tremendous contribution of the members of the WA bar for their work, at the request of the court, in providing pro bono representation for self-represented litigants in asylum cases before the High Court in that State<sup>15</sup>. The US experience is similar in that events such as 9/11 and Hurricane Katrina which clearly demonstrated high levels of legal need were met with a strong and widespread pro bono contribution from the US legal profession.

## **Barriers**

Litigation possesses some unique characteristics that present challenges in obtaining pro bono assistance and these apply particularly to court pro bono referral schemes.

- **The uncertainty as to its size and scope**  
Unlike advice, transactional, drafting or training assistance, the size and scope of litigation is particularly difficult to estimate. This means that lawyers may be unwilling to consider litigation at all as the impact on their budgets and resources are open-ended. This can adversely affect the management of a law firm's pro bono program as most programs are managed on the basis of a commitment made by the partners to a certain annual pro bono budget. Open-ended liability is especially prohibitive in the case of smaller law firms and rural and regionally-based lawyers, who are already struggling to run their businesses.
- **Lengthy litigation is prohibitive**  
The case of *Mallard*<sup>16</sup> in WA involved over 25 days of hearing before the Criminal Court of Appeal of Western Australia and the High Court. It was the single largest pro bono case ever undertaken by Clayton Utz. Their lawyers spent over 3,000 hours on the matter. The firm became involved at the Criminal Court of Appeal stage with the strong belief that the application would be successful and they could therefore anticipate the resources required. However, the application was not successful in the Court of Appeal and being committed to the merits of the matter they then had to pursue a special leave application and High Court hearing before they were ultimately successful. Accordingly a lot more time was spent on this matter than was originally anticipated which restricted the firm's ability to undertake other pro bono work in WA.

Late in the matter \$132,000 was made available as an ex-gratia payment from the Federal A-Gs department to cover counsel's fees for the High Court appeal. However the solicitors' pro bono contribution was vast, not reimbursed and in the Court of Appeal counsel also spent hundreds of pro bono hours on the matter.

It appears that there must be a strong public interest for firms to take on lengthy litigation.

---

<sup>15</sup> Speech by the Chief Justice to the National Access to Justice and Pro Bono Conference 2006, Melbourne, 11 August 2006.

<sup>16</sup> *Mallard v The Queen* [2003]WASCA 296 and *Mallard v The Queen* [2005] HCA 68

- **Often the request for assistance is made at the 11<sup>th</sup> hour**

Taking on litigation under a tight time frame for a firm of solicitors can be difficult and risky as there are often voluminous and poorly-ordered documents, limited time to ascertain whether other relevant documents might exist, whether the potential client has received previous legal advice which they may have ignored and peruse and consider relevant documents to make an assessment of the merits of a matter. For counsel, being confronted with such matters is not unusual but without the ongoing support of a firm of solicitors it is difficult for counsel to continue to act. Also the 11<sup>th</sup> hour factor makes it difficult for firms who have to juggle existing commitments. Even large firms have a limited capacity to act in a litigious matter at short notice.

If there is a Public Interest Law Clearing House ('PILCH') or other referral scheme they may have the capacity to do the job of sorting out the documents. However there is still the issue of 'missing' information such as court dates and filed documents. Current rules around access to documents from tribunal and court registries can make it difficult for referral schemes to obtain copies of these documents and previous orders. Some courts have copying and access fees in relation to such documents and require persons to attend to make copies. Also the dependence on other parties to produce relevant documents, be they solicitors for the other side or supporters of the litigants (such as in the migration law area), can create delays and difficulties.

- **The risk of being cited for professional misconduct or the subject of an adverse costs order.**

Under the Legal Profession Act 2004 (NSW), the provision of legal services or lodgment of court documentation without reasonable prospects of success may constitute professional misconduct<sup>17</sup>.

Under recent amendments to the Migration Act 1958 (Cth) a lawyer must not file a document commencing proceedings unless he or she certifies that the matter has a reasonable prospects of success<sup>18</sup>. Also a lawyer who encourages a party to commence or continue migration litigation where they do not give proper consideration to whether a matter has a reasonable prospect of success may have a personal costs order made against them for all of the costs incurred by that party to the litigation for the time that the lawyer acts in the matter<sup>19</sup>.

The Senate Inquiry into the amending legislation to the Migration Act was of the view that these provisions would provide a disincentive for lawyers to take a matter on pro bono<sup>20</sup>.

---

<sup>17</sup> S.347 Legal Profession Act 2004 (NSW).

<sup>18</sup> S. 486I Migration Act 1958

<sup>19</sup> Ibid. Ss. 486E and F.

<sup>20</sup> see Legal and Constitutional Affairs Committee, *Provisions of the Migration Litigation Reform Bill 2005*, at para 3.57, viewed at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/mig\\_litigation/report/c03.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/mig_litigation/report/c03.htm)

- **Disbursement assistance**

The cost of disbursements, and the procedures for applying for disbursement funding, can act as a barrier to various forms of pro bono activity, in particular more complex litigation in higher courts. Disbursements may include the cost of obtaining expert reports or transcripts of proceedings and the cost of counsel and interpreter fees. Some pro bono schemes have reported that the prohibitive costs of obtaining court transcripts can limit the availability or willingness of, for example, barristers to give an advice on the merits of proceeding with an appeal.

Disbursement and full litigation assistance funding schemes exist in many State jurisdictions to provide disbursement assistance to litigants in some areas of civil litigation. However, the availability of funding is limited, application for assistance sometimes can only be made *after* the disbursement cost has been incurred, the funds apply application fees, means and merits tests and assistance can be limited to cases involving the likelihood of recovering damages.<sup>21</sup> Much pro bono litigation is not seeking an order for damages. Most have been established as litigation lending models without any policy view to supporting pro bono litigation. Law Societies and trustees could assist by reviewing the operation of their disbursement assistance schemes. Funds need to be flexible enough to suit different needs and circumstances.

However, a recent report on pro bono legal services in Western Sydney suggested that disbursement assistance will not make a significant difference to the capacity of smaller firms to take on less-complex litigation matters in local courts or tribunals. None of the solicitors surveyed for this report regularly drew on disbursement assistance schemes because the levels of disbursements incurred was not significant for the type of work they did.<sup>22</sup> although several lawyers also referred to the prohibitive administrative burden of applying and accounting for the disbursement assistance.<sup>23</sup>

The cost of filing fees has also been identified by some as a constraint on providing pro bono litigation services. However, exemptions or waivers are available in respect of many Court or Tribunal fees, including exemption from setting down or daily hearing fees. The PILCH schemes of Victoria, Queensland and New South Wales have each produced fee waiver and exemption guides for their respective state courts and tribunals, as well as federal courts and tribunals. The resources have been developed to assist pro bono lawyers identify fee exemption and waiver provisions and access the relevant application forms.<sup>24</sup>

---

<sup>21</sup> Details of the various State and Territory based disbursement assistance schemes are contained in the *Pro Bono Manual* at [http://www.nationalprobono.org.au/probonomanual/ProBono\\_Manual\\_04.htm#5](http://www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5) .

<sup>22</sup> see Gillian McAllister and Tom Altobelli, *Pro bono legal services in Western Sydney* (November 2005) University of Western Sydney and the Law and Justice Foundation of NSW at p 25. Available at [www.nationalprobono.org.au/publications/other](http://www.nationalprobono.org.au/publications/other) .

<sup>23</sup> Ibid.

<sup>24</sup> Links to these guides can be found at <http://www.nationalprobono.org.au/publications/legalguide/index.html>

Pro bono activity that needs disbursement support is a broad issue and one that the Centre intends to research further. Some of the emerging issues include:

- greater inter-professional cooperation is one way that expert report costs might be met. This is a real challenge but there may be scope for reciprocal arrangements.<sup>25</sup>
- addressing cross-jurisdictional access issues. For example, a NSW-based firm would be more likely to assist pro bono clients in another jurisdiction if they could more readily access that other jurisdiction's disbursement fund (if such a fund exists).

This is probably an area where Government could lend active support – by supporting the amendment of court rules to allow for automatic exemption from fees for pro bono matters and also provide interpreters for pro bono matters.

- **Costs Recovery**

Law firms acting pro bono for clients now regularly use conditional fee agreements which provide a contractual obligation on the client to pay costs but only from the proceeds of a costs order made against the other party in the event of a successful outcome. This is done to try and level the playing field when it comes to settling a matter. Without such an agreement, there is a monetary and tactical advantage to the side who has a fee agreement with their client as they can continue to incur costs on their side knowing that the other party has no right to recover those costs from them in the event they lose the matter.

This type of solicitor-client agreement is very similar to a “no win no fee” agreement. Perhaps the key difference between the two is that in a pro bono matter the solicitor enters into the solicitor-client agreement with no commercial expectation of a fee and also in a ‘no win no fee’ agreement there might be a premium which is recoverable from a claimant’s damages or award. Pro bono agreements will also often indicate that the solicitor will pay all disbursements incurred (perhaps up to a monetary limit).

A recent decision of the NSW Court of Appeal in the long running matter of *Wentworth v Rogers*<sup>26</sup> seems to endorse the position that the indemnity principle does not abrogate the effective use of such agreements to underpin a costs order in favour of the party who has been acted for ‘pro bono’ and to recover costs from the client.

---

<sup>25</sup> The Centre notes that other professionals are embracing the pro bono ethic. The Australian Medical Association (NSW) Ltd maintain a database of practitioners who may be willing to volunteer their services to occasionally provide free medical opinion and reports via the NSW Law Society pro bono scheme. See, also, the not-for-profit organisation ‘Architects for Peace’ at <http://www.architectsforpeace.org/> who consider that professionals within the reach of their organization should “assist in the creation of more democratic, fair and better cities for all, wherever we are based.” See also ‘Architects and pro bono’ in *PILCH Matters*, Issue 8, March 2006 at p 4 available at <http://www.pilch.org.au/>.

<sup>26</sup> *Wentworth v Rogers* (2006) NSWCA 145 (7 June 2006).

As Basten JA noted<sup>27</sup>

Whether the term ‘pro bono’ now extends to situations where the lawyer, satisfied that the client has a meritorious claim, nevertheless enters a speculative fee arrangement to charge a usual fee, taking some risk of non-payment, is a question of fact to be determined in the context of the particular case.

In the UK this year this matter was put beyond doubt by the introduction of a Law Society Regulation<sup>28</sup> which made clear that a solicitor is entitled to enter into a Conditional Fee Agreement (‘CFA’) where he or she is acting on a pro bono basis. The amendment is designed to have the effect of abrogating the indemnity principle for such agreements. The regulation also makes clear that a solicitor may share all or part of their fee with a charity and the Attorney-General’s Pro Bono Committee is developing proposals for a charitable foundation to receive pro bono CFA recoveries.

In the spirit of pro bono, the Centre notes in its *Australian Pro Bono Manual*<sup>29</sup> that firms should consider the benefits of allocating monies received from successful pro bono litigation to their firm’s pro bono budgets and/or specifically meeting disbursements in other pro bono cases or donating the monies recovered to a charity so as to remove any doubt about the matter being conducted on a pro bono rather than a no win no fee basis.

- **Rising unmet legal need**

In 1998, the Senate *Inquiry into the Australian Legal Aid System: Third Report* concluded that an indicator of how well the legal aid system was working was the number of litigants who appear before the courts without legal advice or representation. Evidence at that time suggested that this was occurring increasingly.

In 2004 the Senate *Inquiry into Legal Aid and Access to Justice* the committee said,

Various reports and research projects, including those by the Australian Law Reform Commission and the Family Law Council, have established a strong link between cuts to legal aid funding and the rising incidence of self-representation, particularly in the Family Court. While some individuals may choose not to have a lawyer because, for example, they perceive they will have a tactical advantage, evidence to this inquiry suggests that reduced legal aid funding is directly responsible for the lack of legal representation for many others.

So it now seems clear that the decrease (in real terms) of funding to legal aid and CLCs has been a factor which has led to a rise in unrepresented litigants<sup>30</sup>. To cope with servicing clients, Legal Aid periodically reviews guidelines and means

---

<sup>27</sup> Ibid. at para 132.

<sup>28</sup> Law Society Regulation Solicitors Practice(Pro Bono and Fee Sharing) Amendment Rules 2006.(8 June 2006)

<sup>29</sup> The Australian Pro Bono Manual, edited by Jill Anderson, NPBRC and Victoria Law Foundation, 2005, p.66

<sup>30</sup> Australian Law Reform Commission Report “Managing Justice” and 2004 Senate Report accessed at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/b01.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/b01.htm) .

tests. For example, recently the NSW Legal Aid Commission announced small increases in rates for lawyers in family, criminal and civil matters and a significant increase in the means test threshold<sup>31</sup>. CLCs reaction to tight funding has been to restrict the areas in which they can assist clients to do more strategic policy work (at the expense of representing individual clients<sup>32</sup>). This puts pressure on pro bono to do more than complement publicly funded services and pro bono risks becoming a replacement for government funded legal services.

## **Initiatives – ways forward**

### **Court Pro Bono Referral Schemes**

Many courts have pro bono referral schemes created under their rules of court. Most of these schemes operate on the basis that the Registrar or other officer of the court seeks referrals when directed to by a judge or magistrate. Referral numbers through these schemes are relatively low compared to direct referrals to the larger firms and to the numbers of referrals going through professional association and clearing house schemes. There may be many reasons for this and some of them are set out above. Effective pro bono referrals require a good understanding of how the pro bono referral systems operate in that State, and that strong relationships with the key pro bono service providers and/or referral agencies seem to be a key aspect of successful pro bono referrals.

### **Litigants in Person and Referrals**

I note that some courts have been preparing management schemes to deal with the rise in Litigants in Person ('LIPs') and a number of these advert to the possibility of increased pro bono assistance to address the problem.

One of the difficulties with designing approaches to this issue seems to be that persons appear as LIPs for different reasons. There are those that want their day in court and may have already had legal advice that their case has little merit but are determined to carry on. It is very difficult to see how pro bono can help these people. They have to be managed by the rules and processes of court.

Then there are those whose case does have merit but they are unable to afford legal representation. Some of these might pass the means and merit tests administered by pro bono providers. Others will not, particularly those involved in complex commercial matters.

If pro bono is to have some impact on the first of these two, remembering that referral is sought at a time when a person is appearing in court (and thus proceedings are well advanced), then effective referral is likely to need significant support from the court. This means closer liaison between an appropriate court

---

<sup>31</sup> Base rate for criminal and family law matters went from \$130 to \$140 an hour effective from 1 August 2006. Means test financial eligibility thresholds have risen 40% this year.

<sup>32</sup> sources: CLC Budget Submission to 2006/7, submissions to NSW CLC Review.

officer and the referral schemes and pro bono providers particularly in relation to access to documents, interpreters, transcripts etc.

It may not be easy to discern between a serial litigant and one who can be helped but it seems necessary if existing pro bono structures and resources are going to be able to assist with this problem.

Courts are increasingly addressing the problem of SRLs by introducing “vexatious litigant” provisions in Rules of Court. These provisions risk affecting others more deserving of legal assistance, and can be seen as punitive, and in effect, simply cost-shifting. While they may deter litigants, in effect they deliver the litigant and the problem to other sectors: most often the welfare sector.

I note that QPILCH have created an LIP project schema that involves law firms, barristers and law students proposing to work with the Queensland Court of Appeal commencing in the second half of 2007. I also note that 6 months ago, the Supreme Court of Victoria appointed a dedicated unrepresented appellants officer who has been liaising closely with the Victorian legal assistance referral schemes. I believe this is the only court in Australia to have created such a position. It is very early days to evaluate the value of this initiative but my inclination is to think that a more focused approach and a dedicated resource such as that adopted by the Supreme Court in Victoria may assist.

### **Co-counseling**

A positive initiative in pro bono litigation is the co-counseling between private law firms and community legal centres (‘CLCs’) in public interest cases with positive results. Two examples of this are the relationship between Herbert Geer and Rundle and Fitzroy Legal Service who have combined to undertake some large scale civil action in cases of unreasonable application of force and the case run by the Prisoners Legal Service in Queensland with Blake Dawson Waldron about the constitutional validity of detaining persons after their sentence had expired but where there was an “unacceptable risk” of them re-offending<sup>33</sup>. This is a sign of increasing trust developing in the pro bono sector between private lawyers and the community legal sector. Pro bono works best when the legal community works together.

### **Cross-sector meetings**

These can be quite useful. For example in late 2004 the Centre met with the Federal Magistrates Court, CLCs, law students and private solicitors to discuss solutions to the workload created by the court’s new migration jurisdiction. This led to a few concrete outcomes where service providers and Courts work together. More of these kinds of forums should be encouraged, on a regular basis.

### **Cooperative Legal Service Delivery Model**

---

<sup>33</sup> Fardon v A-G of Queensland [2004] HCA 46

This is a model of legal service delivery trialed in three areas of NSW and coordinated by NSW Legal Aid. It includes all levels of service provision, including legal aid, CLCs, courts (Local and Federal) and pro bono providers. It is now being rolled out in other areas of NSW. Initial reports indicate that this model is working well to identify need and ways to assist clients and further the effective and efficient administration of justice.

Collaborative solutions also have a cost benefit beyond economic savings. When people before the courts have assistance with both the procedural and substantive parts of their problems, the benefits are not just economic: while there are inevitably financial cost savings from not having LIPs take up expensive court time and resources (and costs for the other party in litigation), there are also flow on savings when citizens have faith in the legal system. That is, there are the benefits of the 'avoided' costs of having people call on other parts of government for assistance when their legal problems escalate into other social problems sometimes requiring welfare assistance. Early intervention and preventative justice is far less costly.

### **What Should/Could the Courts Do and Not Do?**

- Evaluate their pro bono referral scheme if they have one – to learn the benefits and detriments and to find out how to make them work better.
- If they don't have a scheme– learn from the pros and cons of others' schemes
- Work more collaboratively with all levels and representatives of the profession, and develop relationships with the pro bono providers and the community assistance sector.
- Take a strategic approach to 'green-lighting' the processes that will facilitate pro bono representation in appropriate cases (access to documents, transcripts, interpreters).
- Develop consumer-friendly resources – and consider employing community liaison officers who can assist the consumers through the litigation process and steer litigants to sources of non-legal assistance which may be just as important as legal assistance and in fact assist in keeping unnecessary litigation out of the courts
- Look to PDR and ADR processes more closely
- Consider endorsing the Centre's Aspirational Pro Bono Target
- Don't provide "cold" referrals to organisations that can't assist: Referrals to inappropriate places –unnecessarily raising expectations and anxiety of litigants is counter productive as it makes it more difficult to build a relationship with that service provider.

John Corker  
17 September 2006