

Pro bono opportunity in DISCRETE TASK ASSISTANCE

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If we regard unbundling of services as ‘discrete task assistance’ we can see that it is not a new phenomenon. Moreover, its development may prove fruitful by making it easier for lawyers to provide pro bono services.

THERE IS NOTHING PARTICULARLY new about lawyers undertaking limited or discrete legal tasks – in recent years labelled ‘unbundled’ legal services. It is not, for example, novel for a lawyer to provide advice or prepare a document for a client in accordance with the client’s instructions without agreeing to do more. This applies whether the lawyer is paid by the client or the State, or acts pro bono.

In this article we suggest that ‘discrete task assistance’ takes many forms, and that, while there are undoubtedly situations where it is not appropriate, discrete task assistance has and will continue to have an important role to play in increasing access to justice.

The phrase ‘unbundled legal services’ is widely used in the United States, but relatively unknown in Australia.¹ The term implies that there is such a thing as ‘bundled,’ ‘full service’ or ‘unlimited’ legal assistance, and that this is the norm from which unbundled services depart. This is misleading. To the extent that the concept of unbundled legal services assumes that the norm is some kind of general retainer, rather than a specific retainer that comes

into being between lawyer and client in particular circumstances, it is terminology that it would seem sensible to avoid. While clumsy, discrete task assistance is a more exact and less misleading label.

The changing face of legal service delivery

A citizen with a legal problem may choose to engage a lawyer to assist them if they can afford private representation or if they are eligible for free or subsidised legal assistance. But there are many who need or would like legal assistance but are unable to afford it, or for whom publicly-funded services are not available. There are also undoubtedly those who would prefer to handle as much of their matter as possible themselves.

There is now a vast array of legal resources available to the savvy legal consumer, short of retaining a lawyer.² These resources include legal information kits,³ do-it-yourself kits,⁴ pamphlets, recorded legal information,⁵ internet resources⁶ and law courses for non-lawyers⁷ produced and distributed by government and non-government agencies. Some legal con-

sumers are now more able than in the past to assist themselves with their legal problems. However, while the expansion of these resources may assist and empower some legal consumers in some situations, there are many disadvantaged people for whom this kind of information is entirely inappropriate or inaccessible.⁸ There is also a well-founded concern, noticeably among those who work in the area of community legal assistance, that these kinds of resources will be seen and accepted as substitutes for needed individual legal services, in particular court representation.⁹

Discrete task assistance in Australia

While the term unbundled services may be new in Australia, in practice Australian lawyers provide discrete task assistance¹⁰ in a large range of situations.

Consider the following common examples where procedural and/or substantive legal assistance is provided for only a discrete part of a legal problem:

- assisting clients with Family Court divorce applications, but not with property settlements;
- providing legal advice to tenants on running their matters in the Consumer Trader and Tenancy Tribunal;
- assisting women with domestic violence applications in the Local Court, but not with related property or criminal matters;
- assisting applicants to commence tribunal or court proceedings by preparing the appropriate documents, but not acting in the proceedings;¹¹
- briefing counsel to advise, or to settle pleadings;
- providing advice to a client on appropriate matters to raise at a sentencing hearing, but not providing in-court representation;
- undertaking research on a particular cause of action for a client, but not providing representation;¹²
- drafting of an affidavit or other document for an otherwise unrepresented litigant;¹³ and
- Chamber Magistrates preparing pleadings in civil matters.

More generally, the operation of the numerous 'shopfront' legal advice clinics by community legal centres, legal aid commissions, law societies and pro bono legal service providers involve the lawyer advisers in undertaking discrete tasks for clients, often including some of the above examples.

Depending on the precise circumstances (including the clients' skills), the legal task will in many cases be characterised by its capacity to stand alone. In some cases this will be the only legal assistance received by the client in relation to the matter; in others, further assistance can be sought elsewhere and/or at another time.

Is discrete task representation always appropriate?

Legal aid funding in Australia has never been sufficient to meet the legal needs of those who cannot afford to pay for required legal services. This problem has been exacerbated by recent declines in some forms of legal aid funding and consequent decreased availability in some areas of law and for some consumers. There are large numbers of consumers experiencing difficulty accessing justice, some of whom may benefit from outside assistance with part of their legal problem.

There may, however, be some circumstances where discrete task assistance is not appropriate. This will normally require a judgment to be made by the practitioner based on factors such as whether there is sufficient time, information, instructions, expertise or resources available to properly give the assistance the legal task requires, taking account of the client's needs and capacities.

At a minimum, any test for whether a matter is suitable for discrete task assistance would include the following questions:

- is there a task that can be usefully done for a client, considering all the resources available?; and
- does the client fully understand and agree to the scope of the legal assistance offered?

An opportunity for pro bono assistance

Australian lawyers provide a significant amount of pro bono assistance to low

vant activity, as is the case in many of the successful pro bono partnerships that have been established around Australia.¹⁵

Discrete task assistance therefore is a means by which pro bono participation may be enhanced and is, for clients, an opportunity to gain some legal assistance as opposed to none at all.

ENDNOTES

1. A search for unbundled services in one Australian legal research database turns up four matches, all of which refer to the unbundling of technology services. The same search in a USA database turns up thousands of matches.
2. See Michael Robertson and Jeff Giddings "Legal Consumers as Coproducers", (2002) 40 *Family Court Review* 63.
3. For example, legal kits compiled and distributed by the Legal Information Access Centre at the State Library of New South Wales.
4. For example, do-it-yourself divorce kits.
5. For example, recorded legal information available from LawAccess.
6. See www.lawaccess.nsw.gov.au for examples.
7. For example, divorce classes run by the NSW Legal Aid Commission and Law For Non-Lawyers courses conducted by Redfern Legal Centre Publishing, Sydney NSW.
8. For example, for those who do not have appropriate language, educational, material or motivational resources to access or use these kinds of resources.
9. Robertson and Giddings op cit at 72.
10. Robertson and Giddings op cit at 65-66.
11. In the USA, this is known as ghostwriting: see John Rothermich, "Ethical and Procedural Implications of 'Ghost-writing' for Pro Se Litigants: Toward Increased Access to Civil Justice" (1999) *Fordham Law Review* 2687.
12. This could involve, for example, giving advice on the particular cause of action, what it would entail, and an idea of what it would cost.
13. Limited assistance of this kind may be sufficient to enable the court to be able to deal properly with the matter before it. Rules of courts that provide for pro bono referrals specifically contemplate that referrals may be made for

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income and disadvantaged people.¹⁴ It is clear, however, that factors which impede greater participation by lawyers include lack of time and, to a lesser extent, lack of knowledge or expertise to carry out pro bono work effectively in a particular area of law. Lawyers may be more willing and able to do pro bono work if their responsibilities are clearly defined and the amount of time expected of them is limited. Identifying the particular discrete tasks that can usefully be performed pro bono offers an important way of increasing the legal services available in particular areas. In addition, training can be provided that specifically focuses on the rele-

different and discrete kinds of assistance, namely: advice in relation to the proceeding; representation on direction, interlocutory or final hearing or mediation; drafting or settling documents; and representation generally in the conduct of the proceeding or of part of the proceeding. See Order 80 Federal Court Rules; Part 12 Federal Magistrates Court Rules; Part 66A Supreme Court Rules; Part 28C District Court Rules.

14. See J. Anderson and G. Renouf, "Legal Services 'for the Public Good'" *Alternative Law Journal* Vol 28 No 1, February 2003.

15. See for example, the Homeless Persons' Legal Clinics established in conjunction with the Public Interest Clearing Houses and their member firms in Brisbane and Melbourne whereby lawyers from member firms receive training from experts from government and community organisations in relevant areas of poverty law.