



**NATIONAL PRO BONO RESOURCE CENTRE**

**Submission to the Productivity Commission:**

**Access to Justice Arrangements**

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## ABOUT THE NATIONAL PRO BONO RESOURCE CENTRE

The **National Pro Bono Resource Centre** is an independent centre of expertise that aims to grow the capacity of the Australian legal profession to provide pro bono legal services that are focused on increasing access to justice for socially disadvantaged and/or marginalised persons, and furthering the public interest.

While the **Centre** does not provide legal advice, its policy and research work supports the provision of free legal services and informs government of the role that it can play to encourage the growth of pro bono legal services. The **Centre's** work is guided by a board and advisory council that include representatives of community legal organisations, pro bono clearing houses, the private legal profession, universities and government.

Established in 2002 as an independent, not-for-profit organisation at the University of New South Wales, it was envisaged that the **Centre** would:

*“Stimulate and encourage the development, expansion and co-ordination of pro bono services, as well as offering practical assistance for pro bono service providers (and potential providers). The **Centre** would play the key roles of facilitating pro bono practice and enabling the collection and exchange of information.”*

The strategies that the **Centre** employs to grow pro bono capacity include:

### **Strengthening the place of pro bono legal work within the Australian legal profession as an integral part of legal practice by**

- being a leading advocate for pro bono legal work;
- promoting the pro bono ethos and increasing the visibility of pro bono legal work;
- developing policies and advocating for measures to encourage an increase in the quality and amount of pro bono legal work; and
- producing resources and sharing information in Australia, regionally and internationally that builds pro bono culture in the Australian legal profession and participation by Australian lawyers in pro bono legal work.

### **Providing practical assistance to facilitate, and remove barriers to, the provision of pro bono legal services**

- undertaking research on how pro bono legal assistance can best respond to unmet legal need, including the identification of best practice in its provision;
- engaging in policy development, advocacy and law reform on issues that have an impact on pro bono legal services;
- providing practical advice to lawyers and law firms to support their efforts to increase the quantity, quality and impact of their pro bono work;
- informing community organisations about the way pro bono operates in Australia; and
- leading in the development of new and innovative pro bono project and partnership models.

### **Promoting the pro bono legal work of the Australian legal profession to the general public by**

- informing members of the public through the media and presentations about the pro bono legal work undertaken by members of the Australian legal profession.

The **National Pro Bono Resource Centre** operates with the financial assistance it receives from the Commonwealth and State and Territories Attorney-General Departments, and support from the Faculty of Law at the University of New South Wales.

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## WHAT THIS SUBMISSION COVERS

The National Pro Bono Resource Centre makes the following submission as an independent centre of expertise that aims to grow the capacity of the Australian legal profession to provide pro bono legal services.

In making submissions to this inquiry, the Centre has adopted its concept of “pro bono work” as specifically meaning “pro bono legal work”. The Centre’s work is focused on the provision of pro bono legal work, as opposed to other forms of community service that lawyers may perform, because lawyers have an important role to play in providing access to justice given their exclusive right to practice law. Therefore wherever the Centre uses the term “pro bono work”, it should be taken to mean “pro bono legal work”.

Given its core expertise and research into the provision of pro bono legal services in Australia, the Centre makes primary submissions comprising data about the number of pro bono hours provided by Australian legal professionals, and provides further information about:

- the effectiveness of measures (like the National Pro Bono Aspirational Target) to encourage an increase in the amount and quality of pro bono legal work;
- the barriers to the provision of pro bono legal services;
- who provides pro bono legal services;
- what are the costs and benefits of providing pro bono legal services;
- who are the recipients of pro bono legal assistance

This information addresses the Commission’s Terms of Reference 2(b) regarding the number of pro bono hours provided by legal professionals, as well as questions in the section on pro bono in Chapter 12: Effective and responsive legal services.

The Centre also engages in targeted project work that aims to identify opportunities and best practice in the provision of pro bono legal assistance focusing on different areas of need, for example family law, alternative dispute resolution, and the use of video-conferencing technology to overcome geographical constraints. It identifies barriers to the provision of pro bono legal assistance and advocates for measures to remove those barriers, for example the awarding of costs and the waiving of court fees in pro bono matters.

Drawing on this body of research and knowledge, the Centre also make comments on other areas in which the Commission is seeking information, in particular: the extent to which models of alternative dispute resolution and technology can contribute to addressing cost pressures, the costs of accessing civil justice on a pro bono basis, and the impact of these costs on access to justice. The submission answers the questions contained in the Commission’s Issues Paper arranged by subject matter, and is not necessarily in numerical order.

## THE PRO BONO LANDSCAPE IN AUSTRALIA

The role of pro bono legal services in the access to justice landscape is becoming increasingly visible and it is now clear that these services are playing an important role in expanding access to justice.<sup>1</sup>

*“There are Australians who, despite their difficulties and their need to appear in court, may not qualify for legal aid... Sometimes there are issues of great legal complexity, and even greater public interest... In these and other situations, the importance of pro bono contributions from the legal profession becomes clear, as pro bono services often provide vital assistance where no other avenue is available.”<sup>2</sup> (The Hon Mark Dreyfus QC MP, former Attorney-General of Australia)*

Pro bono comes from the Latin phrase "pro bono publico" which means for the public good. There is no universally accepted definition of what is meant by 'pro bono legal services' although several definitions have been influential in developing pro bono practices. Most definitions focus on legal assistance provided to disadvantaged or marginalised clients who could not otherwise access legal assistance, or clients whose cases raise a wider issue of public interest. The term often includes legal services provided to organisations working for disadvantaged groups or for the public good. Many definitions include lawyers engaging in free community legal education and/or law reform. Most pro bono legal services are provided without a fee being charged to the client, although some are provided for a substantially reduced fee. There is a general consensus that pro bono work should not be seen as a substitute for publicly funded legal services and that pro bono legal work complements these services. This is often reflected in definitions of pro bono work, sometimes as a criterion for acceptance of a pro bono referral.<sup>3</sup>

Since its beginnings in the mid-1990s the pro bono movement in Australia has grown to encompass the diverse range of stakeholders, programs and services that exist today,<sup>4</sup> namely:

- structured pro bono legal programs in all of the large and increasingly in the mid-sized law firms

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<sup>1</sup> National Pro Bono Resource Centre, [Mapping pro bono in Australia](#) (2007) 7 [1.3].

<sup>2</sup> Speech titled "[Pro Bono – An Ethical Obligation or a sign of Market Failure?](#)" delivered to the Victorian Bar Third Annual CPD Conference in Melbourne on 16 March by the Hon Mark Dreyfus QC MP, Attorney-General of Australia

<sup>3</sup> National Pro Bono Resource Centre, [Mapping pro bono in Australia](#) (2007) 3 [1.2].

<sup>4</sup> John Corker (Director, National Pro Bono Resource Centre), '[Government Lawyers and Pro Bono Legal Work](#)', Paper given at the Public Sector In-House Counsel Conference 2012, 30-31 July, Canberra ACT, p 2

- formal pro bono referral schemes and clearing houses run by legal professional associations
- pro bono clearing houses established by their law firm members in Victoria, New South Wales, Queensland and South Australia<sup>5</sup>
- legal assistance referral schemes created by rules of court<sup>6</sup>
- informal rosters of pro bono lawyers in some courts and tribunals taking on a duty lawyer's role
- inclusion of pro bono in the Commonwealth and Victorian Governments' policy frameworks for legal assistance services, particularly 'pro bono conditions' in government tender schemes for the purchase of legal services from the private profession<sup>7</sup>
- conferences dedicated to the discussion of pro bono legal services
- the National Pro Bono Resource Centre.<sup>8</sup>

Pro bono legal services are provided across the legal profession by lawyers working in law firms of all sizes (ranging from the structured pro bono programs of large firms to the individual contributions of sole practitioners), barristers, in-house corporate lawyers, government lawyers and law students.

The pro bono legal work undertaken by these legal professionals takes many forms. While much of it involves legal advice and representation of individual clients in the course of normal practice, other examples include preparation of law reform submissions, corporate governance, transactional assistance and training for community organisations and charities.<sup>9</sup>

### **Different ways of undertaking pro bono legal work**

Australian lawyers and law firms undertake pro bono work in a number of ways. Many large and mid-sized law firms take an **organised, systematic** approach to pro bono work. These firms have dedicated pro bono lawyers, are members of pro bono clearinghouses or referral schemes, and have sophisticated systems for measuring the amount of pro bono work undertaken, assessing

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<sup>5</sup> JusticeConnect in NSW and Victoria (formerly Pilch NSW and PILCH Victoria), Queensland Public Interest Law Clearing House QPILCH, and JusticeNet South Australia.

<sup>6</sup> See for example Uniform Civil Procedure Rules 2005 (NSW) - Division 9 - court appointed referral for legal assistance, which is applicable to the New South Wales Supreme Court and District Court, and Rule 4.19 Federal Court Rules 2011.

<sup>7</sup> For more information about government tender schemes see the National Pro Bono Resource Centre's website at <http://www.nationalprobono.org.au/page.asp?from=0&id=274>

<sup>8</sup> See section About the National Pro Bono Resource Centre (p. 2)

<sup>9</sup> National Pro Bono Resource Centre, *Mapping pro bono in Australia* (2007) 29 [3.1].

the interest and availability of lawyers, keeping track of and reporting on outcomes of pro bono work, and developing pro bono partnerships and projects for sourcing pro bono legal work. Although large law firms only make up approximately 0.5% of all law firms on Australia, they employ 21.4% of Australian solicitors.<sup>10</sup>

Smaller law firms and sole practitioners take an **ad hoc, individual** approach to pro bono work. Research in both Australia and overseas suggests that these firms engage in the practice of practice of striking items off bills, or not charging the client for all the work undertaken, as a discrete way of assisting clients experiencing disadvantage or with an inability to pay.<sup>11</sup> The pro bono work undertaken by these law firms is embedded into their daily practice, and often goes unrecorded and unreported. The vast majority (83.4%) of law firms in Australia are sole practitioner firms (law firms with one principal). A further 12.9% of all law firms in Australia are small firms with between two and four partners. Collectively, these small firms employ 58.2% of Australia's solicitors.<sup>12</sup>

Many lawyers also choose to volunteer their time at advice sessions at community organisations, particularly community legal centres (CLCs), which provide referrals, advice and assistance to around 195,000 people across Australia each year. In the pro bono and CLC sectors, this type of pro bono work is often referred to as 'individual volunteering'. Many CLCs have managed to attract significant volunteer support, and some rely on the additional capacity provided by volunteers to provide core services.

Increasingly, also in-house corporate and government lawyers are undertaking pro bono legal work, either in partnership with a law firm or a community organisation. The full extent of this work is difficult to capture. Approximately 25% of Australian solicitors work as corporate in-house solicitors or with the government.<sup>13</sup>

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<sup>10</sup> Urbis Keys Young: *2011 Law Society National Profile – Final Report*, prepared for the Law Society of New South Wales, 14. Large law firms here defined as those with 20 or more partners, as differing from the definition in the Centre's survey (50 or more).

<sup>11</sup> See for example National Pro Bono Resource Centre: *Pro bono legal services in family law and family violence: Understanding the limitations and opportunities*, Final report, October 2013; Scott L Cummings and Rebecca L Sandefur, 'Beyond the Numbers: What We Know - and Should Know - About American Pro Bono' (2013) 7 *Harvard Law & Policy Review*; Rosemary Hunter, *Family Law Case Profiles*, Justice Research Centre, Law Foundation of New South Wales, June 1999.

<sup>12</sup> Urbis Keys Young: *2011 Law Society National Profile – Final Report*, prepared for the Law Society of New South Wales, 14-15.

<sup>13</sup> Urbis Keys Young: *2011 Law Society National Profile – Final Report*, prepared for the Law Society of New South Wales, i

## THE NUMBER OF PRO BONO HOURS PROVIDED BY LEGAL PROFESSIONALS

### *How much pro bono work is currently undertaken, by whom...*

The exact amount of pro bono legal work undertaken by the Australian legal profession is difficult to quantify. Due to the structured, organised way in which large law firms undertake and record their pro bono work, statistics exist on their pro bono contribution. However, the lawyers who work in large law firms account for only about 21.4% of the Australian legal profession.<sup>14</sup>

Estimating the pro bono contribution made by the remaining 78.6% of the legal profession is more difficult and there is no reliable or current data available that quantifies their contribution.

This is in large part due to the fact that the majority of Australian solicitors work in small firms with four or less partners and, as both Australian and international research indicates, the way in which lawyers in these small law firms provide pro bono legal services differs greatly from their larger counterparts.<sup>15</sup> The pro bono work they undertake is difficult to measure and no detailed research has been undertaken to quantify it.

For example, research into the pro bono work of smaller firms in the area of family law suggests that this work is understood by many family law practitioners to mean charging the client less than what the lawyer would normally charge.<sup>16</sup> It is likely that this way of undertaking pro bono work is not limited to lawyers who practice in family law, but may be more characteristic of small firms and sole practitioners more generally.

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<sup>14</sup> As at October 2011, there were 59,280 practising solicitors in Australia: see the Law Society National Profile Final Report, July 2012, 14 (prepared by Urbis for The Law Society of New South Wales), available at: <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/640216.pdf>. Large law firms here defined as 20 or more partners.

<sup>15</sup> See for example, Scott L Cummings and Rebecca L Sandefur: *Beyond the Numbers: What We Know – and Should Know – about American Pro Bono*, (2013) 7 Harvard Law & Policy Review 83, and Hunter et al. *Legal Services in Family Law*, Justice Research centre, Law Foundation of New South Wales, December 2000, and Rosemary Hunter: *Family Law Case Profiles*, Justice Research Centre, Law Foundation of New South Wales, June 1999.

<sup>16</sup> See National Pro Bono Resource Centre: *Pro Bono Legal Services in Family Law and Family Violence; Understanding the limitations and opportunities - Final Report*, October 2013.

## Existing statistics on pro bono legal work do not provide a complete picture

Existing statistics on the pro bono work undertaken by the Australian legal profession are as follows:

1. The Australian Bureau of Statistics (ABS) conducted its latest legal services survey in 2008. The survey found that lawyers undertook an estimated 955,400 hours of pro bono legal work in the 2007-2008 financial year, or the equivalent of approximately 531 lawyers undertaking pro bono work full-time for a year.<sup>17</sup> However, the ABS cautioned that legal practices generally did not maintain records in this area and therefore estimated the value of pro bono work.<sup>18</sup> Although, as explained earlier, the way in which large firms undertake pro bono legal work is likely to result in accurate records being maintained by those firms.

For the purposes of the survey, the ABS defined pro bono legal work as: ‘the provision of legal advice, representation or services by legally qualified staff, either free of charge or at a substantially reduced rate [not including] work undertaken on behalf of, or remunerated by legal aid commissions or other government departments’.<sup>19</sup> The Centre notes that this definition is much broader than other commonly used definitions of pro bono legal work, as it does not refer to any requirement for the assistance to be provided to individuals who experience disadvantage or marginalisation, or organisations which work on their behalf or in the public interest. Therefore the ABS survey captures work that would not be considered pro bono legal work under other accepted definitions, some of which is specifically excluded from the definition the Centre uses for the purposes of the National Pro Bono Aspirational Target and the National Law Firm Pro Bono Survey.<sup>20</sup> For example, the Centre’s definition specifically excludes free work done for the purposes of business development, or legal assistance given to family members or friends without reference to whether they can afford to pay for that assistance.

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<sup>17</sup> Based on a 37.5 hour working week over 48 weeks.

<sup>18</sup> Australian Bureau of Statistics, Legal Services, Australia, 2007-2008, available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features82007-08>. For the purposes of the survey, the ABS defined pro bono legal work as: ‘the provision of legal advice, representation or services by legally qualified staff, either free of charge or at a substantially reduced rate [not including] work undertaken on behalf of, or remunerated by legal aid commissions or other government departments.’

<sup>19</sup> Ibid.

<sup>20</sup> For the definition used by the Centre, see <http://www.nationalprobono.org.au/page.asp?from=3&id=189>

2. The Centre conducted biennial National Law Firm Pro Bono Surveys in 2008, 2010 and 2012 targeting firms with 50 or more full time equivalent (FTE) lawyers.<sup>21</sup> Thirty-six firms participated in the survey in 2012, and collectively reported undertaking a total of 343,058 hours of pro bono legal work in the 2011/2012 financial year, or the equivalent of 191 lawyers undertaking pro bono work full-time for a year.<sup>22</sup>
3. The Centre reports on the pro bono performance of the signatories to the National Pro Bono Aspirational Target ('Target') each year. According to the Sixth Performance Report on the Target, as at 30 June 2013, the Target had a total of 104 signatories, comprising of 79 law firms and incorporated legal practices (ranging from sole practitioners to large law firms) and 25 individual solicitors and barristers. The Target covers 8,763 FTE legal professionals, or approximately 15% of the Australian legal profession. Responses indicate that 8,741 legal professionals (99.7 percent of all legal professionals covered by the Target) collectively undertook 294,329.1 hours of pro bono work in the 2012/2013 financial year.

Both the ABS and Centre's surveys, and the report on the Target only provide an incomplete picture of the pro bono work undertaken. The Centre's survey results only cover the law firms with 50 or more FTE lawyers that responded to the survey. Lawyers in the 36 respondent firms in 2012 represent just under a fifth of lawyers in Australia (19% or 11,460 FTE lawyers).<sup>23</sup>

There is significant overlap between the Centre's large law firm survey respondents and Aspirational Target signatories. However, both capture unique sets of data, as not all large law firms are Target signatories and Target signatories include pro bono providers that aren't large law firms. There may also be partial overlap between these data sets and the ABS survey sample.

Neither the ABS or the Centre's large law firm survey encompasses the pro bono work undertaken by in-house and government lawyers or barristers, or any pro bono work undertaken by individual lawyers outside the auspices of their law firm (for example, by volunteering at a CLC).

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<sup>21</sup> At the time of the latest survey, in July 2012, there were 51 firms with 50 or more full time equivalent (FTE) lawyers.

<sup>22</sup> Based on a 37.5 hour working week over 48 weeks.

<sup>23</sup> AS at October 2011, there were 59,280 practising solicitors in Australia: See the *Law Society National Profile Final Report*, July 2012 (prepared by Urbis for the Law Society of New South Wales), available at: <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/640216.pdf>

4. In June 2012, the National Association of Community Legal Centres (NACLC) conducted a survey of the approximately 200 CLCs in Australia regarding their use of volunteers, 106 of which responded.<sup>24</sup> The survey found that 3,637 volunteers (1885 of whom were lawyers) contributed an average of 8,369 hours of volunteer work per week, or the equivalent of 242 FTE employees.<sup>25</sup>

However, the NACLC survey encompasses only approximately half of all CLCs in Australia (106 of approximately 200). The survey results also do not provide a breakdown on volunteering hours into pro bono legal work and other, non-legal work. Whilst the survey found that more CLCs (89.2%) used volunteers for direct legal service delivery than any other type of tasks (for example administrative support), it is not possible to determine from the survey results the exact amount of pro bono legal work undertaken by volunteers at CLCs. For the purposes of the survey, a volunteer was defined as 'a person who has, as an individual, made a personal choice to provide their skills and experience to a CLC from their own time, and is distinguished from a pro bono partner'.<sup>26</sup>

### **Pro bono legal work cannot be a substitute for publicly funded legal services**

The Australian pro bono culture is built on the fundamental premise that the primary responsibility for ensuring that access to justice is within the reach of every Australian lies with the government.

Also, whilst considered a lawyer's professional responsibility, the provision of pro bono work in Australia is underpinned by a voluntary ethic. The provision of pro bono legal services, although recommended and encouraged by many, is not mandatory. Given its voluntary nature, the pro bono legal work done by the profession is therefore only able to respond to a small part of unmet legal need.

The limitations on responding to unmet legal need are not only related to the numbers of pro bono hours that the Australian legal profession is willing to contribute. They are also related to

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<sup>24</sup> National Association of Community Legal Centres: *Working Collaboratively: Community Legal Centres and Volunteers*, November 2012, available at: [http://www.nacalc.org.au/resources/NACLC\\_VOLUNTEERS\\_web.pdf](http://www.nacalc.org.au/resources/NACLC_VOLUNTEERS_web.pdf)

<sup>25</sup> Based on a 37.5 hour working week over 48 weeks.

<sup>26</sup> National Association of Community Legal Centres: *Working Collaboratively: Community Legal Centres and Volunteers*, November 2012, available at: [http://www.nacalc.org.au/resources/NACLC\\_VOLUNTEERS\\_web.pdf](http://www.nacalc.org.au/resources/NACLC_VOLUNTEERS_web.pdf). A pro bono partner is defined as a person or firm that, as a business, has formally committed to allocating resources and making a contribution to a CLC and/or their clients, free of charge. The NACLC Survey also found that 56,939 hours were contributed in one year in pro bono partnerships. Many of these pro bono hours from 'pro bono partnerships' overlap with the hours reported by the Centre's National Law Firm Pro Bono Survey.

the areas of law and the types of clients which pro bono providers choose to assist, depending on their capacity, expertise, willingness and interests.

Given the flexibility that economies of scale provide, large law firms may potentially have more capacity to undertake pro bono legal work than smaller firms. However, with the exception of some smaller, discrete legal matters for which a lack of expertise can be addressed by training (for example victims compensation), large law firms undertake only a small amount of pro bono work in areas of law which are outside the traditional range of a commercial lawyer.

Although the provision of pro bono legal assistance should be encouraged to grow, it cannot take the place of government funded legal services, and cannot come close to meeting the legal needs of people who are experiencing socio-economic disadvantage.

### ***How important is pro bono work in facilitating access to justice?***

Pro bono legal work is often provided as a “last resort” – where no other suitable legal service is available. In the context of individuals, pro bono is often provided to clients who have been refused a grant of legal aid or where legal aid funding is unavailable. In the context of not-for-profit organisations and charities, pro bono legal assistance is provided where an organisation has no funds to pay for legal advice or to extend the organisation’s capacity to provide services to individuals in need. From the perspective of a pro bono client, access to pro bono legal assistance is invaluable. Without pro bono legal assistance, justice could be delayed or denied, or, in the case of organisations, limited resources would have to be diverted from service provision to paying for legal advice.

It is generally accepted that pro bono work should not be seen as a substitute for publicly funded legal services, and should complement these services. There is a continuing concern in the Australian pro bono community that the provision of pro bono legal services in core areas of legal aid funding will allow governments to renege on their commitment to funding free legal services. This concern is often reflected in the criteria for applications for pro bono legal assistance.

### ***For whom is pro bono work currently undertaken?***

Although there is no universal definition of pro bono legal work, most definitions consider it to be legal work that is provided for free either for individuals experiencing disadvantage who have no other access to the legal system, or for not-for-profit organisations who work on behalf of disadvantaged members of the community or for the public good. However, whether pro bono legal services are provided for individual clients or for organisations is highly dependent on the context in which those services are provided. Again, there is no comprehensive data available on the characteristics of pro bono clients, although some research provides useful information

about the recipients of pro bono legal assistance from large and mid-sized law firms, individual volunteers, and small law firms and sole practitioners:

### **Pro bono legal work undertaken by large and mid-sized law firms**

The results of the Centre's National Law Firm Pro Bono Survey in 2012 show that the majority of pro bono work undertaken by large and mid-sized law firms is for not-for-profit organisations (an average of 63%).<sup>27</sup> This is also reflected in the areas of law in which pro bono legal services are provided by these firms, with four of the top five areas of law in which most pro bono services were provided being only relevant to organisations. These areas were: Governance, Deductible gift recipient (DGR) applications, Employment law, Commercial agreements, and Incorporations.<sup>28</sup>

### **Pro bono legal work undertaken by individual volunteers**

Community Legal Centres across Australia provide legal services to the public, focusing on the legal needs of individual experiencing disadvantage. In the 2011/2012 financial year, CLCs assisted over 195,000 individual clients in 230,695 matters.<sup>29</sup> Any pro bono work done by volunteer lawyers in CLCs is likely to be undertaken for individuals, or to support the CLCs law reform efforts on issues impacting upon individuals experiencing disadvantage.

### **Pro bono legal work undertaken by small law firms and sole practitioners**

The majority of Australian solicitors work in small firms with four or less partners. As explained above, both Australian and international research indicates that the way in which lawyers in small law firms and sole practitioners provide pro bono legal services differs greatly from the way in which pro bono legal services are provided by their larger counterparts. This pro bono work takes the form of continuing to act for individuals after a grant of legal aid has run out or acting for a reduced fee for clients with little or no funds.

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<sup>27</sup> National Pro Bono Resource Centre: *National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers, Final Report*, January 2013, available at: [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf)

<sup>28</sup> Ibid.

<sup>29</sup> National Association of Community Legal Centres (NACLC) Annual Report 2011/2012, 3. Available at: [http://www.naclc.org.au/resources/NACLC\\_AR12\\_web.pdf](http://www.naclc.org.au/resources/NACLC_AR12_web.pdf)

**What areas of the law, which groups, or geographic locations is pro bono particularly important for?**

In commenting on the areas of the law, which groups, or geographical locations that pro bono is particularly important for, the Centre draws on its research into the pro bono work that is currently being done. Obviously from the perspective of any pro bono client, the assistance is important. However, broader observations about where the greatest unmet legal needs lie, including those who may benefit from pro bono legal assistance but have not sought it or have been unable to obtain it, needs to be made from the kind of large-scale empirical research undertaken by, for example, the Law and Justice Foundation in its Legal Australia-Wide surveys of legal need in Australia.<sup>30</sup>

As pro bono assistance is traditionally a ‘last resort’, offered only when publicly funded legal assistance is unavailable (or where individuals do not qualify for legal aid), information on the areas in which pro bono legal assistance is provided (and not provided) is also an indicator of unmet legal need.

In the Centre’s 2012 National Law Firm Pro Bono Survey of Australian firms with 50 or more lawyers (“the Centre’s Survey”), the areas of law and practice selected by the highest number of firms as one of the areas in which they provide the most pro bono services in descending order were: governance, deductible gift recipient (DGR) applications, employment law, commercial agreements, and incorporations. The areas selected by the highest number of firms as areas in which they had rejected requests for pro bono assistance in descending order were: family law (other than domestic violence), wills/probate/estate law, criminal law, employment law, and DGR applications. The focus areas of pro bono practices that were identified by respondents to the Centre’s Survey included human rights, corporate governance, administrative law, native title, workplace rights, consumer rights, and “all areas excluding criminal law and family law”.<sup>31</sup>

Pro bono legal services are often focused on groups experiencing particular disadvantage, but also groups whose legal needs fit with the skills, expertise, and capacity of pro bono providers and the interests of lawyers undertaking the work. Some of the groups identified by respondents to the Centre’s Survey included “people who are marginalised and disadvantaged

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<sup>30</sup> Christine Coumarelos et al., ‘Legal Australia-Wide Survey: legal need in Australia’, Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012

<sup>31</sup> National Pro Bono Resource Centre: *National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers, Final Report*, January 2013, available at: [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf)

with a particular focus on Aboriginal and Torres Strait Islander clients”, “youth and old age”, and “emerging arts”.

It is well established that unmet legal need is high in regional, rural and remote (RRR) areas<sup>32</sup> where there are few legal services available and providing pro bono legal services presents particular challenges. Less than half of the respondents to the Centre’s Survey reported undertaking pro bono work which was focussed on RRR areas. Many firms reported barriers to undertaking pro bono work in a RRR area, which included: “travel and accommodation costs and time out of the office for staff”, “costs of reaching clients”, and “distance and time zone difference”. These barriers are reflected in the fact that only a small proportion of the work was actually undertaken by lawyers travelling to those areas.<sup>33</sup>

Reflective of findings regarding pro bono work in a RRR area, all but one of the twelve firms that reported undertaking international pro bono work reported that less than five percent of their international pro bono legal work was actually conducted outside Australia.

### ***How successful has the National Pro Bono Aspirational Target been in encouraging pro bono work?***

#### **Background**

The National Pro Bono Aspirational Target (“the Target”) was launched by the Centre on 26 April 2007. The 44 signatories that signed up before 31 December 2006 are ‘Foundation Signatories’ who provided the impetus for formally establishing the Target, and whose performance against the Target epitomises the growth of pro bono legal work since the Target’s inception.

The Target is contained in a Statement of Principles, and is a voluntary target of at least 35 hours of pro bono legal work per lawyer per year. It represents a benchmark for the number of hours of pro bono legal work that all signatories aspire, rather than being required, to undertake.

Signatories to the Target undertake to report their performance against the Target to the Centre at the end of each financial year. The number of pro bono hours undertaken by each signatory firm is averaged across the number of FTE lawyers in that firm to measure the firm’s

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<sup>32</sup> See for example: *Postcode justice: rural and regional disadvantage in the administration of the law in Victoria*, Richard Coverdale, Centre for Rural Regional Law and Justice, Deakin University, 2011

<sup>33</sup> National Pro Bono Resource Centre: *National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers, Final Report*, January 2013, available at: [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files/cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files/cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf)

performance against the Target. The Centre reports on the overall performance of Target Signatories each year without identifying individual Target signatories.

As at June 2008 (the first time the Centre reported on the performance on Target signatories), the Target had 58 signatories and covered approximately 3,000 legal professionals, being individual solicitors, barristers and law firms.

According to the **Sixth Annual Performance Report on the Target**, as at 30 June 2013, the Target had a total of 104 signatories, comprising of 79 law firms and incorporated legal practices and 25 individual solicitors and barristers. The Target now covers 8,763 FTE legal professionals, or approximately 15% of the Australian legal profession. This represents a 192% percent increase in the number of lawyers covered by the Target since the 2007/2008 financial year.<sup>34</sup>

A significant incentive for law firms to become signatories to the Target has been the inclusion of the pro bono provisions in the application process for the Commonwealth Legal Services Multi-User List (LSMUL). The pro bono provisions require agencies to consider each applicant's pro bono contribution when awarding tenders, and each applicant must include either a) Confirmation that the Applicant subscribes to the National Pro Bono Resource Centre's Aspirational Target; or b) A nominated target value of Pro Bono Work over a financial year.

As of 1 July 2014, firms with more than 50 lawyers will no longer be able to nominate a target value b) and will instead be required to select option a) and ensure that they have signed up to the Target.

### **Effect of the Target**

There is evidence to suggest that being a Target Signatory increases the amount of pro bono work undertaken, and is helpful in building a pro bono culture within a firm and encouraging staff to participate.

When reporting on their performance against the Target, the signatories are asked to also comment on the effect the Target has had on their pro bono practice. In the 2012/2013 financial year, 42% of signatories reported that being a signatory to the Target had increased the amount of pro bono work undertaken, and a further 44% indicated that being a signatory to the Target has increased the firm's focus on the legal needs of disadvantaged people. Some other effects reported by Target Signatories include:

*"Our being a signatory to the Target has enabled the allocation of company resources to launch, promote, manage and monitor Author performance in pro bono aspirational targets... In preparing for the forthcoming new financial year, we have promulgated a firm wide company pro*

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<sup>34</sup> National Pro Bono Centre: *Sixth Annual Performance Report on the National Pro Bono Aspirational Target*, October 2013, available at: [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/Sixth%20Annual%20Performance%20Report%20on%20the%20Aspirational%20Target%202013.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Sixth%20Annual%20Performance%20Report%20on%20the%20Aspirational%20Target%202013.pdf)

*bono policy and procedure, this has now been distributed to all Professional staff and is available on the company intranet.”*

*“The Target led to increased awareness of the ethical and social aspects of lawyers' professional responsibilities within the firm and encouraged participation of staff in the firm's pro bono scheme.”*

*“Our firm is in a period of growth and having the Target is enabling the firm to properly assess our pro bono commitment and make necessary changes to our budgeting and financial contributions... The target is a positive tool to have in discussions.”*

*“The firm is now committed to significantly increasing the amount of pro bono legal work performed each year with the aim of meeting the Target in the next 3 years.”*

*“The target provides a clear framework of what is expected, at a minimum, to be performed in pro bono work by Australian law firms. [Our firm] sees itself as a leader in pro bono practice, and therefore has made the strategic decision to exceed the Target each year. “*

The positive effect of the Target in encouraging pro bono work is also illustrated by the fact that firms that have been signatories longer perform better against the Target. For example, as at 30 June 2013 all signatory firms averaged 33.6 hours of pro bono work per lawyer per year and a participation rate<sup>35</sup> of 65%. Those firms that had been signatories for at least three years reported an average of 42.7 hours per lawyer per year, and a participation rate of 73.9%.<sup>36</sup>

#### **Target signatories vs. non-signatories**

Evidence also suggests that Target signatories perform better than law firms that are not signatories to the Target. Results from the 2012 National Law Firm pro Bono Survey show that the 20 respondent firms that were Target signatories provided an average of 36.6 hours of pro bono legal work per lawyer in the 2011/2012 financial year, compared with an average of 20.1 hours of pro bono legal work per lawyer per year by the 12 firms that were not Target signatories. Target signatory firms also reported a higher participation rate (59.3%) compared with non-signatories (43%) and a higher percentage of pro bono work measured as a percentage of total practice income (2.9% vs. 1.4%).

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<sup>35</sup> The participation rate indicated the percentage of lawyers in the firm who have undertaken at least one hour of pro bono legal work in the preceding financial year.

<sup>36</sup> National Pro Bono Centre: *Sixth Annual Performance Report on the National Pro Bono Aspirational Target*, October 2013

## **What are the costs and benefits that accrue to legal service providers who provide pro bono services?**

In the Australian pro bono community, a strong driving factor for law firms to undertake pro bono work is the fundamental responsibility of lawyers to ensure equal access to justice, given their privileged position as members of the profession that has the exclusive right to practice law. However, there are also benefits to being involved in pro bono legal work that provide a business rationale for undertaking pro bono work.

In the US context, these benefits are summarised in Esther Lardent's article *Making the Business Case for Pro Bono*,<sup>37</sup> and include: making the firm more attractive to high-quality legal recruits who are increasingly attracted to firms that provide opportunities to undertake pro bono work; greater retention of valued employees, which also reduces recruitment costs; the development of professional skills and experience in a supervised environment; enhancing staff morale and loyalty; and providing unique opportunities to market the firm, enhance its corporate image and thereby generate new business.<sup>38</sup> In Australia, the inclusion of pro bono conditions by the Commonwealth and Victorian governments in their tender schemes for the purchase of legal services from the private profession has also encouraged the growth of pro bono legal services in those jurisdictions.<sup>39</sup>

The costs that legal service providers incur by providing pro bono services include:

- Disbursements and out of pocket expenses
- Risk of professional misconduct and personal costs order
- Business opportunity costs (especially for barristers, smaller law firms and regionally-based lawyers who provide pro bono with little extra capacity and less capacity to absorb risks, unexpectedly lengthy litigation or difficult/demanding clients can have a negative impact on a small business that may already be struggling)

*“It can be financially difficult and a drain on the resources of the firm. Small firms are not in a position to take on a lot of pro bono as they cannot afford it commercially.”* (Small firm principal)

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<sup>37</sup> Lardent E, *Making the Business Case for Pro Bono* (2000) p 1, at [www2.nycbar.org/mp3/DoingWellByDoingGood/pbi\\_businesscase.pdf](http://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi_businesscase.pdf).

<sup>38</sup> Lardent E, *Making the Business Case for Pro Bono* (2000), at [www2.nycbar.org/mp3/DoingWellByDoingGood/pbi\\_businesscase.pdf](http://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi_businesscase.pdf).

<sup>39</sup> For more information about government tender schemes, see the National Pro Bono Resource Centre's website at [www.nationalprobono.org.au/page.asp?from=0&id=274](http://www.nationalprobono.org.au/page.asp?from=0&id=274).

*“Pro bono clients can make many complaints to the law society and this can lead to unwarranted claims on the firm’s insurance, which leads to an increase in insurance premiums. Larger firms can absorb the risk and are also less likely to be undertaking pro bono work for individuals in the way that small firms do because they don’t have expertise in those areas of law e.g. family law”.* (Small firm principal)

**What cost effective ways are there to make the provision of pro bono services more attractive?**

There are a number of cost effective practical measures that can make the provision of pro bono services more attractive. Key amongst them is the existence of organisations and relationships of support for pro bono practices. Organisations that provide information and materials about how to develop or manage a pro bono practice provide vital support and assistance to a pro bono practice. Building and supporting relationships amongst access to justice organisations and pro bono practices aides in feeding information through the sector. In particular, clearing houses and community organisations are able to analyse legal need and identify particular areas of law or disadvantaged communities in need of pro bono assistance. Relationships between pro bono practices and access to justice organisations create opportunities to share knowledge and resources, in particular training commercial lawyers in areas of law outside their standard commercial practice to enable to the provision of pro bono services.

Some of the ways in which a small amount of resources has been used to increase the amount of pro bono work undertaken, and to address significant barriers to the provision of pro bono work include the Centre’s work to:

- create resources that facilitate the provision of pro bono legal work, for example, The Australian Pro Bono Manual – A practice guide and resource kit for law firms; and Pro Bono Partnerships and Models: A Practical Guide to *What Works* (“*What Works*”).
- Identify barriers to the provision of pro bono legal services and advocate for reforms to address them, for example, the provision of free practising certificates for lawyers wanting to undertake pro bono work, and the establishment of a professional indemnity insurance scheme to enable lawyers without appropriate insurance coverage to undertake pro bono work (for example in-house corporate and government lawyers).<sup>40</sup>

As set out above, these organisations play a key role in supporting the work of pro bono practices in connecting them to the wider access to justice sector and providing important sources of information and support to lawyers and practice managers.

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<sup>40</sup> For more information on the National Pro Bono Professional Indemnity Insurance Scheme, see p 27 of this submission.

The work done by the various pro bono referral organisations across Australia also represents a cost effective way of making the provision of pro bono services more attractive. They facilitate the efficient provision of pro bono legal advice by acting as an intermediary between people or organisations needing legal assistance and lawyers prepared and able to assist, connecting those with unmet legal needs to the pro bono capacity of their members

Clearing houses and referral schemes exist in each state and territory of Australia as follows:

Victoria	<b>**JusticeConnect</b> (formerly Public Interest Law Clearing House (PILCH) (VIC))
New South Wales	<b>** JusticeConnect</b> (formerly Public Interest Law Clearing House (PILCH) (NSW))  <b>Law Society of NSW Pro Bono Scheme</b>  <b>NSW Bar Legal Assistance Referral Scheme</b>  <b>Cancer Council Legal Referral Service</b>
Queensland	<b>**Queensland Public Interest Law Clearing House (QPILCH)</b>
South Australia	<b>**JusticeNet SA</b>
Western Australia	<b>Law Access Pro Bono Referral Scheme, Law Society of WA</b>  <b>Western Australian Bar Association</b>
Northern Territory	<b>NT Pro Bono Clearing House, Law Society of NT</b>
ACT	<b>ACT Pro Bono Clearing House, Law Society of the ACT</b>
Tasmania	<b>Law Society of Tasmania's Pro Bono Clearing House</b>

**\*\*** clearing houses that are partially government funded.

The work done by these organizations is important in making the provision of pro bono legal services more attractive to a potential pro bono provider. Referral schemes conduct an initial assessment of the merits of a case and the means of the applicant, saving (sometimes hours) of a pro bono providers time. Importantly, they also reject applications for assistance where the applicant's case has no merit.

In addition to referral services, some clearing houses run projects and programs where they, and their members, work in collaboration with community and government agencies to respond to

unmet legal need. For example, JusticeConnect runs the Homeless Persons Legal Clinic in Victoria, which is a specialist legal service that provides free legal assistance and advocacy to people who are homeless or at risk of homelessness. Legal assistance is provided by pro bono lawyers from member firms at nine homelessness assistance services.

Making pro bono services more attractive relies on ensuring that a pro bono practice is well supported by access to justice organisations and provides a range of opportunities to lawyers to fulfil their personal motivation for undertaking such work. Within pro bono practices there is no magic formula for determining what will make a pro bono matter or pro bono client attractive to a particular lawyer or law firm. Rather, one of the greatest strengths of pro bono is that a variety of elements of a pro bono matter attract a variety of lawyers. Ensuring that a pro bono practice provides opportunities to harness this range of motivating factors is a cost effective way of attracting lawyers to pro bono work.

For some lawyers, social justice was the motivation for undertaking a law degree. Pro bono practices within commercial law firms allow lawyers with a commitment to social justice to continue that commitment alongside a commercial practice. For such lawyers, it is not a client or type of legal issue that makes pro bono attractive but that pro bono work facilitates social justice or access to justice. For other lawyers, the ability to develop skill sets that complement their commercial practice is the key characteristic of an attractive pro bono matter, for example drafting constitutions or ensuring governance compliance for an organisational client. The skills involved in this type of pro bono matter complement and develop the skills used in the same work for a commercial client.

Conversely, for other lawyers the most attractive feature of a pro bono matter is that it involves skills and issues not used or dealt with in their commercial work. This may be because the pro bono client is an individual and their work is usually for large organisations, allowing for development of client interviewing skills. The pro bono matter may have a shorter time frame with a clearer direct impact on a client's life than a drawn out commercial matter affecting large commercial entities, or the pro bono matter may draw on different skills to those utilised in their commercial practice such as advocacy or allowing a corporate lawyer to use their drafting skills for a statement rather than a contract for example.

Ensuring a diversity of pro bono opportunities to lawyers is a simple and cost effective way of ensuring that lawyers engage in pro bono work. This may be achieved through a firm engaging with a peak clearing house for pro bono work or through developing their own relationships with community legal centres and other community organisations. It may involve engaging in rosters to provide legal advice at a community organisation, case work, and discrete aspects of larger matters to engage lawyers from across different practice groups in a firm. Ensuring diversity in available pro bono opportunities enables a pro bono practice to capture a wider audience of lawyers.

The diversity of a pro bono practice is important not just in attracting lawyers to pro bono work but also in retaining the engagement of those lawyers. The length and complexity of matters needs to vary in order to ensure lawyers are engaged either through the satisfaction of being able to resolve a matter in a short time or through the intellectual challenge of a more complex or lengthy matter. While the aim of a pro bono practice may be to be challenging and engaged in a number of ongoing matters, there is still a need for easier to resolve, discrete matters that a lawyer can complete in a short time and that can result in a clear outcome.

Once again, the relatively simple need to ensure that a pro bono practice provides a diversity of opportunities to lawyers is a cost effective way to ensure that a pro bono practice attracts a variety of lawyers. Diversity in pro bono practices can draw upon a range of skills order to maximise the opportunity to attract lawyers with a range of motivations for undertaking pro bono work.

Most Law Societies run pro bono referral schemes and make the pro bono contributions of their members visible through their publications. This helps build pro bono culture within the profession. Strong public recognition from law societies of the importance of pro bono and the obligations of the profession in facilitating access to justice is a simple and cost effective way to make pro bono services more attractive both within and outside the profession.

The concomitant requirement to ensuring that the provision of pro bono services are attractive is in addressing the practical barriers or features that make a particular pro bono matter unattractive. The key features in this respect are the funding of disbursements, conflicts between commercial clients and potential pro bono clients, and the area of law in which there is a need for pro bono assistance (see section on barriers to pro bono work).

***How well do pro bono programs operate, how are they resourced, and are they effectively targeted?***

In responding to this question, the Centre takes ‘pro bono programs’ to mean the organised, structured pro bono practices of (mostly) large and mid-sized law firms. Australia has a strong pro bono clearing house system in most states and territories which could also be described as ‘pro bono programs’. The Centre understands that some of these clearing houses will make their own submissions to this inquiry.

### ***How well do pro bono programs operate?***

The most effective pro bono practices are those which are dedicated and engaged; a practice that has dedicated pro bono resources in terms of full-time staff and is deeply engaged with the wider access to justice sector. This is in part achieved by addressing the factors set out above in section *'What cost effective ways are there to make the provision of pro bono legal services more attractive?'* to ensure a practice offers a range of opportunities to appeal to a range of lawyers.

The leading pro bono practices in Australia have teams with full-time lawyers and staff and dedicated pro bono resources on a full-time basis appears to be the hallmark of a strong pro bono practice. Having a team of lawyers solely dedicated to pro bono services does not mean that practice alone undertakes the pro bono work of a firm but that the pro bono work of a firm can be effectively managed and supported by that team. It is also important that the roles of the dedicated pro bono team be taken by people with seniority in the broader commercial firm. This seniority and accompanying authority assists in growing a pro bono culture across a firm and promoting the importance of the practice.

A full-time pro bono team enables practice development and liaison with the wider access to justice sector. This close liaison enables a pro bono practice to be proactive about identifying legal need in the community and subsequently the direction of the practice is better focused. It also enables the pro bono team to undertake their own pro bono matters while also placing pro bono matters within the wider pool of lawyers in a firm and then training and supporting those lawyers in undertaking pro bono work. It is essential that a pro bono practice does not operate in isolation in a commercial firm but rather draws in lawyers of all levels and stages across the firm.

While pro bono legal services cannot take the place of government funded legal services in meeting legal need, they can assist in providing significant support. Many pro bono practices are deeply engaged with community legal centres, legal aid commissions, community organisations and pro bono practices of other commercial law firms.

Although the success of any partnership will depend on the parties, a pro bono practice which is deeply engaged with the wider sector can be of great value. This is particularly so where a firm can provide legal expertise or resources where a community legal sector or grassroots community organisation has identified a need. This ability to link and work closely with those at the 'coal face' of community need leads to ensuring that a pro bono practice is linked with the community and responsive to its needs. This may take the form of a formal partnership or referral scheme with a community legal centre, participation in a roster to service a particular geographic location or client group, or secondments to an organisation with which the pro bono practice has a relationship.

Successful pro bono practices are reliant on a strong interface with well-funded legal aid commissions, Aboriginal and Torres Strait Islander legal services and community legal centres, including clearing houses and other not-for-profit community organisations. This is particularly so in terms of how it is that a pro bono practice takes on a matter. Very few pro bono practices within large or mid-size law firms will take clients from cold calls to the firm. Of those that will accept such clients, that client source is a very small percentage of the overall client base of the practice. Pro bono practices are almost entirely reliant on referrals from their relationships with the wider sector for the bulk, if not all, of their pro bono clients and matters. Pro bono practices complement government funded legal services but cannot come close to meeting the legal needs of the socio-economically disadvantaged community. While pro bono practices should be encouraged to grow, they cannot take the place of government funded legal services, nor can they become the de facto funders of such services, be it directly or indirectly.

### ***How are pro bono practices resourced?***

As discussed above, the way in which a pro bono practice is resourced has a significant impact on how well it operates. The resourcing of a particular pro bono practice varies widely across commercial law firms throughout Australia.

In Australia, all large law firms and a number of mid-size law firms have some dedicated pro bono resources. This may take the form of a dedicated pro bono practice group of a partner, lawyer(s) and support staff or may be through a dedicated pro bono coordinator to oversee the placement of pro bono matters throughout the firm. Other firms undertake pro bono work without dedicated resources and instead structure pro bono programs around allocating responsibilities for pro bono work to particular partners or lawyers, alongside their existing commercial practice.

The resourcing of particular pro bono practices also varies greatly across firms. Some firms have adopted a budgeting system; setting a budget for the pro bono work of a lawyer or the firm by time spent or by a monetary value.<sup>41</sup> For most firms, this budget acts as a guide rather than a 'cap' on the amount of pro bono legal work they undertake. Other firms limit their pro bono practice only by the capacity of the pro bono practice itself, or other lawyers in the firm, to take on a matter. The overarching theme is that however a law firm structures the resourcing of their pro bono practice, the resources come from the generosity of the firm and are limited by the capacity to take on pro bono legal work at any given point in time. Most firms are very

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<sup>41</sup> National Pro Bono Resource Centre 'National Law Firm Pro Bono Survey – Australian firms with fifty or more lawyers – Final Report', January 2013, 36-38.

generous when it comes to such resourcing but they are commercial entities themselves and there is a limit to what they can resource.

Firms also choose to allocate their resources according to what kind of legal assistance will be provided. Legal assistance, in its most obvious form, may be through direct case work for individual or organisational clients, acting in a wide range of capacities. It may also take the form of community legal education for a community organisation on a particular area of law such as discrimination, or it may focus on the legal needs of a particular client group such as homeless persons. Other firms also choose to provide legal assistance by seconding one of their lawyers to a community legal centre or other community organisation. What remains key amongst these resourcing options however is that the pro bono practice itself is able to direct its practice and the forms of legal assistance that may be provided in order to capture the different motivations of lawyers and operate successfully within the wider culture of the firm.

### ***Are pro bono practices effectively targeted?***

Pro bono practices have been around for some time in Australia and this has become a highly sophisticated sector. The best pro bono practices operate with the same sophistication as other practice groups within the firm; developing strategies for identifying and targeting clients, fostering networks with the wider sector, and considering opportunities for systemic change while continuing to undertake case work. Again however, whether a pro bono practice effectively targets clients and areas of legal need is dependent on engagement with well-funded community legal centres, legal aid commissions and Aboriginal and Torres Strait Islander legal services and other community organisations. The effectiveness of any such engagement will in turn depend on the parties engaged.

A second key feature of the Australian pro bono landscape is its collegiate nature. This is particularly so in the case of New South Wales and Victoria where the pro bono practices of most large and mid-size law firms meet regularly and work collaboratively. Firms understand well the pro bono practices of other firms; the type of work a particular pro bono practice is or is not able to take on, expertise of a particular pro bono practice or lawyer and the size and capacity of other pro bono practices. Pro bono practices of firms that would be considered competitors in terms of commercial legal work often undertake training together, develop projects together and share information about areas of law and their own practices.

Perhaps the best way to assess whether a pro bono practice is effectively targeted is to consider whether it can truly be said to be a pro bono *legal* practice servicing those in need. That is, does the pro bono program concentrate on the provision of pro bono legal services or is more engaged in activities that fall more properly in the realm of corporate social responsibility? Does

the pro bono program provide services to clients that meet the definition set out by the National Pro Bono Resource Centre?<sup>42</sup>

The hallmark of a good, effectively targeted pro bono practice is that it is practice that provides legal assistance to clients in need. Pro bono legal practices are effectively targeted when they provide legal assistance. Legal assistance encompasses direct case work for individual or organisational clients, undertaking law reform or policy work, providing community legal education direct to particular groups of individual clients or to staff of an organisational client or providing a lawyer on secondment. It is important not to conflate such pro bono legal assistance with corporate social responsibility such as donations to community organisations, sponsorship of events or undertaking non-legal work for a community organisation.

Similarly, a good pro bono practice provides pro bono legal services to clients in need, to clients who are unable to themselves pay for legal assistance, to organisational clients that service low-income or disadvantaged clients or to clients with legal matters that raise issues of public interest that could otherwise not be pursued. This should not be equated with providing legal assistance to **any** not-for-profit or charitable organisation. Such work could extend to pro bono legal assistance for a wealthy private school, a wealthy sports organisation or a wealthy charitable foundation. This is not to discourage such work if an individual wishes to undertake such work or a firm chooses to provide services at a reduced rate. Rather, it is to emphasise that the role of a pro bono practice is to facilitate access to justice for those who would otherwise be unable to access it.

Another mark of the effectiveness of a pro bono program can be seen in their ability to influence and shape the culture of a firm and in turn, the industry and the broader commercial sector. Pro bono practices are effective in the 'access to justice culture' they can foster within a firm. Pro bono clients and matters expose lawyers to issues and clients they may not otherwise think about or be exposed to. To achieve these ends, pro bono practices cannot be entirely outsourced by providing lawyers on secondment to community organisations. While secondments must be recognised as an effective pro bono strategy in certain circumstances, they cannot provide the same firm-wide influence as a full-time pro bono practice within a firm supporting pro bono work being undertaken by a broad range of lawyers in all practice groups. When provided within a firm, pro bono work is likely to engage with lawyers who will go on to be influential in industry and commerce, spreading an access to justice culture broadly in the community and outside the realm of those already dedicated to the issue.

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<sup>42</sup> For the definition used by the Centre see: <http://www.nationalprobono.org.au/page.asp?from=3&id=189>

***What barriers are faced by lawyers seeking to provide pro bono services and how are they being addressed? To what extent are the responses to these barriers linked to the success of the national legal profession reform?***

There are several barriers to lawyers seeking to provide pro bono legal services. The types of barriers vary depending on the type of pro bono work sought to be provided and whether it is done in the context of a structured law firm pro bono program, within a government or corporate in-house legal department or on the basis of individual volunteering.

**Practising certificates**

In order for lawyers to be able to undertake pro bono legal work that involves the provision of legal advice or representation, they must hold a practising certificate issued by the law society or bar association in their state or territory. Where an individual is not required to hold a practising certificate as part of their employment, the cost of holding a practising certificate is generally born by the individual practitioner. For example, the cost of an unrestricted practising certificate in several Australian jurisdictions exceeds \$1,000.<sup>43</sup> For individual lawyers wanting to provide pro bono legal assistance, this cost may be prohibitive and can act as a disincentive to participation in pro bono service provision.

In addition to the cost of practicing certificates, certain classes of practicing certificates may impose restrictions on lawyers wanting to provide pro bono legal services. For example, Restricted (Corporate Lawyer) practicing certificates issued by the Law Society of the Northern Territory, entitle the holder to provide legal advice only to their employer. Similar restrictions exist in corporate and government practicing certificates in some other Australian jurisdictions (for example Tasmania).

In other jurisdictions (Victoria, New South Wales and Queensland), these restrictions have been addressed through regulatory and/or legislative change. For example, the holders of all types of practicing certificates in New South Wales are “entitled to engage in legal practice as a volunteer providing pro bono legal services through a law practice or under an arrangement approved by the Council of the Law Society.”<sup>44</sup>

The barrier relating to restrictive conditions on practicing certificates was addressed in the Legal Profession National Law (31 May 2011).<sup>45</sup> Under Chapter 3, Part 3.3, Division 3, Section 3.3.7,

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<sup>43</sup> For example, the cost of an unrestricted practicing certificate in the Northern Territory is \$1,498, in Western Australia \$1,000, in the Australian Capital Territory \$1,176 and \$1,100 in Tasmania.

<sup>44</sup> The Law Society of New South Wales, Practising Certificate types and Conditions 2013/2014, available at: <http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/702990.pdf>

<sup>45</sup> Post COAG Draft.

subsection (5) authorises the holders of all classes of Australian practising certificate to engage in legal practice as a volunteer at a community legal service, or otherwise on a pro bono basis.<sup>46</sup> However, the Legal Profession National Law does not address the issue of the cost of a practising certificate. The Centre submits that the cost of a practising certificate remains a significant barrier to providing pro bono legal services, and that *free* practising certificates should be available for the sole purpose of engaging in pro bono legal work for lawyers who would otherwise be eligible for a practising certificate. The availability of free practising certificates would act as an incentive to lawyers who have, for example, recently retired from paid legal work or work in a capacity that does not require them to hold a practising certificate to make a contribution to access to justice.

### **Professional Indemnity Insurance**

Before a lawyer with a practising certificate can undertake pro bono legal work, they must (by law) have appropriate professional indemnity insurance (PI Insurance) cover. This insurance is essential not just to safeguard the lawyer and client against risk, but to provide cover in the event that the lawyer operates outside of the scope of his or her practising certificate. The availability and cost of PI Insurance may represent a barrier to many lawyers, particularly government and in-house lawyers and individual volunteers.

This barrier has in part been addressed through the Centre's National Pro Bono Professional Indemnity Insurance Policy (the Policy'). The Policy was introduced in May 2009 to encourage lawyers with no professional indemnity insurance to undertake pro bono legal work. The Policy, which is provided by LawCover Insurance Pty Ltd covers lawyers providing pro bono legal services with the approval of the Centre.<sup>47</sup> The Policy is a "safety net" policy that only extends to circumstances where no other professional indemnity insurance cover exists. Since its launch, the Centre has approved more than 40 different pro bono projects for in-house corporate legal departments, government legal departments and individual lawyers.<sup>48</sup>

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<sup>46</sup> For the purposes of the Legal Profession National Law, and Australian legal practitioner provides legal services on a pro bono basis where: (a) the practitioner, without fee, gain or reward or at a reduced fee, advises or represents a clients in cases wherwe (i) the client would not otherwise have access to legal services; or (ii) the client's case raises a wider issue of public interest; or (b) the practitioners is involved in free community legal education or law reform; or (c) the practitioner is involved in the giving of free legal advice or representation to charitable and community organisations.

<sup>47</sup> Lawyers with a valid practising certificate may seek cover under the Policy by completing an application and submitting it to the Centre for approval. If the proposed pro bono work falls within the definition of pro bono legal work (which is based on the Law Council of Asutralia's definition of pro bono legal work), and a solicitor with an 'unrestricted practising certificate' will supervise the work, the application for cover is likely to be approved.

<sup>48</sup> See the National Pro Bono PI Register at <http://www.nationalprobono.org.au/page.asp?from=8&id=302>

## Disbursements

The inadequate reimbursement of disbursements incurred when carrying out pro bono legal work can act as a significant barrier to undertaking pro bono legal work. Pro bono legal services are the provision of free professional services, not the provision of associated disbursements. The three key areas in which disbursement costs become prohibitive are travel, interpreters and retaining experts. A matter which has a need for significant disbursements in these areas is likely to make it unattractive to a pro bono practice considering whether to take a matter on.

Information obtained by the centre in its National Law Firm Pro Bono Surveys in 2008, 2010 and 2012 indicated that disbursements are a significant factor when firms are assessing their decision to provide pro bono legal assistance, and may therefore affect their decision to provide that assistance.<sup>49</sup> In the 2012 Survey, only 25 percent of respondents said they meet the cost of all external disbursements. A further 14% of respondents said they meet the cost of external disbursements up to a pre-determined value, and then charge the client for the rest. Forty-four percent of firms indicated that they charge their pro bono client for all external disbursements. Where a pro bono client does not have the capacity to pay these disbursements and cannot obtain disbursement assistance, it is unlikely that their matter will proceed.<sup>50</sup>

The barrier of disbursements has been addressed to a certain extent by the establishment of disbursement assistance schemes. There are currently nine different disbursement assistance schemes operating in Australia, at least one in each state and territory with the exception of the ACT, and a separate scheme for Commonwealth law matters. However, only the NSW and Commonwealth disbursement assistance schemes are ones that have been established specifically to fund disbursements in pro bono matters, other state-based schemes provide assistance in a broader range of litigious matters.

Many of the schemes are subject to limitations that reduce their accessibility, such as an application fee, or a condition that an application can only be made once the disbursement has been incurred. Other limitations include caps on the amount that can be recovered, means and merits tests, and conditions that limit assistance to cases where damages are likely to be

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<sup>49</sup> See National Pro Bono Resource Centre: *Report on the Pro Bono Work of 25 Large Australian Firms* (2008); *National Law Firm Pro Bono Survey: Final Report* (2010); and *National Law Firm Pro Bono Survey – Australian firms with 50 or more lawyers – Final Report* (2012).

<sup>50</sup> The respondents in the 2012 Survey identified Expert witness reports and appearance fees, as well as filing fees as the most significant barriers to undertaking pro bono legal work.

recovered.<sup>51</sup> This means that from the perspective of a pro bono provider, there can be no guarantee or certainty, when taking on a matter, that any disbursement costs will be met. Anecdotal evidence from law firms and other legal practitioners suggests that obtaining funding for reimbursements of disbursements, if available at all, can be difficult and time consuming.

### ***Travel costs***

Travel costs, including both the travel itself and any accompanying accommodation, seem to exponentially increase the further the travel from a city centre, often making such travel well beyond the capacities of pro bono lawyers other than those located in the community in need. It is also often the communities located far from cities that are most in need of legal assistance.

While improvements in telecommunications technologies, including video conferencing, enables better communication and goes some way to addressing the prohibitive costs of travel, it is not always appropriate or possible. For such communication options to be effectively deployed, both the lawyer and the client need access to the technology. While this may not be a problem for a commercial law firm providing pro bono legal services, it is often impossible for a client to access such technology. Even if relationships are developed with community organisations in remote areas to enable facilitation of individual client relationships, the organisations themselves often do not possess the technology. In addition, there are certain client groups for whom communication via video conferencing or other telecommunications technology is not appropriate for cultural reasons. A physical presence is necessary for many matters in remote communities; to foster a relationship of trust and confidence between client and lawyer, and to be able to take complete instructions. To fully develop these relationships with local organisations is essential as these organisations are often the source of clients for a firm or the intermediary between client and firm. To provide ongoing support to these organisations requires visits at least two or three times a year to maintain the relationship and client source and therefore the costs are incurred numerous times.

### ***Interpreter fees***

The second significant area in which disbursements become substantial is in interpreter fees. This becomes particularly relevant when a pro bono provider services a large number of clients from non-English speaking backgrounds. Clients from non-English speaking backgrounds frequently need pro bono legal services across a range of areas from immigration matters for clients seeking protection visas to negotiating with government agencies. Interpreter fees, even for a relatively simple matter, can often run into thousands of dollars and pro bono providers

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<sup>51</sup> For more information on disbursement assistance schemes, see the National Pro Bono Resource Centre: *The Australian Pro Bono Manual – A practice guide and resource kit for law firms*, Section 4.5 available at <http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=11>.

face few prospects of ever being able to recover those costs. One potential way to address the issue of interpreter fees is to provide pro bono practices with access to the Translating and Interpreting Service (TIS), on the same basis as it is provided to community legal centres. Community legal centres currently access TIS services free of charge for services for which they receive funding from the Attorney General. Extending this to pro bono providers would go a significant way in reducing the high costs they currently face in taking on a matter for a non-English speaking client.

### ***Expert fees***

The third key area in which disbursements become prohibitive is in fees charged by experts. This becomes particularly apparent in litigious matters when expert evidence will be essential in running a matter. As mentioned, while some disbursement funds may be available for expert fees they rarely, if ever, are able to come even close to the actual cost of obtaining expert advice or evidence. Expert evidence becomes crucial when the pro bono matter in question is a public interest test case. Expert evidence is clearly critical if testing a new point of law or addressing a controversial issue and the high importance of such evidence necessitates obtaining experts at the very top of their field and therefore likely to charge high fees. A potential way to address this issue is to encourage the provision of pro bono services in other professions. Encouraging professions such as accounting or psychology to provide pro bono expert assistance would greatly lessen the burden of costs borne by pro bono providers in taking on matters that require expert evidence. However, the Centre's experience on this issue is that it will require leadership from peak bodies in the relevant professions before the provision of pro bono services will occur to any significant extent.

While the total cost of addressing the issue of disbursements may be large, the cost effectiveness of addressing the issue is potentially also large. Removing the barrier of prohibitive disbursements through ensuring disbursements can be covered, at least to a greater degree than they are currently, makes a pro bono matter that was previously unattractive, now attractive for one of the reasons identified above, or at least on a level playing field with other potential pro bono matters. The wider cost effectiveness of the provision of pro bono services, as a complement to well-funded community legal centres and the legal aid sector, is able to be enhanced if the issue of disbursements is addressed.

### **Conflicts of interest**

Another key barrier in the provision of pro bono services is the issue of conflicts between commercial clients and potential pro bono clients. These conflicts are often commercial in nature, rather than direct legal conflicts. This issue, which is particularly relevant to large law firms, is a major one in particular industries such as telecommunications, banking and insurance. It is also a significant issue not just where the potential pro bono client has a dispute with an

existing client of a commercial firm but where the pro bono matter is a test or public interest case which may lead to a systemic change in a particular industry. A firm may feel unable to take a matter on where even though the pro bono matter does not specifically bring about a client conflict, the wider point it addresses or change it seeks in an industry, is viewed unfavourably by a client in that industry. This leads to firms being concerned that acting on a pro bono basis against the government or a certain corporations will prejudice them from obtaining further paid work from these clients. The Centre sought to address this issue by developing a 'conflict protocols' which have been adopted by some governments.<sup>52</sup>

In these circumstances the collegiate nature of the pro bono sector in Australia comes to the fore as firms attempt to refer matters to another pro bono practice. As discussed however, there are particular industries in which most if not all large or mid-size law firms are conflicted out of acting. The importance of a government funded community legal sector and legal aid system is vital for such matters. Without a publicly funded system of legal representation for disadvantaged clients there would be few avenues for such individuals to access justice in dealings with commercial entities in certain industries.

### **Mismatch of legal skills and legal need**

A common barrier to undertaking pro bono legal work is the mismatch between the skills and knowledge of (potential) pro bono lawyers and the expertise and types of services typically required by pro bono clients, particularly in the case of individuals experiencing disadvantage or in areas of great unmet legal need.

Providing pro bono legal assistance to individuals experiencing disadvantage requires more than knowledge of a specialist area of the law. Many clients may present with complex needs, for example mental illness, intellectual disability or a history of victimisation and abuse, which may affect their ability to understand legal advice or to give instructions. Lawyers may need specific communication and client management skills to be able to build a relationship of trust with their client in order to be able to assist them effectively.

Some pro bono programs in law firms have responded to this mismatch in skills by offering training for their lawyers in relevant areas of the law, and some partner with CLCs or other community organisations to obtain training on dealing with clients with specific needs or who come from a culturally and linguistically diverse background. However, there is always a balance to be struck between the cost of providing training to lawyers and the benefit to be

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<sup>52</sup> Both the Victorian and Commonwealth Governments have adopted a conflicts protocol which makes it clear that when purchasing legal services, government agencies will not discriminate against legal service providers who have acted, or may act, against the government on a pro bono basis, unless there is an actual conflict of interest.

obtained by clients from the delivery of the service.<sup>53</sup> Consequently, respondents to the National Law Firm Pro Bono Survey identified insufficient expertise in relevant areas of the law as the second most common barrier to providing pro bono legal services.<sup>54</sup>

## 4: THE COSTS OF ACCESSING CIVIL JUSTICE

### FINANCIAL COSTS

***The Commission invites comments on the financial costs of civil dispute resolution and the extent to which these costs dissuade disputants from pursuing resolution. Data are sought on these financial costs including the costs of advisory services, ADR and litigation.***

The issue of costs permeates the whole of the administration of civil justice. It affects access to justice because costs can place the courts beyond the reach of those who cannot afford, or cannot afford to risk, the costs implications of resolving disputes. On the issue of costs in civil dispute resolution, the Centre refers to the recent inquiry by the New South Wales Law reform Commission on Security for Costs and Associated Costs Orders<sup>55</sup> and makes the following submissions.

The Centre is aware of many cases where the cost implications of litigation have dissuaded disputants from pursuing resolution, particularly where the disputants are experiencing disadvantage. This is especially the case where the matter involves an unresolved area of law, so that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that disadvantaged or marginalised applicants will pursue important test cases. As a result, important legal issues affecting the community may not be tested and resolved.

In its April 2009 submission to the Commonwealth Attorney-General on Protective Costs Orders, the Public Interest Law Clearing House (PILCH) Victoria provided several case studies

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<sup>53</sup> See for example an evaluation of the Family Law Affidavit Writing Pilot Project, available at: [www.lawfoundation.net.au/ljf/app/&id=96A5E275C9519729CA257544000FFA9C](http://www.lawfoundation.net.au/ljf/app/&id=96A5E275C9519729CA257544000FFA9C)

<sup>54</sup> National Pro Bono Resource Centre 'National Law Firm Pro Bono Survey – Australian firms with fifty or more lawyers – Final Report', January 2013, 44.

<sup>55</sup> New South Wales Law Reform Commission: *Report 137: Security for Costs and associated Costs Orders*, December 2012, available at: [www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf)

demonstrating how the risk of an adverse costs order acted as a disincentive to litigants pursuing meritorious public interest litigation.<sup>56</sup>

Given that the costs and disbursements associated with litigation impact disproportionately on indigent persons, they may be regarded as a restriction on the right of access to a court contrary to the right of a fair hearing as set out in international law.<sup>57</sup>

A way of addressing this barrier to accessing the courts in public interest matters is to develop rules for the granting of protective costs orders (PCO), which protect a litigant from the risk of an adverse costs order in public interest matters, where a court may order that:

- A specified party will not be liable for costs, whether or not it is successful;
- One party's costs will be paid in whole or part by the other, regardless of the outcome of the proceeding; or
- The amount of costs for which a specified party may be liable will be capped.

Seeking PCOs in public interest litigation is a relatively new phenomenon in Australia and a culture of seeking PCOs is yet to develop amongst lawyers, law firms and public interest organisations engaging in public interest litigation. There is no general 'public interest' exception to the operation of the ordinary rule that costs follow the event. Australian courts have differed in their willingness to exercise their power to award costs to make PCOs in public interest matters.<sup>58</sup> While the High Court has confirmed the courts' jurisdiction to do so, case law provides little guidance on what will constitute appropriate circumstances for making a PCO. The jurisprudence with regard to costs in public interest litigation and the role of costs in access to justice in Australia is therefore in its early stages of development.

The Centre's informal consultations with representatives of plaintiff firms also suggests that some matters in the public interest proceed to litigation on the basis of an expectation that in the event of an adverse costs order against the plaintiff, the respondent will not pursue that costs order. This may occur, for example, where a defendant which is a government entity or a corporation weighs up the cost of negative publicity against the costs that would be recoverable from an impecunious or otherwise disadvantaged plaintiff.

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<sup>56</sup> PILCH (Vic), Submission to the Commonwealth Attorney-General on Protective Costs Orders (2009) at 2.2

<sup>57</sup> For a summary of Australia's obligations under international law see in PILCH (Vic) Submission at 2.3

<sup>58</sup> For a summary of current law on PCOs in Australia and elsewhere see PILCH VIC Submission to the NSW Law Reform Commission Consultation Paper 13 – Security for costs and associated costs orders, August 2011, Section 3, and the attached Jurisprudence Review on Protective Costs Orders in Public Interest Litigation, February 2011.

The Centre submits that the uncertainty of how courts will exercise their discretion to make PCOs, or relying on the ‘goodwill’ of the defendant when deciding to pursue litigation in the public interest, is an unsatisfactory state of affairs that dissuades disputants from seeking resolution and submits that there is need for law reform to:

- (a) Confirm every relevant Australian court’s jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about ‘judicial legislating’; and
- (b) Clarify the factors that are relevant to the discretion to make a PCO in public interest matters, one of these criteria being whether the person is being acted for on a pro bono basis; and
- (c) Clarify the types of PCO that can be made, and that they can be ordered at any stage of a proceeding.<sup>59</sup>

The above factors should also be taken into consideration in deciding whether to make an order for security for costs (or to order security for a lesser amount than that sought by the defendant).

## 11: IMPROVING THE ACCESSIBILITY OF COURTS

### **Costs awards and court fees**

Due to the rising numbers of self-represented litigants and the challenges they present for the courts, courts should actively facilitate working with litigants acted for on a pro bono basis. This is likely to result in a more efficient processing of these litigants’ claims (or defences).

#### **a) Arrangements for awarding costs**

***The Commission seeks information on different approaches adopted by courts and tribunals to the allocation of legal costs among the parties to a dispute.***

***What principles should apply in deciding how to award costs so that they create appropriate incentives for equity and efficiency in civil dispute resolution?***

Pro bono legal assistance contributes to equity and efficiency in civil dispute resolution by providing access to justice for people who would not otherwise be able to access legal

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<sup>59</sup> PILCH (Vic) proposed wording of legislative amendments to confer power on the High Court and Federal Court to make protective costs orders in its Submission at Annexures A and B.

assistance and resolving important issues of community concern through public interest litigation. In this context, the Centre submits that the principles that should apply in working with litigants or potential litigants in and around the court processes and in making costs orders should:

- Encourage the provision of pro bono legal assistance;
- Seek to retain the pro bono capacity of pro bono service providers;
- Ensure a level playing field between litigants; and
- Recognise all pro bono referral schemes in the same way that court-based pro bono schemes are recognized when awarding costs.

Entitling clients represented on a pro bono basis to recover costs, and having those costs in turn recoverable by the legal practitioner acting on a pro bono basis, helps to achieve outcomes consistent with these principles.

Permitting pro bono costs recovery assists in retaining pro bono capacity in practitioners acting on a pro bono basis, by allowing them to:

- Pay litigation disbursements (including counsel's fees);
- Direct funds back to their pro bono budgets, thereby retaining capacity for further pro bono assistance; and
- Otherwise make donations (including to pro bono disbursement funds).<sup>60</sup>

Allowing pro bono litigants to recover costs also ensures a level playing field between litigants where one party is not at a disadvantage when trying to negotiate a settlement in the matter, and unsuccessful litigants do not receive an undeserved benefit owing to the other party being represented on a pro bono basis.

Having a consistent approach to cost recovery avoids the situation where some pro bono lawyers are in a less favourable situation than others, depending on whether a court-based pro bono referral scheme applies to them.

However, the current law and practice relating to costs orders still contains notable constraints to the recovery of costs in matters where a lawyer is acting on a pro bono basis. This discourages the provision of pro bono legal assistance is therefore undesirable from an access to justice perspective.

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<sup>60</sup> For a further discussion on this issue see New South Wales Law Reform Commission: *Report 137: Security for Costs and associated Costs Orders*, December 2012, 57-61.

## The current law

### ***The Indemnity Principle***

The purpose of a costs order is to compensate the successful party in litigation for those costs necessarily incurred to obtain justice (known as the indemnity principle).<sup>61</sup> However, the indemnity principle can only operate where a successful litigant is under an obligation to pay his lawyer.<sup>62</sup> This is a key concern in the context of pro bono representation since the successful party does not need to be compensated where no loss has been incurred.<sup>63</sup> Although the indemnity principle itself is clear, its application by the courts has been ad hoc. The extent to which the indemnity principle permits costs recovery in pro bono cases is uncertain, especially considering existing case law<sup>64</sup>.

### ***An uneven playing field***

A costs order is not meant to punish, nor is it meant to be a dividend. The possibility of having to pay one's opponent's legal costs discourages unjustified litigation. It also encourages parties to refrain from incurring unnecessary costs, and acts as an incentive for settlement.

Under the current system a litigant who is represented pro bono may not be able to recover his costs even if his claim is successful, whilst still being liable for the other party's costs if his case is unsuccessful. The reverse is that an opponent of a litigant who is represented pro bono may benefit from not having to pay his opponent's costs, even if he is unsuccessful.<sup>65</sup>

Attempts have been made by pro bono advocates through the use of a particular form of conditional fee arrangements to level this inequitable setup. The client is required to

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<sup>61</sup> Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (2009) at 87.

<sup>62</sup> *Baker & Anor V Kearney* [2002] NSWSC 746 (total estimate of the costs to be paid by the client was furnished by counsel, but the agreement did not oblige the payment of fees).

<sup>63</sup> "Where a party to an action has an agreement with their legal adviser that they do not have to pay any costs, then the general law principle states that that party cannot recover party and party costs against their adversary": *McCullum v Ifield* [1969] 2 NSW 329 at 330 per Taylor J citing *Gundry v Sainsbury* [1910] 1 KB 645

<sup>64</sup> *Wentworth v Rogers* [2006] NSWCA 145 at 132; *King v King* [2012] QCA 81.

<sup>65</sup> *The Final Report of the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice* ("2004 Senate Report"), available at: [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/200204/legalaidjustice/report/ch09.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/200204/legalaidjustice/report/ch09.htm), referred to anecdotal information that suggested that some lawyers use delaying tactics against pro bono litigants, thus recommending 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.

contractually agree to be bound to pay the advocate in the event of being successful and being awarded a costs order.<sup>66</sup> Many matters taken on a pro bono basis may not be of a type where costs orders are being sought or made. For those that are, the experience of the Centre is that these costs agreements have been reasonably successful in establishing an indemnity relationship sufficient for the court to make a costs order. However, current case law contains considerable uncertainty and ambiguity as to what constitutes the type of conditional costs agreement that accommodates the indemnity principle.<sup>67</sup>

Some of the other benefits of a costs system based on the indemnity principle are also unavailable to a pro bono litigant. In regular litigation, the possibility of losing and thus being liable for a costs order forces litigants to conduct their cases expediently and functions as a deterrent against those cases comprising little merit. In some cases, the prospect of an adverse costs order encourages litigants to settle out of court. In the context of pro bono representation however, where the opposing party knows that, based on the doctrine of compensation, they will not be liable for a costs order, such cost deterrents do not exist. Thus the pro bono litigant is in the disadvantageous position of having this vulnerability exploited.<sup>68</sup>

### ***Court pro bono referral schemes***

In addition to inequitable outcomes that depend on whether the participants to a court proceeding can afford to pay for the services of a lawyer, there is also inconsistency when recovering costs in different courts. When providing legal assistance under the Pro Bono Assistance Schemes in each of the Federal Court, Federal Circuit Court and the Supreme Court of NSW, the rules of court provide that the advocate is entitled to recoup from the other party the amount of any costs recovered through a costs order. However lawyers acting through other courts or pro bono referral schemes do not share this entitlement. There is no rationale for this disparity. In both cases, pro bono legal services are extended to provide access to justice for those who would not otherwise be able to obtain it. Rectifying these discrepancies would further assist with the goal of providing greater access to justice.

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<sup>66</sup> John Corker, 'Funding Litigation: The Challenge' (2007) *UNSWLRS* 2.

<sup>67</sup> *Wentworth v Rogers* [2006] NSWCA 145 at 132; *King v King* [2012] QCA 81

<sup>68</sup> The 2004 *Senate Report on Access to Justice* referred to anecdotal information that suggested that some lawyers use delaying tactics against pro bono litigants, thus recommending 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.

The Centre, along with several other public interest and pro bono referral organisations,<sup>69</sup> has advocated for legislative change regarding the recovery of costs in pro bono matters in the New South Wales Law Reform Commission’s Inquiry into Security for Costs and Associated Costs Orders.<sup>70</sup> In its Report on the inquiry, the NSW Law Reform Commission concluded that it sees “... merit in providing courts with the ability to make a costs order in cases where a lawyer is acting pro bono. We are particularly influenced in this respect by the importance of pro bono legal advice, assistance and representation in securing access to justice. We are also influenced by the role played by costs orders in encouraging responsible conduct on the part of litigants.”<sup>71</sup>

## **Recommendation**

The Centre submits that the indemnity principle should be abrogated, to the extent necessary, to ensure that litigation costs can be awarded in pro bono cases. This should be regardless of whether or not a litigant has been referred for assistance through a court –based pro bono referral scheme.

### **b) Court fees**

*The Commission invites comments on the appropriateness of court fees.*

*What factors should be considered in determining court fees?*

The Centre submits that being acted for on a pro bono basis should be considered in determining court fees, and should actually constitute a category of persons who are exempt from court fees.

Current court rules provide for exemptions from having to pay filing fees for certain categories of persons. For example those who are exempt under the Federal Court Rules include:

- (a) Those granted Legal Aid
- (b) Those granted assistance under Part 11 of the Native Title Act by a representative Aboriginal or Torres Strait Islander body.
- (c) Holders of

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<sup>69</sup> For example the Public Interest Law Clearing House Victoria and the Public Interest Advocacy Centre (PIAC).

<sup>70</sup> New South Wales Law Reform Commission: *Report 137: Security for Costs and associated Costs Orders*, December 2012, available at: [www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r137.pdf)

<sup>71</sup> *Ibid*, 62.

- a health care card;
- a health benefit card;
- a pensioner concession card;
- a Commonwealth Seniors health card;
- another card issued by the Department of Family and Community Services (Not Family Court), Centrelink or the Department of Veterans' Affairs that certifies entitlement to Commonwealth health concessions;

(d) an inmate of a prison or a person otherwise lawfully detained in a public institution;

(e) a child under the age of 18 years;

(f) a person in receipt of Youth Allowance, Austudy or ABSTUDY

Anecdotal evidence from pro bono clearing houses around Australia, and from law firm pro bono programs indicates that most low-income Australians that are acted for on a pro bono basis are exempt from the payment of fees.

However, those who are being acted for on a pro bono basis but do not fall within the above exempt categories, for example asylum seekers, are only able to avoid paying these fees by seeking a waiver or deferral of the payment of the fee. They can request the Court to exercise its "financial hardship" discretion on the basis that payment of the fee would cause them to suffer financial hardship having regard to their income, day-to-day living expenses, liabilities and assets.

This is a lengthy and, for people already experiencing disadvantage, a difficult process with uncertain prospects of success. It requires completion of a four-page Statement of Financial Position and attesting in an affidavit about the veracity of the information provided.

A recent example involves an asylum seeker in Australia on a temporary visa who was advised that his application for waiver or deferral was refused on the basis that he had \$4000 in the bank, which he had recently earned working long hours in the kitchens of a bakery, despite the fact that he had no other assets. Given the difficulties that appealing the decision to the Administrative Appeals tribunal would have caused the applicant, the law firm representing him on a pro bono basis was considering paying the court fees on his behalf.

The Centre submits that adding a further exempt fee category to the current rules, specifically "those that are being acted for on a pro bono basis", would provide greater efficiency for the court and the applicant in dealing with persons being acted for on a pro bono basis. It would save time by avoiding the need to complete and assess lengthy applications submitted for fee waiver or deferral, and bring pro bono matters into line with the current treatment of matters where there is a grant of Legal Aid.

The Centre made the same submission to Senate Legal and Constitutional Affairs Reference Committee's Inquiry 'Impact of federal court fee increases since 2010 on access to justice in Australia'.<sup>72</sup> Although the submission was rejected by the Committee by majority, the Committee Chair Senator Penny Wright, recommended that "a new fee exemption category be introduced in the federal courts, for clients who are being represented on a pro bono basis. This exemption should be limited to certified pro bono assistance schemes, prescribed in regulations, or cases where the pro bono lawyer certifies that they are acting pro bono and their client cannot otherwise afford legal representation."<sup>73</sup>

## 4: THE COSTS OF ACCESSING CIVIL JUSTICE

### GEOGRAPHIC CONSTRAINTS

The Centre's submission on geographic constraints and the use of technology is primarily informed by consultations undertaken during the research for its resource *Pro Bono Partnerships and Models: A Practical Guide to What Works* ("What Works") published May 2013, and its pro bono partnership with Hobart Community Legal Service ("HCLS") and DLA Piper to provide legal assistance remotely via Skype video-conferencing technology ("the NBN project").

The NBN project was funded by the National Broadband Network (NBN) Regional Legal Assistance Program from 2012 to 2013 to trial NBN-based initiatives that seek to strengthen and increase legal assistance delivery in regional and remote areas. In cases where HCLS did not have the expertise to provide advice, Skype video-conferencing technology was used to enable lawyers from DLA Piper's Melbourne office to provide assistance to clients referred by HCLS from its outreach service in Sorell, an area of considerable social disadvantage outside of Hobart.

#### ***How important is face-to-face contact with lawyers or court officers?***

From the perspective of clients, the importance of face-to-face contact with lawyers varies with the individual needs of the clients, and how comfortable they are with other modes of

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<sup>72</sup> National Pro Bono resource Centre: *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the impact of Federal Court fee increases since 2010 on access to justice in Australia*, April 2013, available at: <http://www.nationalprobono.org.au/page.asp?from=4&id=54>

<sup>73</sup> The Senate Legal and Constitutional Affairs Reference Committee: Report on the inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia, June 2013, recommendation 6, 57.

communication. For example, there may be particular client groups that are less familiar or less comfortable with communicating using video-conferencing. During the NBN Project, the project partners found that overall the clients seemed comfortable with speaking to a lawyer via video and demonstrated a high degree of acceptance of this mode of communication. The lawyers from DLA Piper reported that clients were at greater ease when they could see their lawyer, and through the course of the interview, were able to relax and provide full and candid instructions. However, there were individuals who expressed reluctance to use it, specifically older clients and one client with a mental illness. Views expressed during consultations for *What Works* were consistent with this experience, for example: “Young people are comfortable with technology and in many cases prefer using mobile/online forms of communication.” (Community legal centre solicitor)

From the perspective of lawyers assisting people experiencing disadvantage, the outcomes achieved from face-to-face contact with a client cannot be fully replicated with technology. For example lawyers from DLA Piper, who were taking instructions from clients and providing advice during the NBN Project, reported the advantage of video-conferencing over communicating by telephone was the ability to observe the client’s body language and visual cues. However they also reported that it was not possible to establish the same level of rapport with the client over Skype as in person, which made taking instructions more difficult. They also found that they could not detect nuances of body language and facial expression which would allow a lawyer to accurately gauge, for example, whether or not a client is telling the truth. The lawyers felt that having a HCLS solicitor present with the client was essential to ensuring the client’s needs could be fully identified and assessed.

### ***Does a lack of physical proximity represent a barrier to accessing justice?***

The greater potential for impaired communication using non-face-to-face methods like phone and video-conferencing, could represent a barrier to accessing justice. While some may argue that having some access to legal advice is better than none at all, views expressed during consultations for *What Works* warned of the potential risks of providing advice without fully understanding the client’s situation or advice that is not fully understood by the client, for example:

*“This is particularly relevant for clients who may face cultural and/or language barriers in communicating effectively. The wrong message might be transmitted by either the client or provider if not conducting the initial client interview fact-to-face. Even if there is a delay in making an appointment it is better to have a face-to-face meeting then do follow up by phone.”*  
(Community legal centre solicitor)

### ***To what extent can technology overcome geographic barriers?***

The commonly anticipated challenges to the use of video-conferencing technology to connect people who are geographically isolated with legal service providers are focused around the reliability of the technology (video freezing, dropouts etc) and the familiarity and comfort of those using it. The reluctance of both clients and lawyers to speak on video and their preference for the phone over video-conferencing has been well documented.<sup>74</sup> The views expressed during the NBN Project and consultations for *What Works* were consistent with this finding, for example:

*“There is a general antipathy in the sector towards provision of legal assistance online with an agenda of maintaining the priority of face to face services.” (Community legal centre solicitor)*  
*“We felt that we needed to make an appointment to make a call on Skype, because Skype would be more of an intrusion on the lawyers helping us at DLA Piper, but we could simply call on the phone.” (HCLS solicitor)*

However, the NBN project found that an additional and perhaps even more significant consideration is the model of service delivery in which the technology is used, which needs to be developed with an understanding of how the use of a remote communication method changes the way legal assistance processes work. While the NBN project used video-conferencing, the issues apply similarly to use of the phone to provide advice remotely.

Without a lawyer physically present, the clients need to be strong communicators, independent and resourceful enough to clearly explain their situation and take any required actions on their own. If the clients are not able to do this (which is more likely to be the case if they are highly vulnerable and disadvantaged), a significant investment of resources (probably lawyers) is needed at the client end to support their part in the process. A mid-sized law firm coordinator who was consulted for *What Works* explained that “Particularly if online advice is to address unmet legal need in RRR areas, there would need to be a person acting as a filter for matters who could ensure that all the relevant background information on the client’s matter is obtained.” The NBN Project partners found that having two sets of solicitors, with solicitors at both ends needing to be on top of the matter to effectively manage the case, was inefficient and frustrating.

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<sup>74</sup> Law and Justice Foundation, *Legal Assistance by Video Conferencing: What is Known?* (2011), at [www.lawfoundation.net.au/ljf/site/articleIDs/B0A936D88AF64726CA25796600008A3A/\\$file/JI15\\_Videoconferencing\\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/B0A936D88AF64726CA25796600008A3A/$file/JI15_Videoconferencing_web.pdf)

The extent to which video-conferencing technology can overcome geographic barriers is not currently as great as many may hope, especially for people experiencing disadvantage, but there is scope for the range of suitable matters/situations to grow. This growth is likely to come from the group of clients who are becoming more familiar with video-conferencing as a form of communication, and otherwise have the skills and confidence to independently participate in the legal assistance process.

However, as HCLS experienced, for clients who are not independent, not resourceful, who have trouble communicating their issues/needs, and need support to take action, the fact that they are comfortable with technology will not obviate the need for the support of a legal service provider who can be present to help them, for example, to find the relevant document at the Land Titles Office. For these clients, a significant investment would need to be made in providing the necessary support to ensure the effectiveness of the use technology, and raises questions as to the extent to which use of video-conferencing technology is actually a cost-effective solution.

While the use of technology to overcome geographic barriers is commonly associated with the use of video conferencing to allow a client to communicate with a lawyer remotely, technology has been successfully used in other ways to support access to justice, for example: the delivery of professional development training to CLC solicitors, and the provision of initial advice and referral.<sup>75</sup>

The NBN Service was one of several pilot projects funded by the NBN Regional Legal Assistance Program. The Centre notes that the development of such technology-based services is still in its infancy and the vast majority of people with unmet legal needs in regional and remote areas of Australia do not currently have access to this kind of service.

## 11: IMPROVING THE ACCESSIBILITY OF COURTS

### THE USE OF TECHNOLOGY

The Centre's submission on the use of technology is primarily informed by consultations undertaken during the research for its resource *Pro Bono Partnerships and Models: A Practical Guide to What Works* ("What Works"), and its pro bono partnership with Hobart Community Legal Service ("HCLS") and DLA Piper to provide legal assistance remotely via Skype video-conferencing technology ("the NBN project").

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<sup>75</sup> See the section on the use of technology.

The NBN project was funded by the National Broadband Network (NBN) Regional Legal Assistance Program to trial NBN-based initiatives that seek to strengthen and increase legal assistance delivery in regional and remote areas. In cases where HCLS did not have the expertise to provide advice, Skype video-conferencing technology was used to enable lawyers from DLA Piper’s Melbourne office to provide assistance to clients referred by HCLS from its outreach service in Sorell, an area of considerable social disadvantage outside of Hobart.

***How can technology be best used to improve the efficiency and scope of service delivery?***

The section in *What Works* on the use of technology explains that it is important to assess whether there is actually a gap in legal services that a technology-based service can address, to ensure that it is not duplicating an existing service, and that the need is one that is appropriate for the use of the particular technology-based service (for example, video-conferencing).

In a consultation for *What Works*, the coordinator of the Connecting Country to City Legal Clinic Service which connects lawyers from Minter Ellison in Adelaide with disadvantaged clients in RRR areas of South Australia warns that “If an issue can be dealt with over the phone, it is preferable to use the phone. Clients don’t like being in to a host organisation for a one minute simple issue that could have been dealt with over the phone.”

One of the community legal centres consulted for *What Works*, which demonstrates how technology can be effectively used to fill a gap and improve the efficiency and scope of service delivery, is the National Children’s and Youth Law Centre (NCYLC). NCYLC provides an interactive internet-based legal advice and information service aimed at assisting children and young people.

LawMail is the NCYLC’s national legal advice service, provided by email, which responds to around 1000 requests for assistance from all jurisdictions across Australia each year.<sup>76</sup> It also maintains a multi-jurisdictional website, “LawStuff”,<sup>77</sup> which is regularly updated to include comprehensive information on a diverse range of topics for children living in different states and territories, and an interactive animation feature “CourtStuff”, which provides valuable insight in a visual form about what young people can expect when going to court.

As an indicator of the reach of these services, this financial year the NCYLC expects the number of unique visitors to Lawstuff to exceed 500,000 Australians for the first time, having been visited by approximately 450,000 unique visitors in 2012/13. That figure represents 450,000

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<sup>76</sup> <http://www.lawstuff.org.au/lawmail>

<sup>77</sup> [www.lawstuff.org.au](http://www.lawstuff.org.au)

people who received legal information and possibly referral, and who were then prompted to seek legal advice via LawMail if their circumstances indicated that they needed it.

This use of technology improves the efficiency of service delivery because it provides early intervention and refers clients to the most appropriate service provider (whether legal or non legal), thereby increasing the likelihood that the issue will be resolved before it becomes a larger problem and avoiding the “referral roundabout”. It improves the scope of service delivery by offering a mode of seeking and obtaining advice that is attractive to its target market. The Director of NCYLC, Matthew Keeley explains that “Young people are comfortable with technology and in many cases prefer using mobile/online forms of communication. The trend is towards the use of mobile networks/smart phones, especially as they become cheaper, with over 90% of young people between 16 and 18 years of age using mobile phones”.

NCYLC’s national web presence means that clients can access information no matter where they are in the country and what time of the day it is, and obtain advice via LawMail within six days, with urgent cases being dealt with even more quickly. As the advice is in email form, it is also highly accountable.

The NCYLC model could be applied more broadly, for example as an addition to existing telephone-based legal information and referral services like Law Access in NSW.

***What opportunities exist to increase collaboration across the sector to further develop the use of technology?***

The NCYLC model is a good example of how collaboration in a technology-based project can draw significant pro bono resources into the legal assistance sector. The LawMail service operates with the assistance of around six ‘cyber volunteers’ each day who login remotely, mostly from the five capital city offices of King & Wood Mallesons to the LawMail service to access emails from young people requesting assistance.

The NCYLC has found the use of email (in preference to face to face or phone) to be an ideal medium for leveraging the impact of the NCYLC’s pro bono volunteers. This use of technology has allowed pro bono partners, King&Wood Mallesons, Telstra and ASIC, to provide a greater pro bono contribution than they would otherwise have been able to if their lawyers had been required to attend NCYLC in person. Legal Counsel at Telstra M&A Legal Services, Fiona Robson, who coordinates Telstra’s involvement with the Project, explained that the “Cyberlaw Project is the perfect project for in-house counsel as it involves a relatively small time commitment and the work can be done via the internet.”

***What opportunities are there to use technology to cost-effectively expand services, particularly for regional and remote Australia?***

While the use of technology to overcome geographic barriers is commonly associated with the use of video conferencing to allow a client to communicate with a lawyer remotely,<sup>78</sup> the most successful aspect of the NBN project was actually the use of Skype to deliver professional development training sessions, leveraging existing DLA Piper training modules that could be adapted to suit HCLS's needs.

HCLS has previously found it difficult to obtain training/mentoring assistance locally, given that there are few practitioners in Tasmania with the requisite level of expertise in the required area of law, and the actual and perceived risk of conflicts within a small jurisdiction. Being able to access the high quality training resources of a large law firm remotely has greatly improved the capacity of HCLS to expand the subject areas and cases in which it can assist its clients. The opportunities to use technology in this manner are significant given that it is a convenient way for law firms to provide pro bono assistance.

For example, HCLS lawyers who attended the training session on industrial relations law on 12 December 2012, said that the NBN-based service worked very well for the purpose of training. The video technology, and the speed and reliability of the connection, allowed them to engage in an interactive session, with real-time two-way question and answer style sections of the training, in addition to one way information provision in the presentation.

All of them found the training immediately useful to their ongoing case work. They have since reported that it increased their confidence and ability to undertake matters involving industrial relations law, which allowed them to deal with an influx of matters and provide a number of advice sessions in response to changes to the Fair Work Act that came into force in January 2013. This interaction also helped to build rapport between the HCLS and DLA Piper lawyers which facilitated an ongoing mentoring relationship that has continued beyond the pilot project period.

The NCYLC model of providing early legal information, preliminary legal advice and referral to legal representation and other non-legal service providers, as well as support for self-represented individuals or those being represented by a non-lawyer, could be applied to assist people in regional and remote areas of Australia. This would be akin to the Law Access model in

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<sup>78</sup> See the previous section on geographic constraints.

NSW,<sup>79</sup> but with advice provided by email instead of phone, and could be applied either nationally or, like Law Access, at a State or Territory level.

This model has the capacity to radically enhance access to legal information and referral to appropriate services, and appears to fill need for high level information, advice and referral across the justice system. For example the NCYLC has recently entered into an arrangement with the Australian Catholic University (ACU) to provide a legal service to its students across five campuses, three States and one Territory. In its request for tenders, the ACU identified that email advice from a remote service provider (that is, a provider not on campus) was its preferred model. This demonstrates that there exists a demand for this type of legal service, which primarily focuses on provision of legal information, referral and preliminary advice.

### ***What other groups might benefit from the delivery of cost-effective outreach and online services?***

In addition to people who are geographically constrained from accessing legal services, the delivery of online services might benefit people with limited mobility, for example people with disabilities.

Online services will also be of benefit to people who simply prefer the online medium. The Director of NCYLC explained that “Many young people are concerned about confidentiality and would prefer to remain anonymous. The online medium, which young people are generally confident navigating, allows clients to obtain legal advice using an anonymous web persona.”

During the NBN Project, HCLS solicitors were actually surprised at the high level of acceptance and comfort which most clients demonstrated with the use of video-conferencing. DLA Piper solicitors reported feeling that through the course of the Skype interview, clients were able to relax and provide full and candid instructions.

However as explained earlier, it is important to assess whether the service can be effectively provided using the online medium considering the nature of the matter and the needs of the client. For example it might work better for information, initial advice and referral than for ongoing casework and representation where more client support is needed.

People trying to resolve their legal issues may also benefit from the access to information that online information and initial advice services (like the model that NCYLC provides) can provide

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<sup>79</sup> See <http://www.lawaccess.nsw.gov.au/>

to non-legal advocates and other support people who may be directly assisting them, such as social workers or financial counsellors.

### ***Do some groups face particular obstacles in using online services?***

The experience of HCLS during the NBN Project was that older people and people with a mental illness were reluctant to appear on video and communicate with a lawyer via video-conferencing, but were happy to be in the room providing instructions to the HCLS solicitor and having them speak to the DLA Piper solicitor.

## 9: USING INFORMAL MECHANISMS TO BEST EFFECT

### ADR

As part of its research for the report, *Alternative Dispute Resolution: Assisting people experiencing disadvantage* (“the Centre’s ADR Report”), the Centre consulted stakeholders on the issue of whether unequal power between the parties can be addressed with legal assistance, particularly where one party is very disadvantaged. The report aimed to identify opportunities for pro bono lawyers to improve access to justice for disadvantaged and marginalised people by assisting them in ADR processes.

### ***How might ADR be strengthened to improve access to justice?***

The Centre’s ADR Report found that in the context of assisting people experiencing disadvantage to resolve disputes, ADR practitioners and lawyers need to have a strong general knowledge about the legal issues relating to poverty and marginalisation, as well as the types and sources of disadvantage. It also suggested that the actual independence, professionalism and skill of the ADR practitioner may be the most important factors in ensuring a fair and effective ADR process. Therefore, ensuring the appropriate training and experience of ADR and legal service providers (and perhaps accreditation requirements that reflect the need to possess knowledge of the issues affecting disadvantaged parties) is a way of strengthening ADR to improve access to justice.

During a consultation interview for the Centre’s ADR Report, Celia Tikotin (Director, Legal Practice, Consumer Action Law Centre, Victoria) observed that in the consumer credit area, even well trained mediators are unable to redress the power imbalance between parties to mediation if they are not familiar with both the legal issues and practice issues affecting low income consumers. For example, she has found that many mediators who do not know about the inalienability of Centrelink income have encouraged judgment-proof clients to agree to pay an

amount to the other party, when they would not have had to pay anything if their legal rights had been upheld at adjudication.

Denis Nelthorpe (Manager, Footscray Community Legal Centre, Victoria) added that: “Most lawyers, and mediators, concentrate on issues of liability in making decisions. There is now a growing realisation among advocates for low income and disadvantaged clients that liability is not the only issue, or even the main issue, for many of these clients. More often than not the key issue for these clients is ‘capacity to pay’ and the consequences of non-payment. This is a recent development for many in the legal aid sector. In our experience mediators are rarely even aware of the issues let alone the relevant law. This could be overcome by appropriate training but will be a major impediment to the involvement of low income and disadvantaged clients in ADR until addressed by those advocating increased use of mediation.”

Some submissions expressed the view that in some circumstances, legal representation may be the best way to overcome power imbalance between parties in ADR.

*I also recognise that sometimes legal representation is the most appropriate way to address power imbalances particularly for disadvantaged consumers or for those who are unable to advocate on their own behalf. (Public Transport Ombudsman Victoria)*

*...Unequal bargaining power can be managed, if not overcome, with legal representation. There are many examples of David v Goliath disputes in which the less powerful party wins. That is what lawyers for weaker parties strive to do. (Victorian Bar ADR Committee)*

*The role of legal and non-legal advocates is also very important in ... redressing the power imbalances through the way they support the process and in explaining and/or advising the client. The legal practitioner must be free to intervene if their client’s interests are not being met. (Women’s Legal Services NSW)*

*We strongly disagree that an appropriately trained ADR professional could obviate the need for representation for disadvantaged parties in ADR. (Large law firm pro bono coordinator)*

The Centre’s ADR Report recommends that, given the significant numbers of lawyers who are already trained in ADR processes (with some already accredited as ADR practitioners) that these lawyers should be encouraged to maintain their skills and accreditation and act pro bono either as an ADR practitioner or as a lawyer acting for a client in an ADR process. It explains that a critical part of developing capacity in this area is the provision of more effective coordination of those wishing to contribute their skills on a pro bono basis.

***In what circumstances or settings is it appropriate (or not) to facilitate greater use of ADR in resolving civil disputes?***

The Centre's ADR report also found that it was not possible to equalise some aspects of entrenched disadvantage relating to a client's circumstance and that sometimes a determinative process may best serve the interests of the client.

It drew on community legal centre experience that some disputes, by their nature, will always be more appropriately resolved by adjudication and that disadvantages faced by CLC clients (due to poverty, mental illness, homelessness, language difficulties, limited literacy or other factors) can prevent them from participating in ADR on an equal footing.

Views expressed in submissions echoed the concern that deeply entrenched disadvantage may not be able to be adequately addressed with legal advice or representation, and cautioned that there are some cases where power imbalance is so entrenched that they may be unsuitable for ADR.

*There is also the disadvantage many of our clients suffer from a lifetime of relative powerlessness. They have never been successful in asserting their rights previously and operate on the assumption that they will not be able to do so in the context of ADR either.*

*Pro bono legal representation can help equalise the position of clients so far as process and availability of assistance in litigation goes but cannot equalise other aspects of disadvantage related more closely to the client's life circumstances and outlook. A skilled ADR professional will not be able to overcome the client's life circumstances and outlook either.*

*While a pro bono lawyer could play a part in ensuring the process of ADR was fair when bargaining power is unequal, we are less convinced that a pro bono lawyer could address the actual and perceived inequality that can result in ADR being more disadvantageous to pro bono clients. (Large law firm pro bono coordinator)*

*The Society would caution against attempts to redress the power imbalances in certain cases, for example in family law matters where domestic violence is involved. We note that there is no requirement to undertake Family Dispute Resolution if there has been domestic violence or child abuse. In certain situations, mediation is not a suitable option though a highly skilled ADR practitioner could manage such power imbalances.*

*We also note that low income parties who hold genuine claims are often best served by getting their 'day in court' quickly in the low-cost self-representing tribunals or forums where their cases are determined. In some ways this can be an empowering process for many of these parties. In our view, low income clients need swift and appropriate advice on how to get to this point as quickly as possible. (Queensland Law Society (Matt Dunn, Principal Policy Solicitor))*

*Not all cases are suitable for mediation and it is important for each case to be fully assessed to determine suitability. An irremediable power imbalance may be a reason to assess a case as*

*unsuitable for mediation or to suspend a mediation if it becomes apparent during the mediation.  
(Victorian Department of Justice)*

Concern was also expressed that ADR should not become a lesser form of access to justice for people who cannot afford to go to court.

*We are concerned that the ever-increasing push for ADR is part of a wider reduction in access to court for people in our pro bono client base. A two-tiered justice system is developing where disputes worth more money receive the benefit of the rigour of the court system and the disputes our clients are involved in are accorded such rigour less and less. A small (in money terms) dispute may have a significant impact on the life of an individual. (Large law firm pro bono coordinator)*

**6 November**  
**National Pro Bono Resource Centre**