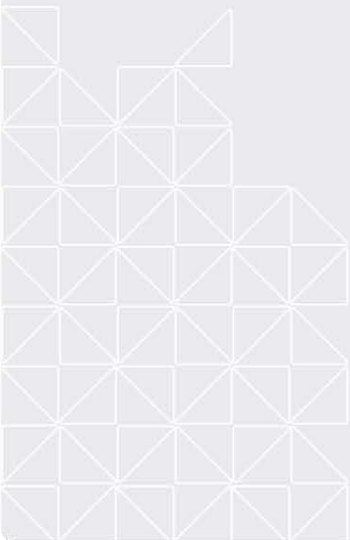


Access to Justice Arrangements

Submission to the Productivity
Commission

November 2013



1. About Justice Connect

Justice Connect is an independent not-for-profit organisation based in Melbourne and Sydney. It was formed when the Public Interest Law Clearing House NSW (established in 1992) and Public Interest Law Clearing House Victoria (established in 1994) merged on 1 July 2013.

Justice Connect provides access to justice to people experiencing disadvantage and the community organisations that support them, by connecting them with pro bono lawyers who will assist them for free. We also provide training and support for pro bono lawyers and community organisations and, in some circumstances, our lawyers provide legal advice directly to clients.

Justice Connect has access to the pro bono resources of thousands of lawyers, including at our 50 member law firms. By working with pro bono lawyers to develop and strengthen pro bono capacity and strategically match this with unmet legal need, Justice Connect avoids duplication, enables access to legal services for clients and delivers a holistic response to disadvantage.

Justice Connect's programs

1. Referral service

Justice Connect makes pro bono referrals to our member lawyers. In Victoria, Justice Connect also manages the Victorian Bar Pro Bono Scheme and Law Institute of Victoria Legal Assistance Service. Most clients have complex legal problems and limited options for obtaining legal assistance, having exhausted or being ineligible for other free legal options.

2. Not-for-profit Law

Not-for-profit Law is a specialist legal service for not-for-profit community organisations, providing information, training, advice and pro bono referrals in more complex legal matters.

3. Specialist outreach legal services:

- **Homeless Law** - for clients experiencing or at risk of homelessness;
- **Seniors Law** - for older clients with a legal issue associated with ageing, including elder abuse; and
- **MOSAIC (Migrant Outreach Services - Advice, Information and Community Education)** - for recently settled migrants, asylum seekers and refugees.

Building and promoting pro bono culture

Justice Connect works to increase the pro bono capacity of the legal profession and to improve the efficiency of pro bono legal work. It builds and engages commitment to pro bono through support and training, specialist advice and partnership with lawyers, and by contributing to public policy about access to justice and the role of pro bono.

Responding to unjust and unfair laws

Justice Connect's work often reveals unjust and unfair laws and policies that may cause or perpetuate disadvantage, or which are unduly complex. It challenges and seeks to change this by suggesting areas for law and policy reform, using evidence provided by its casework and by giving clients a voice and using their stories to highlight the need for change.

2. Executive Summary

Justice Connect welcomes the opportunity to respond to the inquiry by the Productivity Commission into Access to Justice Arrangements.

Justice Connect's core activity is to address emerging and unmet legal need through pro bono legal assistance. We work in areas of law where there are no or limited other options for people. Thus, the very nature of our work is indicative of an insufficient government or private sector responses to legal need. In particular, the bulk of our work is in supporting the civil law legal needs of people experiencing disadvantage, an area where there is often less government funded legal aid and where community legal centres have less capacity to provide assistance.

Justice Connect is therefore well placed to identify gaps in the availability of legal services and barriers to accessing the justice system which exist for those unable to afford legal advice and representation.

This submission is made in the context of our work to facilitate access to justice for people experiencing disadvantage and the community organisations that support them. It is limited to the questions in the Issues Paper that relate to Justice Connect's core work and experience.

3. Response to Issues Paper

Part 2 of Issues Paper: Avenues for dispute resolution and the importance of Access to Justice

Justice Connect endorses the definition of legal need and access to justice contained in the Law and Justice Foundation of New South Wales's report, *Legal Australia-Wide Survey – Legal Need in Australia (LAW Survey)*,¹ This broad definition includes a consideration of the ability of disadvantaged people to:

- obtain legal assistance;
- participate effectively in the legal system;
- obtain assistance from non-legal advocacy and support; and
- participate effectively in law reform process.

Equitable access to justice is central to the effective protection and promotion of human rights in Australia, and includes the right to a fair hearing, to equality of and before the law, and to access justice. The principle of ensuring equitable access to justice underpins a fair and efficient civil justice system and supports the rule of law. Equal access to justice requires equal access to legal services. Pro bono is just one way that people who cannot afford legal services are able to pursue access to justice. The ability to obtain legal representation is a central component of effective access to justice. A range of legal services are available to people who cannot afford to pay for a private lawyer, including legal aid, community legal centres, pro bono, no win no fee firms and speculatively funded litigation.

Justice Connect provides legal assistance to individuals at both ends of the service spectrum: through early identification and resolution of matters through its clinical models and through referrals for pro bono assistance as a service of last resort. The matters are often complex, involving a number of areas of law and a number of intersecting issues.

Justice Connect's focus is the provision of legal assistance through pro bono lawyers. If pro bono lawyers do not have the skills or capacity to assist, then our ability to assist clients is limited. The table below shows that, over the period 2007 to 2011, requests made to Justice Connect (in Victoria) for assistance increased without a corresponding increase in our ability to refer those applicants for pro bono assistance. Justice Connect is acutely aware that where we cannot facilitate pro bono assistance, it is highly unlikely that the client will be able to obtain assistance elsewhere.

¹ Legal Australia-Wide Survey: Legal Need in Australia Law and Justice Foundation of NSW, August 2012, page iii.

Year	Enquiries / Requests	Rejections	Referrals for pro bono Assistance
2007	1792	1280	585
2008	1871	1304	543
2009	2264	1607	685
2010	2080	1502	556
2011	2173	1693	496
2012	1800	1200	400

Part 8 of Issues Paper - Effective matching of disputes and processes

How might people with complex legal issues be better directed to multiple legal and non-legal services to meet their needs? How can services be 'joined-up' to assist in this regard?

Justice Connect's experience confirms that clients with complex legal issues require careful assistance and support to resolve their issues. This may involve more than one legal service provider and one or more non-legal services, such as drug or alcohol counselling, housing services or financial counselling. These referrals also need careful management, to avoid overwhelming the client with disjointed services.

Non-legal services can be an important means of linking people experiencing disadvantage who have unmet legal needs with legal services. The LAW Survey found that most people who seek advice do not consult legal advisors and that they resolve their legal problems outside the formal justice system. Respondents sought advice for only half of all legal problems and took no action to try to resolve 19% of problems. Of the people who did seek assistance for their legal problems, nearly 70% consulted only non-legal advisers in relation to their problems. Nearly 30% of people contacted a health or welfare adviser, representing a substantial proportion of the non-legal advisers consulted in relation to legal issues. A similar finding was observed at the co-located West Heidelberg Community Legal Service and Banyule Community Health. People did not always seek assistance with legal or rights problems but, if they did, they often approached health practitioners or community service agencies in the first instance.²

There are many reasons for this. Some of these legal issues are not recognised as legal issues by clients: for instance, a mother whose child is experiencing chronic, intractable asthma will not realise that it is her landlord's legal responsibility to eradicate mould from her rental housing, which will substantially improve her child's health. In this instance, what appears to be a medical issue is actually caused by a legal issue. By way of contrast, other clients will recognise certain issues as being legal in nature – for instance, proceedings in relation to debt collection – but will not know who to contact for legal assistance. In such circumstances, it is often a health services worker who will first interact with the client: for example, when they present to a hospital's emergency department with recurrent headaches due to stress. On many occasions, clients will not perceive their issues as isolated in nature, or linear problems with a beginning and an end. Thus, their legal problems may be subsumed into their larger social and health problems, and be considered in totality rather than in isolation.³

It is therefore essential that non-legal professionals are able to identify that individuals need legal assistance and to know where to send them for assistance. Justice Connect has long been aware of the key role of non-legal service providers in supporting an effective response to unmet legal need. Our outreach services – Homeless Law, Seniors Law and MOSAIC (for newly arrived migrant communities in inner Western Sydney) – are located within non-legal service providers. Justice Connect invests significant time and resources into assisting non-legal professionals to understand the nature of a legal issue and the legal assistance sector through training and the introduction of tools such as legal health checks.

² Mary Anne Noone, 'Integrated Legal Services: Lessons from West Heidelberg CLS' *Alternative Law Journal*, vol 37(1), page 26.

³ *Ibid* at page 27.

Homeless Law

Homeless Law (formerly the Homeless Persons' Legal Clinic) was established in 2001 in response to the unmet need for targeted legal services for people experiencing or at risk of homelessness. It provides holistic legal services to chronically vulnerable and disadvantaged people who are homeless or at risk of homelessness. Homeless Law's mission is to prevent homelessness and reduce disadvantage, by providing individual legal services which recognise that tailored and targeted intensive strategies are necessary for people with complex legal and non-legal needs.⁴

Many of the clients of Homeless Law have complex legal needs, which intersect with non-legal needs. In 2011, a file review of over 400 open clinic files revealed that:

- 24% of our clients have severe mental health issues;
- 23% have drug and alcohol dependence issues; and
- 17% experience multiple complex needs.

In response, the Homeless Law service model involves:

- **Outreach based service:** focussing on accessibility and early intervention, we have 8 legal clinics located at services already accessed by clients experiencing or at risk of homelessness, including emergency accommodation and other community service providers. Legal services are provided by over 400 pro bono lawyers from member law firms;
- **Building service capacity:** building the capacity of pro bono lawyers and advocates to assist with legal issues experienced by people experiencing (or at risk of) homelessness. Providing training, resources and ongoing support for pro bono lawyers who work within and alongside the communities they serve;
- **Holistic services:** working with the Homeless Law social worker to provide integrated and holistic assistance to highly vulnerable clients and developing relationships with a range of support services in order to improve individual outcomes; and
- **Evidence based advocacy:** our casework experience gives us insights about systemic issues experienced by our clients and we advocate for change based on this evidence.

Legal health checks

In addition to co-location, Justice Connect utilises legal health checks in its outreach services. Legal health checks are generally a form with a basic 'tick box' series of questions to enable non-legal professionals to identify a client's legal issues and direct the client to an appropriate response.⁵ They enable non-legal professionals to:

- have conversations with their clients about legal issues;
- identify legal issues; and
- understand how to respond to legal issues.

Justice Connect's Homeless Law service has developed a Legal Health Check form and a Pre-Legal Health Check Survey. The Legal Health Check form is provided to non-legal staff at the agencies that host Homeless Law's outreach clinics and at agencies that refer clients to Homeless Law. In order to encourage the use of the Legal Health Check, a Homeless Law team member attends each agency and meets with the non-legal staff to provide an overview of Homeless Law's services. During these meetings, Homeless Law requests that staff complete a 'Pre-Legal Health Check Survey' in order to identify gaps in their knowledge and opportunities for training. Completed Legal Health Checks are sent to Homeless Law and, depending on the issues identified, individuals will be booked for an appointment with Homeless Law or referred to a more appropriate service.

Advocacy-Health Alliance Network

Drawing on our experience with co-located outreach services, in 2012 Justice Connect assisted in the formation of the Advocacy-Health Alliance Network (**AHA Network**). The project is housed at Justice Connect. The Network aims to build understanding of the importance of partnerships between legal and non-legal services that go beyond co-location to a holistic response to client/patient need.

⁴ Legal Australia-Wide Survey: Legal Need in Australia Law and Justice Foundation of NSW, August 2012, page 238.

⁵ See an example of a legal health check at Appendix 2. Boston Medical Legal Partnership has developed a tool called "I-HELP" National Center for Medical Legal Partnership, 'Implementing the Core Components of MLP' in *Starting Your Own Medical-Legal Partnership* George Washington University, November 2012 at page 15.

In particular, the objective of the AHA Network is to grow and support the Advocacy-Health Alliance model of service delivery in Australia. This model is based on the United States' innovation of Medical-Legal Partnerships. This healthcare delivery model incorporates legal assistance as an integral element of the healthcare team.⁶ Health professionals work together with lawyers to identify and to address legal issues that impact upon a patient's health⁷. Health professionals are trained to identify legal problems and legal professionals form part of a client's casework team. This can include use of tools like legal health checks. This helps ensure that the intersecting legal and non-legal problems of the client/patient can be addressed quickly and holistically. These collaborations also lead to the identification of systemic issues so that together health care professionals and lawyers can advocate for change.

In one US study of a pilot Medical Legal Partnership, 85% of participants had not used legal resources before they were enrolled in the pilot project, and 78.8% of participants were not aware of legal resources they could access. Most of the participants in the program had multiple legal and social issues; of the participants, two-thirds stated that their legal issues were entirely or partially resolved through the program.⁸

Co-location of legal and non-legal services is not necessarily a novel concept in Australia. For instance, the West Heidelberg Community Legal Service (mentioned above) has been co-located with Banyule Community Health for over thirty years. However, service delivery models like the Advocacy-Health Alliance model are increasingly being recognised as an effective way in which services can be joined-up to assist patient-clients to meet their legal and non-legal needs effectively and through which the potential of co-located services can be enhanced.

Part 12 of the Issues Paper – Effective and responsive legal services

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

It is difficult to determine the amount of pro bono work done in Australia and Justice Connect is not in a position to speculate on this. Data from firms quantifying pro bono work is not necessarily indicative of how many marginalised and disadvantaged clients are assisted through pro bono, given the different definitions and measures of pro bono used by different law firms.

However, based on the past reported statistics available on pro bono work from the larger Australian firms, it appears that they add around 7% to 8% to the capacity of free legal services through their total pro bono legal work.⁹ Given that less than 40% of this reported work was done for individuals (the remainder being for not-for-profit organisations), their pro bono work for individuals makes up less than 3% of the capacity of legal assistance services.¹⁰ The percentage from that work actually performed for marginalised and disadvantaged clients is expected to be even lower.

In addition, as noted earlier, pro bono is just one of a number of sources of legal assistance for people experiencing disadvantage. By far the majority of such people are assisted through legal aid commissions and community legal centres. In the case of civil law, many people are assisted by 'no win no fee' arrangements in cases where a sum of money by way of compensation is available. Despite this spectrum of legal assistance services, there is still significant unmet legal need. Funding for legal aid commissions and community legal centres falls significantly short of what is required to respond to legal need. As government funding reduces, there is greater demand for pro bono. For example, funding pressures forced Victoria Legal Aid to change its guidelines for funding for criminal and family law in 2012. This has resulted in a significant increase in the number of requests Justice Connect received in those practice areas in 2012-2013. We have struggled to refer those matters, particularly family law cases, which can often be complex and resource intensive and not easily placed with pro bono lawyers. In 2013 we conducted a survey of family law practices to gauge the appetite and

⁶ Elizabeth Tobin Tyler et al (eds) *Poverty, Health and Law, Readings and Cases for Medical-Legal Partnership* (Carolina Academic Press, 2011), at page 74.

⁷ The LAW Survey above documents the adverse impacts legal problems have on people's lives, including financial strain (29%), stress-related illness (21%), physical ill health (20%), relationship breakdown (10%) and having to move home (6%) at page 83.

⁸ Dana Weintraub, et. al. 'Pilot Study of Medical-Legal Partnership to Address Social and Legal Needs of Patients' *Journal of Health Care for the Poor and Underserved*, Supp: *Social Determinants of Children's Health*, vol. II, 21.2 (May 2010), at page 157-168.

⁹ Hugh De Kretser, Fiona McLeay & David Hillard, *Pro Bono Reflects Social Gap*, *The Australian*, 9 November 2012, p 33.

¹⁰ *Ibid.*

capacity for doing this work pro bono. The survey results indicated a low probability of successfully referring family law cases to most firms. Pro bono is clearly not the answer to unmet legal need and cannot 'fill the access to justice gap' created by reduced government expenditure on legal services.

Despite the scale of the unmet legal need, and the relatively small scale of its capacity to respond, pro bono legal services do have an important role to play in providing access to justice and responding to unmet legal need. This is particularly the case where pro bono work and pro bono lawyers are managed effectively, to avoid overlap with other free services and ensure that applicants are directed to the most appropriate service, including a community legal centre or a no-win-no-fee firm, before accessing pro bono assistance.

In particular, pro bono can play an important role in areas including civil law, human rights and discrimination which often fall outside legal aid and community legal centres' expertise or capacity. These areas of law are typically within the expertise of private law firms and comprise a significant component of firms' work for disadvantaged individuals. The amount of pro bono undertaken, and the specific areas of law covered, are discussed further below in response to the question '*How much pro bono is currently undertaken, by whom and for whom?*'. A considerable amount of the pro bono work which is undertaken by the private legal profession is done for not-for-profit community organisations, which is also discussed below.

There is limited pro bono capacity in areas such as criminal, family and immigration law. There are a number of reasons for this. First, these areas of law have typically been serviced by legal aid and community legal centres and there is reluctance among pro bono lawyers to move into these areas as government funding fails to keep pace with need. Secondly, the medium and large sized law firms that typically operate structured pro bono programs rarely have expertise in criminal or family law, or have lawyers who are also migration agents. Finally, the smaller firms and sole practitioners that do the bulk of criminal and family law do so under grants of legal aid or charge reduced fees to people experiencing disadvantage. They have very limited capacity to undertake pro bono work in addition to this work.

Finally, pro bono should not be viewed as exclusive from other sorts of assistance. For example, Justice Connect and Victoria Legal Aid partner to deliver Homeless Law, which is partly funded by Victoria Legal Aid and works closely with both legal aid commissions and community legal centres to source pro bono clients. Many law firms also partner with community legal centres in the delivery of their pro bono work.

How much pro bono work is currently undertaken, by whom and for whom?

This submission is limited to discussion of pro bono work facilitated through Justice Connect and the available statistics on pro bono work undertaken by medium and large law firms, as collated by the National Pro Bono Resource Centre (NPBRC). Justice Connect facilitates pro bono work for law firms, barristers and occasionally corporate in-house counsel. We note that other pro bono work is done by sole practitioners, government lawyers and retired or non-practising legal professionals on a voluntary basis.

The NPBRC's National Law Firm Pro Bono Survey (NPBRC Survey) captures the pro bono data of firms with 50 or more lawyers. The 2012 NPBRC Survey reported that 36 of 51 firms that responded to the survey did a total of 343,058 hours of pro bono legal work in the 2011-2012 financial year. The NPBRC estimates that this is equivalent to 191 lawyers undertaking pro bono work full-time for a year.¹¹

In addition to pro bono work by solicitors, a significant pro bono contribution is made by barristers. There are almost 900 barristers registered with the Victorian Bar's Pro Bono Scheme, which is managed by Justice Connect. Justice Connect made 280 referrals for pro bono assistance to barristers at the Victorian Bar as part of this Scheme.

Recipients of pro bono work

As noted above, pro bono work is done both for individuals and community organisations, primarily not-for-profit organisations.

When referring individuals for pro bono assistance, Justice Connect considers whether the applicant has exhausted all other avenues of legal assistance. Justice Connect also considers the complexity and nature of the

¹¹ Based on a 37.5 hour working week over 48 weeks: National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian firms with more than 50 lawyers - Final Report*, October 2012 at page 11.

legal matter, and the area of law, in order to determine whether the applicant's matter is likely to be accepted by a pro bono firm or barrister.

It is instructive to consider those who cannot access pro bono in order to determine where gaps exist. The 2012 NPBRC Survey reported that the most frequently declined requests for pro bono related to family (other than domestic violence), wills/probate/estate law, criminal law and employment law.¹² This is consistent with Justice Connect's data, with family law and criminal law consistently among the highest areas of requests for assistance and the highest rates of refusals.

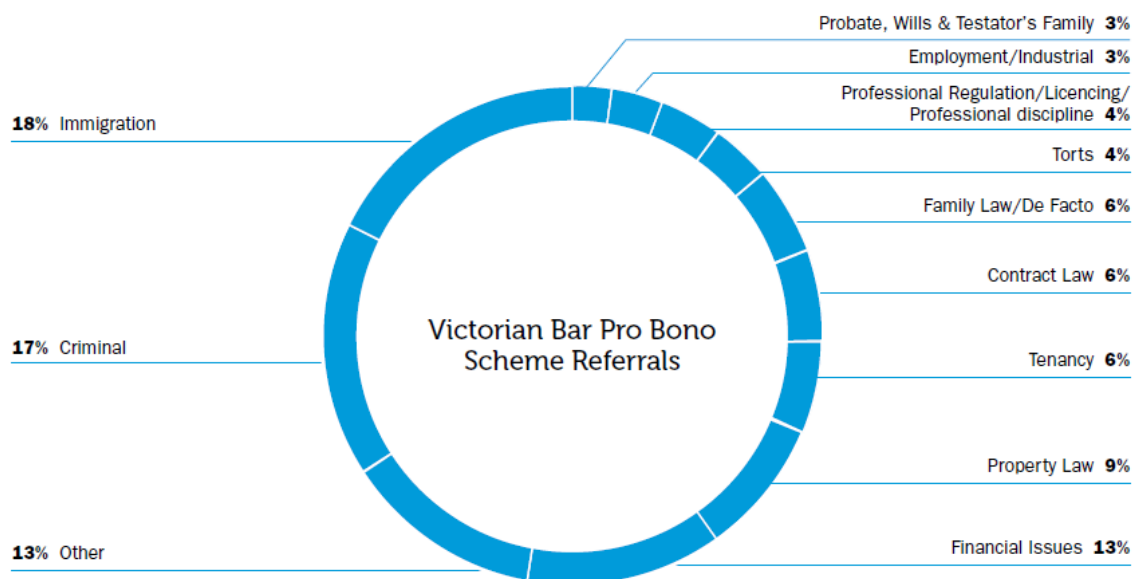
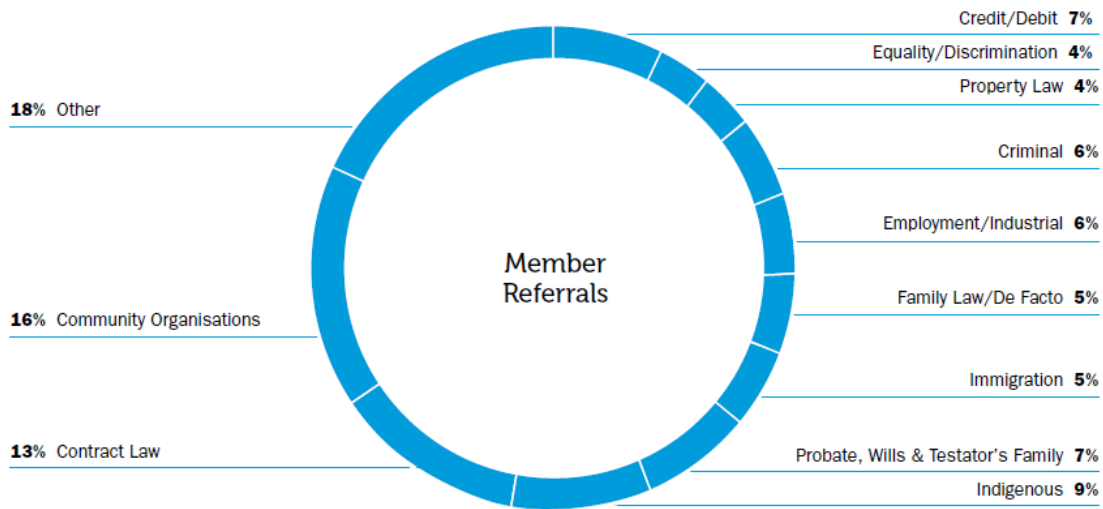
The 2012 NPBRC Survey shows that 63% of pro bono work undertaken by large and mid-sized law firms is for not-for-profit organisations.¹³ Most services were provided in governance, deductible gift recipient tax status applications, employment law, commercial agreements and incorporation of entities.¹⁴ This is consistent with the work of Justice Connect's Not-for-profit Law service – in 2011-2012, telephone advice and referrals to members for pro bono advice were mostly related to governance and compliance with incorporation legislation. This made up just over half of all legal assistance provided, followed by taxation, starting a not-for-profit organisation, insurance, contract law, employment/occupational healthy and safety/discrimination, property law, financial management and intellectual property/information technology.

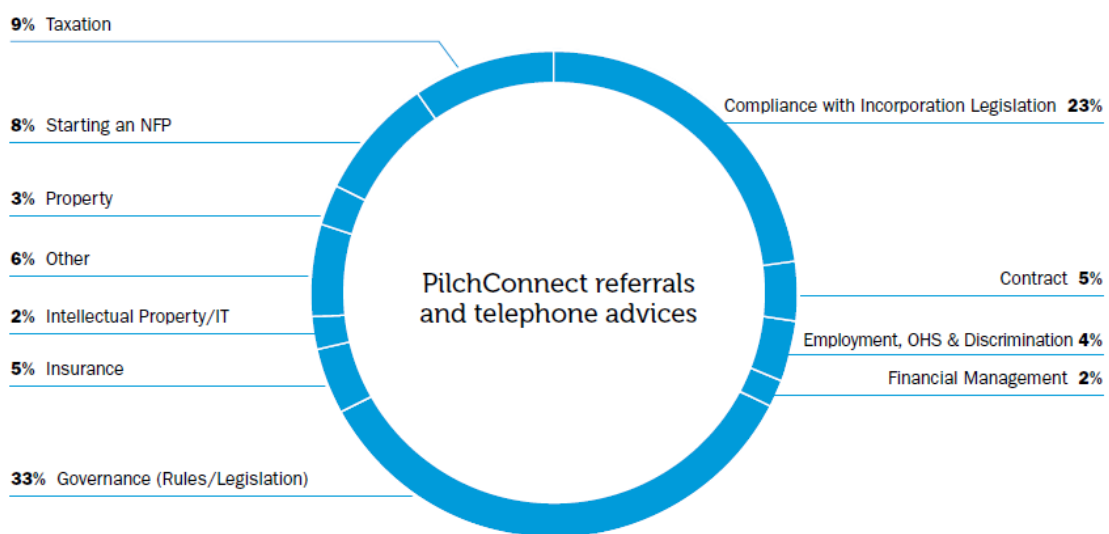
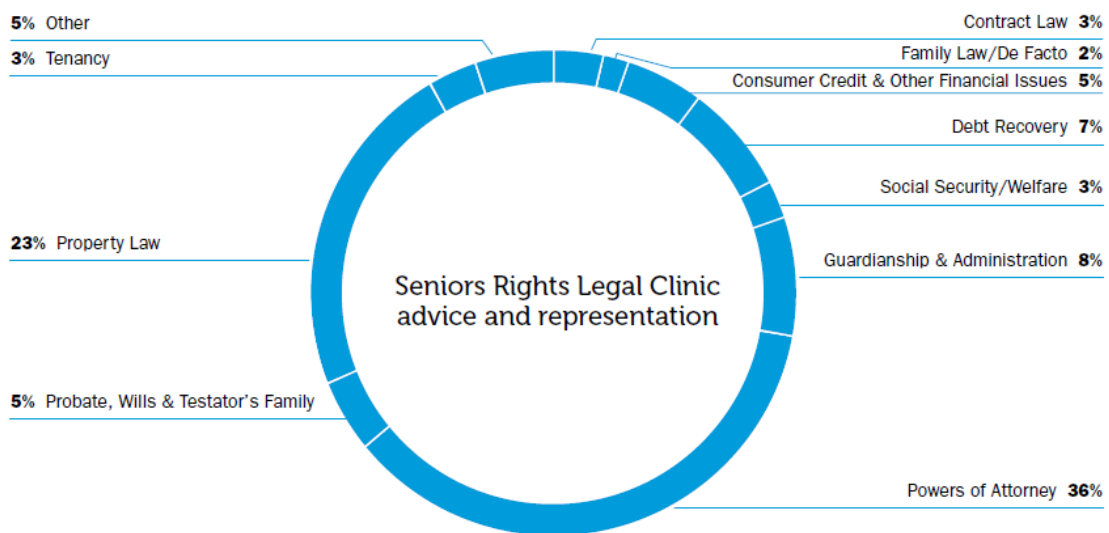
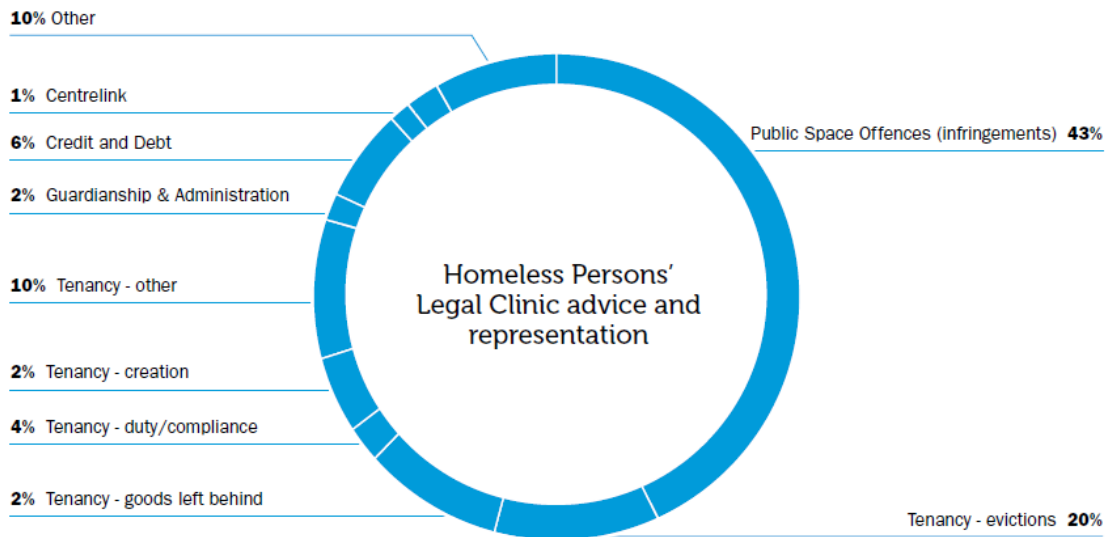
Set out on the following two pages are the statistics regarding the areas in which Justice Connect provided assistance in the 2012-2013 financial year through its different programs. These statistics relate to assistance in Victoria only.

¹² National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian firms with more than 50 lawyers – Final Report*, October 2012 at page 11.

¹³ *Ibid* at page 29.

¹⁴ *Ibid* at page 19.





What cost effective ways are there to make the provision of pro bono services more attractive?
How well do pro bono programs operate, how are they resourced and are they effectively targeted?

A commitment to the ethical and professional responsibility to ensure equal access to the justice system is the primary motivating factor for doing pro bono work. Accordingly, Justice Connect considers that making pro bono more attractive is not the critical issue. The more important issue is adequate funding of the organisations that coordinate and maximise the impact of pro bono, including Justice Connect and similar organisations in other states, so that they can continue to promote and organise effective pro bono work.¹⁵

Justice Connect provides a cost effective model of coordinating pro bono, following a clear strategy which is researched and consistently evaluated. When considering any legal need, Justice Connect considers the following questions:

- is the client unable to afford to pay for legal representation or does their legal problem otherwise raise public interest questions?
- is there another agency better placed to assist the client?
- do pro bono lawyers have the skills and willingness to assist the client, or can we help develop this?
- does Justice Connect have the expertise and resources necessary to support a pro bono response?

Justice Connect champions collaborative pro bono, including delivering training and developing resources that support the work of pro bono barristers and lawyers. Many law firms do not accept matters from the general public, but use referral schemes to filter the work, saving significant resources in the assessment of matters.

Structured, coordinated pro bono represents excellent value for money. In 2011, Deloitte Access Economics undertook an economic evaluation of Justice Connect's Not-for-profit Law service (then known as 'PilchConnect'). The evaluation found:

- The economic contribution of Not-for-profit Law legal services in 2010-11 was estimated to be approximately \$4.3 million. This involved a direct contribution from program delivery of around \$1 million, comprising about \$300,000 from in-house functions (for example, the provision of training and telephone advice) and approximately \$670,000 arising from brokering private sector legal advice provided on a pro bono basis.¹⁶
- Approximately 3,500 additional client services will be provided over the next three years as a result of efficiency gains in NFP organisations assisted by Not-for-profit Law in 2010-11.
- Should the Not-for-profit Law program be moderately expanded (say by around 10%), these additional services could potentially equate to a further \$2 million over the next five years (in net present value terms), over and above a central economic contribution of about \$20.4 million.
- The program has already demonstrated a capacity for innovation, with training activities and direct telephone legal advice playing a greater role in effectively dealing with more standard legal matters. Further expansion could extend these benefits across Australia.

Justice Connect's work also contributes to broad social goals of access to justice and a fairer society. These goals are evaluated using a 'Theory of Change' model of evaluation and assessment. By setting measures to monitor the programs, Justice Connect is better able to understand how its programs work and where improvements can be made. The Theory of Change also enables meaningful reporting on program outcomes.

Justice Connect has also encouraged reform in areas where there is potential to make the provision of pro bono more effective, for example:

- advocating for the TIS Free Interpreting Service to be made available in respect of all pro bono clients;
- advocating for greater cohesion, simplification and flexibility of legal disbursements schemes; and
- encouraging the introduction and enforcement of pro bono requirements for government legal services contracts in all jurisdictions.

Justice Connect also supports reform of the law regarding the circumstances in which Victorian courts may award costs to a successful party in litigation where that party is represented on a pro bono basis. At present, the court's ability to make a costs order in such cases, and the ability of a pro bono litigant to actually recover costs

¹⁵ In the 2013 financial year Justice Connect's Victorian office received 23% of its funding from the Victorian Government and 5% of its funding from the Australian Government. Justice Connect's NSW office receives no funding from the New South Wales Government.

¹⁶ The Deloitte Access Economics evaluation does not include the economic value of policy and law reform activity undertaken by PilchConnect.

under such an order, appears to depend upon the interpretation of the relevant pro bono retainer and, in particular, the terms of any conditional costs agreement. Justice Connect has argued for greater certainty for both pro bono litigants and pro bono lawyers in order to:

- create certainty as to the right to recover costs in pro bono matters;
- increase legal practice and counsel capacity to undertake pro bono matters;
- create a level playing field between litigants; and
- create consistency across court facilitated pro bono schemes.

Justice Connect considers that reform to allow recovery of costs in all pro bono matters will create consistency across its various pro bono referral schemes. Currently, lawyers who provide pro bono assistance to parties involved in litigation in the Federal Circuit Court and the Supreme Court of NSW have a legislative entitlement to receive costs which may be recovered by the assisted litigant under a costs order.¹⁷ Justice Connect believes all pro bono lawyers should be able to recover costs regardless of the jurisdiction.

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

As noted above, pro bono is particularly important for clients with civil and administrative law needs who cannot obtain legal assistance elsewhere. In addition, pro bono is important and effective for the running of public interest matters, for the legal needs of not-for-profit organisations, for people who are unrepresented or self-represented in the court system and for legal need where a rapid response is required. Justice Connect also considers that there is a need for more coordinated pro bono in rural, regional and remote (**RRR**) areas of Australia.

Public interest matters

Pro bono is important for public interest matters that require significant resourcing, such as litigious matters which are too large to be resourced by community legal centres. Several examples of Justice Connect's public interest matters are set out below.



Tampa response: In August 2001, PILCH Victoria sought to contact the 433 asylum seekers detained without communication on the MV Tampa. When PILCH was unable to do this, it brought together a law firm and senior and junior counsel to act pro bono on behalf of Liberty Victoria (the applicant for relief in the nature of habeas corpus and mandamus). Ultimately, the legal challenge did not result in orders bringing the 433 asylum seekers to the Australian mainland; however the issues considered by the Full Court and by the Full Court of the Federal Court on appeal were of international maritime importance and alerted the community to the importance of the legal issues at stake and the circumstances in which asylum seekers were prevented from landing in Australian territory and detained on the Tampa.



Catch the Fire Ministries Inc v Islamic Council of Victoria: What was then PILCH Victoria referred a racial vilification case in which the Islamic Council of Victoria alleged that Muslim people were vilified in a seminar, newsletter and website article issued by the Catch the Fire Ministries in 2002. The matter was heard at VCAT in 2004, where it was found that a newsletter was presented in a manner that was hostile, demeaning and derogatory of all Muslim people and of Muslim religious beliefs and practices (the decision was overturned in the Supreme Court in 2007).

¹⁷ See *Federal Court Rules 2011* (Cth), r 4.19; *Federal Magistrates Court Rules 2001* (Cth), r 12.07 and *Uniform Civil Procedure Rules 2005* (NSW) r 7.41.



Challenge to gender policy: In 2008, a 14 year old girl's father approached PILCH Victoria to prevent an attempt by a junior football league to prevent girls playing in mixed AFL football competitions once they turned 14. A VCAT decision ultimately meant that the young footballer could complete the season and opened the way for another 14 year old girl to continue playing at another club.



Ballan Caravan park residents - In 2012, PILCH Victoria was contacted by a group of residents of a caravan park in Ballan, in outer Melbourne. The caravan park was on Crown land and the residents had been given six months' notice to leave their homes without any reason for the closure. PILCH Victoria facilitated a pro bono referral to a member law firm and counsel who commenced proceedings in the Supreme Court challenging the validity of the notices on a number of grounds, including that the officials had failed to take into account the residents' human rights. The notices to vacate were withdrawn, highlighting the power of the stories of clients to influence government decision making, and the value of the Victorian Charter of Rights and Responsibilities in being able to bring this to bear.

Not-for-profit organisations

Pro bono is particularly important for not-for-profit organisations. Other sources of free legal assistance are not available to bodies corporate, rendering the not-for-profit sector entirely reliant on private firm pro bono unless they have adequate funds to pay for legal advice. The rapid growth of Justice Connect's Not-for-profit Law service is testament to the need in this area.

Self represented litigants

A pro bono response has been developed for self represented litigants in a number of jurisdictions, including:

- the Queensland Public Interest Law Clearing House (**QPILCH**) Self Representation Service in the Supreme and District Courts of Queensland, the Queensland Court of Appeal and the Queensland Civil and Administrative Tribunal;
- a 2012 pilot of a service for unrepresented litigants in the Brisbane registry of the Federal Court of Australia and the Federal Circuit Court, also operated by QPILCH;
- a new service announced in 2013 by the Victorian Bar to assist self represented litigants in civil applications in the Victorian Court of Appeal; and
- a pilot pro bono scheme for jurisdictional issues in Fair Work Australia which commenced in 2013.

Justice Connect endorses the information in the QPILCH submission to this Inquiry as illustrative of how coordinated pro bono can provide a response to the legal needs of self represented litigants.

Legal needs requiring a rapid response

Pro bono plays an important role where there is a need for a rapid response to an immediate legal need. Services such as Justice Connect are well-positioned to coordinate a collective response, drawing on the lawyers within our referral network. Two examples of this are our involvement in Bushfire Legal Help in 2009 and our response to the needs of offshore asylum seekers in 2011-2013.



Bushfire Legal Help (2009) - A collaboration between PILCH Victoria, the Victorian Bar, Law Institute of Victoria, Victoria Legal Aid, the Victorian Law Foundation and the Federation of Community Legal Centres, Bushfire Legal Help was formed in the aftermath of the 2009 Black Saturday fires and established a triage model to deal with legal issues confronting those affected by the fires. Volunteer lawyers from member firms staffed the phones and special legal clinics were conducted in affected areas. PILCH was instrumental in coordinating the service's response to the Bushfires Royal Commission and connecting victims to pro bono support in order to participate in the Commission hearings. The learnings from this project have been applied in disasters in Queensland and NSW.



Asylum Seekers (2011) –What were then PILCH NSW and PILCH Victoria established the Offshore Asylum Seeker Project in August 2011 in response to the High Court’s decision in *Plaintiff M61/2010E v Commonwealth of Australia & Ors and Plaintiff M69/2010 v Commonwealth of Australia v Ors (Plaintiff M61)*, concerning procedural fairness in the review of rejected refugee status claims. The aim of the project was to ensure that all offshore asylum seekers who had received a negative Independent Merits Review or Independent Protection Assessment had access to legal assistance to appeal the decision in court where it contained legal errors. The Project involved 120 barristers and 24 law firms and assisted more than 500 people.

Rural, regional and remote communities

The ability of persons living in RRR parts of Australia to access legal representation is considerably poorer than persons living in metropolitan areas, as there are fewer legal aid and community legal services in RRR areas. Justice Connect considers it important that pro bono practices and other legal providers consider options for increasing the delivery of pro bono in these areas. We are aware of a great deal of interest in the provision of pro bono services in RRR parts of Australia by metropolitan firms in Melbourne and Sydney. However, this work is time and labour intensive, as it requires good connections with local communities in order to facilitate effective pro bono referrals. Justice Connect believes that with additional resources, there is capacity for a far greater pro bono response in RRR areas.

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

Justice Connect prefaces our response to this question by stating our view that the provision of pro bono does not and should not rely on a cost benefit analysis. As noted above, the main driving factor and primary benefit of pro bono is a professional and ethical responsibility.

However, Justice Connect acknowledges that commercial drivers for pro bono have emerged, including meeting the requirements as part of participation in the Commonwealth Legal Services Multi-User List and Victorian Government’s legal service panel (discussed below). Some commercial firms also consider their pro bono contribution as part of their overall corporate responsibility strategy. In client and government tenders, firms are asked to provide information about their corporate responsibility and sustainability contributions. A number of Justice Connect’s members have developed pro bono partnerships with their commercial clients which benefit firms’ corporate responsibility and business development objectives.

Pro bono legal work also has benefits for the individual lawyers who undertake the work, with respect to personal fulfilment and increased job satisfaction. Pro bono work gives diversity to lawyers’ working lives. A strong pro bono program can also be useful in attracting and retaining staff, particularly junior staff.

Pro bono work also provides an opportunity for lawyers to develop knowledge and skills that are complementary to their commercial work. In 2013, Justice Connect’s Homeless Law service undertook a survey of its pro bono lawyers. In that survey, pro bono lawyers reported gaining skills in providing advice, negotiating for a client or appearing in a court or tribunal.¹⁸ They also report developing skills in file management, client interview skills, client management, interpersonal skills, advocacy skills and experience in dealing with clients’ with non-legal issues. In commenting on these issues one lawyer said, *‘The early experience I received drafting letters and communicating on behalf of clients... significantly strengthened my skills, and has assisted me in my commercial work.’*¹⁹

A significant benefit of undertaking pro bono work is that it enables lawyers to develop a broader understanding of access to justice. 70% of Homeless Law pro bono lawyers have reported developing an understanding of the issues affecting socio-economically disadvantaged individuals as a benefit of participating in pro bono work.²⁰

Delivery of law firm pro bono entails hard costs, including salaries of pro bono coordinators, pro bono lawyers and paying for disbursements. Hard costs vary depending on the size and scale of the pro bono practice. In the

¹⁸ PILCH Victoria Homeless Persons’ Legal Clinic Survey 2013.

¹⁹ PILCH Victoria Homeless Persons’ Legal Clinic Survey 2013.

²⁰ PILCH Victoria Homeless Persons’ Legal Clinic Survey 2013.

2012 NPBRC Survey, the reported cost of running firm pro bono programs ranged from \$135,000 to \$12 million.²¹

With regard to disbursements, the 2012 NPBRC Survey indicates the main areas of expenditure are expert witness reports and appearance fees (non-medical), filing fees, medical reports and appearance fees, barrister fees, travel and accommodation, interpreter's fees, search costs, transcripts and internal disbursements.²²

Within medium and large law firms, pro bono is not generally viewed as an 'opportunity cost'. However, for small firms of sole practitioners or for barristers, undertaking pro bono work may result in less capacity to undertake paying work. For example, Justice Connect is aware of a sole practitioner who closed their legal practice to any commercial work for several weeks while litigating a pro bono matter for a vulnerable client.

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

The National Pro Bono Aspirational Target (**Target**) is a voluntary target of at least 35 hours of pro bono legal work per lawyer per year. Signatories include law firms, incorporated legal practices, solicitors and barristers.

The Target was launched in 2007. In 2008, when the NPBRC first reported on the performance of Target Signatories, the Target had 58 signatories made up of approximately 3,000 legal professionals. In June 2013²³, the Target had 104 signatories, made up of 8,763 FTE legal professionals, or approximately 15% of the Australian legal profession. This represents a 192% increase in the number of lawyers covered by the Target since the 2007/2008 financial year.

Recently, 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 LSMUL. The pro bono provisions require government agencies to consider a firm's pro bono work when awarding tenders. From July 2014, firms with more than 50 lawyers will be required to have signed up to the Target in order to be considered for the Commonwealth LSMUL.

Although Target signatories are asked to provide their total hours to the NPBRC each year, the NPBRC does not publish signatories' individual results. However, the hours of each firm have been published in the Australian Government's *Legal Services Expenditure Report* for each year since 2009-2010. Anecdotally, Justice Connect understands that the publicising of pro bono hours encouraged firms to develop and formalise their pro bono programs, including by joining Justice Connect. A result of this has been significant growth in pro bono programs in medium sized firms in the past 3 years, and growth in medium sized firm membership of Justice Connect.

Law firms on the Victorian Government Legal Panel are also required to report on pro bono activities undertaken for 'approved causes' under the Deed of Standing Offer for the Provision of Legal Services. There are 20 law firms on the Victorian Government Legal Panel which has been in place in its current form since 2009. These firms are required under the relevant panel contract to complete pro bono work equal to 15% of the aggregate of all legal service fees (excluding GST and disbursements) paid by government clients. Justice Connect understands that the amount of pro bono work delivered is significantly higher than the 15% obligation.

Justice Connect believes that both panel arrangements have been important in raising the profile of pro bono and encouraging firms to do more work and to develop systems to ensure work is properly managed and accounted for. If other state governments were to similarly mandate pro bono contributions by firms that provide their legal services, the amount of pro bono done in those states would increase.

²¹ National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian firms with more than 50 lawyers – Final Report*, October 2012 at page 38.

²² *Ibid* at page 47.

²³ National Pro Bono Resource Centre, *National Pro Bono Aspirational Target Sixth Annual Performance Report*, October 2013 at page 2.

What barriers are faced by lawyers seeking to provide pro bono services and how are they addressed?

Capacity, lack of relevant expertise and conflicts

Three main barriers Justice Connect's members cite as reasons for declining referrals are lack of capacity, lack of expertise in the specific area of law or an actual or potential conflict of interest. These three barriers were also identified in the 2012 NPBRC Survey as the three main reasons for declining to accept a pro bono matter.²⁴

Firm capacity

In Justice Connect's experience, there is often limited capacity in firms' practice groups that traditionally undertake a significant amount of pro bono work, including litigation and tax practice groups. Justice Connect's referral service often encounters difficulty referring matters for bono assistance that are already involved in or require litigation. Firms may also be reluctant to take on matters where litigation may be protracted given the resources required to run such matters.

Lack of relevant expertise

Another common barrier is the lack of skills and knowledge of commercial lawyers of the areas of law in which disadvantaged individuals require assistance, or a perception that a particular pro bono client or program will require specific skills which they do not have. As part of their risk management processes, law firms are often cautious to provide advice outside their usual areas of practice. Given the difficulties of matching demand for services with existing legal expertise, Justice Connect regularly provides commercial lawyers with training in substantive law, practical skills and client management.

Comprehensive, compulsory training is provided to all pro bono lawyers who participate in the Homeless Law, Seniors Law and MOSAIC services. Justice Connect also provides ad hoc training, for example:

- training litigation lawyers in predatory lending cases to defend clients who are at risk of losing their home because of unsavoury lending practices;
- training lawyers to obtain documents for Aboriginal and Torres Strait Islander people to make claims for unpaid wages; and
- training commercial lawyers on migration law, in the area of judicial review.

In addition, in these outreach services, Justice Connect lawyers take on the supervision of the work of the lawyers, including bearing the professional indemnity insurance responsibility for the work. These strategies (particularly direct supervision of pro bono work) have over the last 10 years significantly increased the amount of pro bono work that has been undertaken for people experiencing disadvantage.

Conflicts of interest

Both legal and commercial conflicts can act as barriers to taking on specific pro bono matters. A commercial (or positional) conflict of interest arises where although there is no direct conflict, the firm perceives a potential disadvantage to its commercial interests if it acts against a client or a potential client.

Commercial conflicts of interests can be a significant barrier to pro bono work. However, there are steps that commercial clients can take which can reduce this barrier. The Commonwealth and Victorian governments (both of which have pro bono requirements for panel firms) have policies which make it clear that law firms who act in public interest matters and for disadvantaged clients against government where there is a commercial conflict will not be considered to be in a conflict situation. The existence of these policies provides some comfort to firms that they will not be penalised for doing pro bono work against a government department.

As a large purchaser of legal services and model litigant, government has an important leadership role to play in reducing the impact of commercial conflicts of interest. For example, decision makers in government should be aware of these policies and be proactive in their implementation. Furthermore, government could instruct its lawyers that where they are a respondent in public interest and pro bono matters, they will not seek costs against litigants and legal advisors in those matters.

²⁴ National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian firms with more than 50 lawyers – Final Report*, October 2012 at page 44.

Addressing a commercial conflict of interest for a law firm's potential or existing corporate client is not as easy to resolve. Anecdotally, a corporate in-house legal department has advised Justice Connect that they have no problem with any of the firms that act for them taking on a pro bono matter against them and indeed, where the client is disadvantaged, would prefer that they were represented so that the matter could be resolved. However, not all general counsel take such a view, resulting in commercial conflicts limiting access to pro bono. It is hoped that as more corporate legal departments engage in pro bono and become aware of the issues that face disadvantaged clients, firms will feel confident in raising this issue in relation to their pro bono work.

Barriers to undertaking pro bono in regional, rural and remote areas

The time and costs for metropolitan lawyers to travel to RRR regions and the cost of accommodation are disincentives for lawyers to undertake pro bono work for those communities.²⁵ Contacting and maintaining clients via telephone and email can also be difficult, particularly in remote areas with limited telecommunications. Sending pro bono lawyers on a 'fly-in, fly-out' basis to see multiple clients can be difficult in terms of logistics, providing timely assistance and building relationships within remote communities that takes time and trust.

The legal profession utilises sophisticated technologies to engage with clients, however this is not always practicable for pro bono clients. The lack of technological infrastructure and equipment accessible to disadvantaged individuals (including no computers or mobile phones) in RRR areas can make the firm's technology redundant.

While acknowledging these barriers, Justice Connect is very aware that some of the most significant unmet legal need is in RRR communities, including in remote Aboriginal communities. Following discussions with a number of our members, Justice Connect is investigating effective ways to deliver much-needed legal services through pro bono practices to disadvantaged individuals in RRR regions. These could include use of technology where it exists and better partnerships with local organisations in RRR communities.

²⁵ National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian firms with more than 50 lawyers – Final Report*, October 2012 at page 58.