



NATIONAL PRO BONO RESOURCE CENTRE

Submission to the Productivity Commission:

Access to Justice Arrangements

21 May 2014

**National Pro Bono Resource Centre
Law Building, UNSW 2052 NSW
www.nationalprobono.org.au**

Leanne Ho
National Pro Bono Resource Centre
Law Building, UNSW NSW 2052

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.

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”.

The Centre’s comments follows the order in which the Productivity Commission’s Draft Report presents its Draft Recommendations and Information Requests, but only provides responses where an issue relating to the provision of pro bono legal services is raised by the content of the Draft Report.

INFORMATION REQUEST 5.3 – FACILITATING EFFECTIVE REFERRALS FOR LEGAL ASSISTANCE

In relation to facilitating effective referrals for pro bono legal assistance, the Centre suggests that it would be desirable for there to be a single point for pro bono referrals in NSW as there is in most of the other states and territories, for example in Victoria where Justice Connect coordinates the pro bono referral service which includes the Victorian Bar Pro Bono Scheme and the Law Institute of Victoria Legal Assistance Scheme.

Having several separate referral pathways in NSW, with separate pro bono schemes run by Justice Connect, the Law Society of NSW and the NSW Bar Association, creates confusion for people seeking assistance and inefficiencies in the referral process, and is inconsistent with the concept of providing a holistic service.

DRAFT RECOMMENDATION 13.4 –PARTIES REPRESENTED ON A PRO BONO BASIS SHOULD BE ENTITLED TO SEEK AN AWARD OF COSTS

The Centre agrees with the recommendation that parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. Case law indicates that, in order to overcome the indemnity rule at common law, this needs to be undertaken legislatively.

INFORMATION REQUEST 13.1 - THE MOST APPROPRIATE MEANS OF DISTRIBUTING COSTS AWARDED TO PRO BONO PARTIES

Note that the Centre provided all Australian law firms with 50 or more lawyers with the opportunity to comment on its draft response to Information Request 13.1 and the following text incorporates any views expressed by firms.

The Centre suggests that it would make sense to consider the options for distributing costs awarded to pro bono parties at the same time as legislative reform to give effect to draft recommendation 13.4. A mechanism should exist to guide the distribution of recovered costs, particularly to make the important distinction between pro bono and contingent fee matters.

The Centre considered various options for distributing costs awarded to pro bono parties in its submissions to the New South Wales Law Reform Commission's Inquiry into Security for Costs and Associated Costs Orders (February 2010¹ and August 2011²).

The Centre submitted that allocating the awarded costs from a case to a general fund to support pro bono services, similar to 'The Access to Justice Foundation' established in the United Kingdom, was not appropriate in the Australian context.

'Pro bono costs orders' are available in the United Kingdom when the successful party has been represented pro bono, and require the other party to make a payment to a charity prescribed by the Lord Chancellor, which has been 'The Access to Justice Foundation' since its establishment in 2008. The Foundation enables the provision of more legal services through distributions to Regional Legal Support Trusts, national pro bono organisations, and strategic projects.³

This approach works in the UK to achieve a balance between competing policy considerations. The spirit of pro bono is maintained because advocates who agree to work pro bono do not end up receiving a fee, while the deterrent value of costs is also maintained as unsuccessful litigants are not relieved of the obligation to compensate the successful party.

However the Australian legal profession and its pro bono culture differs from its UK counterparts. These issues were considered by the NSW Law Reform Commission in its Report 137, *Security for Costs and Associated Costs Orders* which opined⁴:

We do not support the establishment of a special fund to receive and re-allocate pro-bono costs to general community legal needs, as in the United Kingdom, but would prefer investigation of a model that would direct such funds into pro bono litigation.

The Centre submits that a model that would direct such funds into pro bono litigation should be a self-regulatory one, consistent with the voluntary nature of pro bono.

This would give lawyers the freedom to determine where any recovered costs are directed, and so allow these firms to direct the funds to areas where they have assessed it will best facilitate further pro bono work being undertaken.

¹ [https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Submission to NSW LRC on costs.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Submission%20to%20NSW%20LRC%20on%20costs.pdf)

² [https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/NPBRC Submission to NSWLRC on costs August 2011.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/NPBRC_Submission_to_NSWLRC_on_costs_August_2011.pdf)

³ Access to Justice Foundation, Frequently Asked Questions: Section 194 'pro bono costs' orders, The Access to Justice Foundation (February 2010) at p.25. http://www.accesstojusticefoundation.org.uk/downloads/FAQs_Section_194.pdf

⁴ NSW Law Reform Commission, Report 137. "Security for Costs and Associated Costs Orders" (December 2012), p.62, para 3.63.

The pro bono programs of the large firms, that undertake a significant amount of pro bono legal work, are strategic in how they focus the firms' efforts and direct pro bono resources to best meet unmet legal need and further social justice. To the best of the Centre's knowledge, the practice of firms in Australia (in the few cases where costs are recovered in pro bono matters) has mostly been to use the monies to pay disbursements (usually counsel's fees, then other disbursements), and any remaining balance has been put back into a firm's pro bono program.

In contrast to the lawyers working for a firm, barristers take pro bono matters on at a direct 'opportunity cost' to themselves. Therefore to encourage the provision of pro bono work by barristers and ensure it is sustainable, it makes sense to use recovered costs to offer to pay counsel's fees as a disbursement. Some may choose to not accept the fees but, for junior barristers, it may be necessary for them to do so in order to be able to afford to take on another pro bono matter.

A self-regulatory protocol (to which pro bono providers would subscribe) might indicate that recovered monies should be:

1. Used to pay counsel's fees and other disbursements; and/or
2. Reinvested into a firm's pro bono program; and/or
3. Donated to a charity or community organisation of choice (which might be the applicant organisation in the litigation, a co-counsel organisation like a CLC or the pro bono referral agency).

Amongst the firms consulted, there is support for a self-regulated protocol to formalise what is already an accepted industry practice. Most firms with structured pro bono practices stipulate in their pro bono policies (and at times in their retainer letters) that any award for pro bono costs is to be allocated to counsel fees and disbursements with the remainder being directed back into the firm's pro bono program to facilitate greater pro bono activity within the firm.

However one set of comments received on this issue expressed a preference for the third option. It went further to suggest the nomination of a specific community legal centre or clearing house in each State or Territory to be the recipient of any costs award, on the proviso that each has a separate account where such funds are kept and that there should be clear guidelines regulating the use of such funds, for example to fund other public interest litigation with parameters of what "public interest" encompasses.

These comments were based on a concern about whether the legal work that was the basis of the pro bono costs award would remain within the definition of pro bono legal work if costs were awarded, "as in effect the firm has got paid." It was suggested that either this work could not be counted as pro bono legal work (for the purposes of reporting pro bono hours to the Centre for the National Pro Bono Aspirational Target and/or National Law Firm Pro Bono Survey) or that adjustments would need to be made to reflect how much work was truly undertaken on a pro bono basis rather than on a contingency basis.

The Centre agrees with the view that, at the very least, it is important to make it clear that any funds received from a pro bono costs award must be directed to the firm's pro bono program rather than undifferentiated from general firm revenues.

DRAFT RECOMMENDATION 13.6 – PROTECTIVE COSTS ORDERS IN MATTERS OF PUBLIC INTEREST AGAINST GOVERNMENT

The Centre supports the recommendation that Courts should grant protective costs orders (PCOs) to parties involved in matter of public interest against government, and formally recognise and outline the criteria or factors used to assess whether a PCO is applicable. The protection for public interest litigants that PCOs provide from the risk of adverse costs orders is likely to encourage more lawyers to undertake important public interest litigation on a pro bono basis.

As explained in the Centre's original submission, the current uncertainty about how courts will exercise their discretion to make PCOs, or needing to rely 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 relief, redress or clarification of the law.

INFORMATION REQUEST 13.2 – ARRANGEMENTS FOR THE GOVERNANCE AND FUNDING OF A PUBLIC INTEREST LITIGATION FUND (PILF)

The Centre suggests that one of the criteria that should be considered in providing access to the proposed PILF should be whether the lawyer was acting on a pro bono basis, recognising for example that a legal practitioner choosing to become involved in such a matter without payment has undertaken a careful assessment of the merits of the matter.

DRAFT RECOMMENDATION 14.2 – WORKING TOGETHER ON HOW TO ASSIST SELF-REPRESENTED LITIGANTS

The Centre agrees with the recommendation that governments, courts and the legal profession should work together to develop guidelines on how to assist self-represented litigants within the courts and tribunals of each jurisdiction.

In this regard, the pro bono community has valuable experience to contribute from its experience supporting Self Representation Services, with an established service run by QPILCH in Queensland for self-represented parties in the Supreme and District Courts and Queensland Civil Appeals Tribunal, and more recently by JusticeNet in South Australia and JusticeConnect in NSW.

INFORMATION REQUEST 14.2 – UNBUNDLED SERVICES FOR SELF-REPRESENTED LITIGANTS

The lessons learned from the experience of established Self Representation Services outlined in the response to Draft Recommendation 14.2, particularly the longest running QPILCH service, should be considered in plans to extend existing unbundled services for self-represented litigants.

Some of the lessons learned from QPILCH’s experience providing its Self Representation Service are documented in the Centre’s resource, *Pro Bono Partnerships and Models: A Practical Guide to **What Works***, in a case study on the Self Representation Service (QPILCH).⁵ This case study explains the discrete nature of the tasks undertaken by lawyers rostered to provide this pro bono service. “The work is contained to three hour appointments and work is not taken back to the firm. Preparation is as little as a conflict check and reading the client and case summary for each scheduled appointment.” For this reason, it is a good model for attracting pro bono support.

This service has been successful and performs an important role in facilitating access to court, as well as directing people away from the court system when their case has no merit. Compared with duty lawyer services and drop-in community legal services, which provide advice on a one-off basis, the QPILCH Self Representation Service can provide litigants with a number of appointments to assist them throughout the course of their legal proceedings. A full-time QPILCH solicitor also coordinates the service, maintains client files, and supervises the volunteer pro bono lawyers. In the Centre’s view, the fact that this solicitor can provide assistance to clients between appointments, and therefore a level of continuity and accrued knowledge to the volunteer pro bono lawyers, is a crucial factor in its success. It means that the service has some capacity to provide more substantive assistance, even though the pro bono lawyers from the firms may only see the client once.

However the Self Representation Service does have limitations relating to the discrete nature of the advice and the fact that it cannot provide representation in the court room or take on the conduct of the case for the litigant. These limitations become particularly problematic in in complex cases and cases where the litigant, due to literacy or other issues, has trouble acting on the advice of the service. It is important to bear in mind that there will always be people who cannot represent themselves effectively and the need to maintain appropriate services to which these people can be referred.

⁵ National Pro Bono Resource Centre, *Pro Bono Partnerships and Models: A Practical Guide to What Works* at 20.5.1

INFORMATION REQUEST 14.3 – UNBUNDLED SERVICES AND CONFLICTS OF INTEREST

Conflicts of interest, whether actual “legal” or perceived “commercial” conflicts, remain an issue for pro bono providers considering the provision of unbundled services of a discrete nature. The issue of conflicts is a significant constraint on pro bono work and it is worthwhile to explore any options to address this issue. The Centre’s most recent National Law Firm Pro Bono Survey of Australian firms with fifty or more lawyers identified concern about conflict of interest with fee paying clients as one of the top three constraints to pro bono work for a significant number of firms.⁶

There is little that can be done to manage the existence of legal conflicts. If a case presents an issue of legal conflict, then the pro bono provider cannot and will not act. However, measures to minimise the problem of commercial conflicts do exist. One successful model has been the clinic model where a community legal centre or pro bono clearing house takes legal responsibility for the advice provided by the clinic, for example some of the Homeless Persons Legal Clinics. In this model, the private lawyers attend and see clients to provide initial advice but the conflict check is conducted by the community legal centre or clearing house as the clinic operator. The private lawyers do not need to do a conflict check through their firm unless the matter escalates and the firm anticipates taking on work on behalf of the client.

It would be helpful to encourage relationships between pro bono providers and specific commercial clients where the real impact of the potential conflict can be openly discussed. For example some firms have had discussions with particular commercial clients, such as banks, and established that the client is comfortable with the firm acting for a particular person recognising that the person is unlikely to obtain assistance elsewhere and that a negotiated outcome may be beneficial to the commercial client.

Another measure may be to establish a pro bono coordinator or liaison point who can facilitate such relationships and assure pro bono providers that they are not damaging their existing relationships or the prospects of obtaining legal work in the future from particular commercial clients (see response to Draft Recommendation and Information Request 23.2).

DRAFT RECOMMENDATION 16.4 AND INFORMATION REQUEST 16.2 – GUIDELINES FOR GRANTING COURT FEE RELIEF

The Centre supports the draft recommendation that fee guidelines in courts and tribunals should grant automatic fee relief to clients of pro bono schemes “that adopt financial hardship criteria commensurate

⁶ National Pro Bono Resource Centre, National Law Firm Pro Bono Survey Australian firms with fifty or more lawyers, Final Report, January 2013, pp 5 and 44

with those used to grant fee relief,” but also in other cases where the matter has been assessed as in the public interest.

The Centre submits that individual assessment by the court or tribunal is unnecessarily administratively burdensome, and may end up costing more than the savings resulting from withholding fee relief from particular individuals.

Anecdotal evidence from pro bono clearing houses around Australia, and from law firm pro bono practices, indicates that most low-income Australians that are acted for on a pro bono basis are either exempt from the payment of fees or manage to have the “financial hardship” discretion of the Court exercised in their favour so that no fees are payable or else are deferred.

As the Centre submitted to the Senate Legal and Constitutional Affairs Committee on the *Impact of federal court fee increases since 2010 on access to justice in Australia*,⁷ “those that are being acted for on a pro bono basis” should be added as an exempt fee category to the current rules.⁸ It submitted that this would provide greater efficiency for the court and the applicant in dealing with persons being acted for on a pro bono basis, would save time in completing and assessing the lengthy applications submitted for fee waiver or deferral, and bring pro bono matters into line with the current treatment of those matters where there is a grant of Legal Aid. The Chair of the Committee agreed that this measure is appropriate and made a recommendation accordingly.⁹

The Centre submits that where there is any doubt about whether a matter where a client is being represented on a pro bono basis falls within the criteria for the granting of automatic fee relief, that fee guidelines should ensure that fee postponement be granted.

⁷ National Pro Bono Resource Centre, Submission to Senate Legal and Constitutional Affairs Committee on the impact of federal court fee increases since 2010 on access to justice in Australia (15 April 2013).

⁸ The Submission suggests that the fact that the lawyer was acting on pro bono basis could be certified by the relevant lawyer or by a pro bono clearing house (to be named by regulation). And that the definition of ‘pro bono legal work’ that could be used in this regard exists in paragraph 2 of Appendix F of the Commonwealth Legal Service Directions 2005.

⁹ Senate Legal and Constitutional Affairs Committee, *Impact of federal court fee increases since 2010 on access to justice in Australia* (17 June 2013) at paragraphs 1.42 and 1.46.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/courtfees/report/d01

INFORMATION REQUEST 17.3 – COURT ADMINISTRATION ARRANGEMENTS TO FACILITATE MORE EFFICIENT AND EFFECTIVE COURT OPERATIONS

The Centre suggests that it would be desirable for court administration arrangements to, as far as possible, make it easier for legal practitioners to provide pro bono legal assistance. Given that lawyers providing legal assistance on a pro bono basis are giving up their time, expertise and resources free of charge, and often at a cost to their own livelihoods, any unnecessary administrative or procedural obstacles will only serve to deter them making this contribution.

The Centre is not suggesting that these parties be provided with any strategic advantage by the court, but rather that the likely disadvantage that the pro bono client presents might be recognised by the court (particularly the Court Registry). This is a matter that could be considered in the guidelines for the management of self-represented litigants recommended in Draft Recommendation 14.2.

A strategic approach to ‘green-lighting’ the processes that will facilitate pro bono representation in appropriate cases could include:

- Automatic postponement of filing fees
- Better access to documents already filed with the court but not in the possession of the pro bono client or the pro bono lawyer, to transcripts and to interpreters
- Priority timing for lawyers acting on a pro bono basis, in recognition of the fact that they are providing their time free of charge.

DRAFT RECOMMENDATION 19.1 – COLLABORATION ON RULES DEALING WITH UNBUNDLED SERVICES

The Centre suggests that it would be useful to involve pro bono providers in the development of any set of rules dealing with unbundled legal services as they have unique experience in defining the scope of retainers for unbundled services.

Where legal services are provided to clients on a pro bono basis, the cost of the legal assistance which might ordinarily influence a client’s decision about the stage at which they choose to cease legal assistance is not a consideration. As a result of the risk that a pro bono client may wish to pursue their matter on an indefinite basis, pro bono providers have carefully developed methods of defining the scope of the assistance they will provide to a client.

DRAFT RECOMMENDATION 23.1 – VOLUNTEER AND FREE PRACTISING CERTIFICATES

The Centre supports the draft recommendation that all jurisdictions should, if they have not already done so, allow holders of all classes of practising certificate to undertake legal work on a volunteer basis, as our

research below clearly indicates that support of this kind encourages an increase in the provision of pro bono legal services.

Volunteer practising certificates have been available in Victoria since December 2005, in Queensland since 1 July 2007, and in Western Australia since 1 July 2012. The provisions on practising certificates contained in the National Legal Profession legislation in New South Wales and Victoria¹⁰ include a category of practice “as a volunteer at a community legal centre and otherwise on a pro bono basis, only”.¹¹

Recent research undertaken by the National Pro Bono Resource Centre, with the assistance of DLA Piper, shows that the uptake of volunteer practising certificates is steadily increasing in the jurisdictions that offer them.

Jurisdiction	Number of volunteer practising certificates issued by year						
	2006-7	2007-8	2008-9	2009-10	2010-11	2011-12	2012-13
VIC	80	119	147	209	205	245	277
QLD		17	42	63	67	52	82
WA							7*

*As at 5/3/14, a further 10 volunteer practising certificates had been issued bringing the total to 17.

In March of this year, the Centre wrote to the Presidents of the Law Societies in the remaining jurisdictions (South Australia, Tasmania, Australian Capital Territory and Northern Territory) making them aware of this research and encouraging them to make a volunteer practising certificate available in their jurisdiction. It also explained that, in the Centre’s experience, the Queensland scheme works best because it specifically refers to the Professional Indemnity Insurance Scheme administered by the Centre.

An important aspect of providing volunteer practising certificates, or facilitating volunteer work by holders of other practising certificates, is to ensure that the quality of legal work provided by volunteers is maintained at the same level expected of legal practitioners undertaking paid commercial work. While it is desirable to harness the potential of retired and career-break lawyers who might be interested in doing pro bono work, these legal professionals have varying levels of skill, expertise, experience and up to date knowledge of the law. Their ability to competently undertake pro bono work may depend, for example, on the area of expertise they held when they were engaged in paid work and how much time has elapsed since they last undertook legal work.

¹⁰ The Legal Profession Uniform Law Application Bill was passed in both the Victorian Legislative Council and the Victorian Legislative Assembly on 13 March 2014. A Bill applying the Uniform Law as a law of New South Wales was introduced on 27 March 2014.

¹¹ See for example Legal Profession Uniform Law Application Act 2014 (Vic), Schedule 1, Clause 47(1)(c).

In this regard, the Centre suggests that continuing legal education should remain a requirement for volunteer practising certificate holders, and that it is important to consider mechanisms for ensuring adequate supervision of these lawyers when it is required. For example the new Legal Profession Uniform Law Application Act 2014 (Vic) provides, in the Division relating to conditions of Australian practising certificates, that “discretionary conditions imposed by the designated local regulatory authority under section 53 may prohibit, restrict or regulate the provision of legal services by an Australian legal practitioner at community legal services or otherwise on a pro bono basis,” thereby clearly envisaging that this is the mechanism that should be used to address this ‘supervision’ issue.¹² It also provides that “all legal practice as a volunteer or on a pro bono basis needs to be covered by an approved insurance policy for this jurisdiction.”¹³

DRAFT RECOMMENDATION 23.2 - WIDER GOVERNMENT ADOPTION OF THE VICTORIAN GOVERNMENT’S USE OF A PRO BONO ‘COORDINATOR’

Note that the Centre provided all Australian law firms with 50 or more lawyers with the opportunity to comment on its draft response to Draft Recommendation 23.2 and the following text incorporates any views expressed by firms.

The Centre supports the draft recommendation that the Commonwealth Government, and the remaining states and territories, should adopt some form of the Victorian Government’s use of a pro bono ‘coordinator’ to “approve firms undertaking pro bono action”, as well as acting as an important contact point and repository of information about issues relating to pro bono legal work within government.

The exact nature and scope of this role may need to be adjusted to take into account circumstances in different jurisdictions. There may be possible differences in the efficacy of such a model depending on the factors such as the number and size of government departments.

Anecdotal evidence from the Victorian Government’s current pro bono coordinator in the Department of Justice suggests that this role within the government has facilitated an increase in the amount of pro bono by removing a barrier (making it easier for a panel firm to assess whether it has a conflict of interest that would impact on its ability to take a matter on a pro bono basis) and providing guidance on what will count as an “approved cause” under the Victorian Scheme.

The Centre has been advised by the coordinator that requests for pro bono assistance are received on average once or twice a week, which supports the notion that this position plays a useful role in Victoria. The coordinator is in a unique position to relay concerns in a generalised form where the potential pro

¹² See for example Legal Profession Uniform Law Application Act 2014 (Vic), Schedule 1, Clause 47(5), note.

¹³ See for example Legal Profession Uniform Law Application Act 2014 (Vic), Schedule 1, Clause 211, note 3.

bono client is not identified or exposed to possible retaliation. The Centre understands that requests in Victoria are usually processed with a 48 hour turnaround time. Matters where clearance is sought most frequently involve consumer, housing, fines, transport, police, and education matters. Often these conflicts are potential 'commercial' rather than direct, conflicts so the person undertaking the job has to be familiar with the nature of commercial conflicts and the ways in which they arise.

The coordinator also provides the important role of making contact for firms **within** government, thus removing the sensitivity that would otherwise exist if the firm contacted the department or agency directly.

Some firms expressed reservations about the necessity or cost effectiveness of the government pro bono coordinator role. One law firm pro bono coordinator said that the reality in their firm is that if a partner responsible for a particular client was concerned about a conflict then, regardless of whether a government pro bono coordinator said there was no conflict, the firm would not accept the pro bono referral. Another commented that larger firms are likely to have established contacts and already feel comfortable making the judgment call as to whether or not a particular situation poses a conflict, but the role may be of more benefit to smaller firms which may not have such established contacts. In any case, it is suggested that the role should be facilitative and that any approach to a coordinator should be optional.

The Centre also suggests that provisions should exist in each state and territory to make it clear that firms which undertake pro bono matters against government departments or agencies will not be discriminated against in the allocation of paid work, following the lead of Victoria and the Commonwealth. For example, as the Commission quoted in its Draft Report, section 11.3 of the Commonwealth Legal Services Direction 2005 requires that, unless there is a conflict of interest:

“The Chief Executive of an FMA [Financial Management and Accountability Act] agency is responsible for ensuring that the agency, when selecting and retaining legal services providers, does not adversely discriminate against legal services providers that have acted, or may act, pro bono for clients in legal proceedings against the Commonwealth or its agencies.”

For this provision to work properly within government, there needs to be a “go-to” person for firms when issues arise.

INFORMATION REQUEST 23.2 - POTENTIAL FOR INDUSTRY PRO BONO 'COORDINATORS'

Note that the Centre provided all Australian law firms with 50 or more lawyers with the opportunity to comment on its draft response to Information Request 23.2 and the following text incorporates any views expressed by firms.

The Centre recognises and confirms the limitation on the concept of an industry pro bono coordinator that the Commission described in the Draft Report regarding the fact that industry associations do not have the same ability as government agencies to act on behalf of their members.

While some firms supported the notion of establishing industry pro bono ‘coordinators’ in theory, many also expressed concern about the risks that such a role would pose in practice, given the sensitivities involved in the issue of commercial conflicts.

Firms fear that having an external industry pro bono coordinator would “muddy the waters” in their established client relationship practices. One law firm pro bono coordinator explained that: “Firms manage commercial relationships strategically and mindfully. Any perceived commercial conflict would be initially considered against well-established conflict policies (and conflict committees) and then taken up by the appropriate relationship partner. If the relationship partner felt there was a solid reason to consider the matter despite the risk of a perceived commercial conflict they would approach the client to discuss. This would all be dealt with in a considered and commercially sensitive way.”

The Centre suggests that there are simple, discrete matters, for example disputing the quantum of a mobile phone bill for a client of the Homeless Persons Legal Service, where there is little risk of commercial sensitivity, and where an industry pro bono coordinator could help confirm this.

One additional measure that could be taken to help alleviate the fear of commercial conflicts is to encourage relevant industries to adopt policies, similar to that of the Commonwealth and Victorian Governments, making it clear that in their process of selecting and retaining legal services providers, those that have acted pro bono for clients in legal proceedings against them will not be adversely discriminated against (See response to Draft Recommendation 23.2).

Industries having relationships with pro bono providers that frequently give rise to fear of commercial conflicts, and would benefit from having such a policy, include banking and financial services more broadly (particularly insurance and superannuation), health care, telecommunications and utilities. In October last year, the Centre wrote to the Chief Executive Officer of the Australian Bankers Association encouraging the ABA to consider a policy, similar to that of Victoria and the Commonwealth, that agrees to not adversely discriminate against a legal service provider on the basis that the provider has or is likely to provide pro bono legal assistance to parties in actions against a bank. No reply has been received to date.

INFORMATION REQUESTS 23.3 – PRO BONO TARGETS FOR JURISDICTIONS OTHER THAN THE COMMONWEALTH AND VICTORIA

The Centre supports the view that larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should “adopt a pro bono target” (meaning that

the government identifies a target that it expects or encourages law firms to meet) with conditions tied to government tender arrangements for the purchase of legal services.

As noted in the Commission's Draft Report, most respondents to the Centre's most recent National Law Firm Pro Bono Survey of Australian firms with fifty or more lawyers¹⁴ indicated that the pro bono conditions included in the tender arrangements by both the Commonwealth and Victorian Governments have been and remain useful in encouraging their firm to undertake pro bono legal work.

The Centre also supports the idea of a single target being used across multiple jurisdictions, favouring the efficiency of having one target which makes it easy to measure and evaluate, and possible to compare performance against the target across pro bono providers in different jurisdictions. The healthy competition that this kind of visibility and comparison stimulates is undoubtedly one factor driving increases in the amount of pro bono work. (See also answer to Draft Recommendation 23.3)

The National Pro Bono Aspirational Target, launched in 2006, is now well established and recognised, and as at October 2013 covered 8,763 full time equivalent legal professionals, or approximately 15% of the Australian legal profession.¹⁵ This figure rose to almost 10,000 at the beginning of 2014.¹⁶ This represents a 14.2 percent increase in the number of lawyers covered by the Target since the 2011/2012 financial year, and a 48.8 percent increase since 2010/2011.

While maintaining the anonymity of Target signatories, the Centre issues annual Target compliance reports that have been reported on in *The Australian* Legal Affairs section every year since the Target was created. The Target provides visibility to the issue of pro bono across the legal profession and an informal performance benchmark, particularly for law firm pro bono programs.

Through advocacy by the Centre, the Target was embedded in the Commonwealth Government's Legal Services Multi-User List for law firms in 2011. Applicants are now required to either be a signatory to the Target or specify a value of pro bono legal work they intend doing in the coming year. This scheme has motivated a number of the larger second-tier law firms in Australia to significantly lift their pro bono performance.

The Centre recognises the Commission's point that firms which already have a good pro bono culture are more likely to sign up to such targets, making it difficult to ascribe causation for increased pro bono hours to the target itself rather than underlying pro bono culture in the relevant firms. However 42% of law

¹⁴ National Pro Bono Resource Centre, National Law Firm Pro Bono Survey Australian firms with fifty or more lawyers, Final Report, January 2013, pp. 6 and 53.

¹⁵ National Pro Bono Resource Centre, Sixth Annual Performance Report on the National Pro Bono Aspirational Target (October 2013) p.2.

¹⁶ See National Pro Bono News, Issue 85 (February 2014) <http://www.nationalprobono.org.au/page.asp?from=4&id=334#1>

firms that reported to the Centre on their performance against the Target last year reported that the Target led to an increase in the pro bono work undertaken by the firm, and 44% of these firms reported that it increased the firm's focus on the legal needs of disadvantaged people.¹⁷

The Centre also has experience of working with a number of firms which have signed up to the Target when they were far from close to meeting it and has witnessed their significant improvement. The Target provides the Centre with a way of building a relationship with target signatories that provides access to the firm to advise on how to develop their pro bono practice and improve pro bono performance. The Statement of Principles which law firm target signatories endorse includes a commitment by them to "monitor the firm's progress towards the targets established in this statement and to report its progress annually to the partners and staff of the firm and to the National Pro Bono Resource Centre".

In relation to governments in smaller jurisdictions, the Centre suggests that action to encourage pro bono legal work that should be considered by the Attorney-General in that jurisdiction is to write to law firms:

- Reinforcing the position that the Attorney-General takes pro bono seriously and considers it an important ethical value of the Australian legal profession and that they will be reinforcing this message with all government agencies, departments and statutory authorities;
- Acknowledging any past and/or current efforts being made by firms to build their pro bono practices and recognising that opportunities for suitable and sustainable work take time to develop;
- Expressing interest in receiving information/case studies of the pro bono work they are doing;
- Encouraging participation and membership by firms in state-based pro bono clearing houses and referral schemes; and
- Drawing attention to the resources of the National Pro Bono Resource Centre and pro bono clearing houses to assist them in developing pro bono programs, for example the Centre's resource *Pro Bono Partnerships and Models: A Practical Guide to **What Works***.

DRAFT RECOMMENDATION 23.3 – FLEXIBILITY IN USE OF PRO BONO TARGETS AS INCENTIVES IN TENDER ARRANGEMENTS AND SIMPLE REPORTING REQUIREMENTS

The Centre supports the idea that reporting requirements for pro bono targets used by government as incentives in tender arrangements should be clear and simple to minimise the administrative burden on pro bono providers, so that they can maximise the use of their time and expertise on the provision of pro bono service. As many firms, and most of the larger firms, are providing pro bono services in multiple states and territories, having a single target with a uniform system for reporting is vital to ensuring that it is easy for them to administer it. This becomes more important as more jurisdictions adopt the target concept.

¹⁷ National Pro Bono Resource Centre, Sixth Annual Performance Report on the National Pro Bono Aspirational Target, October 2013, p.8.

However the Centre is concerned that “flexibility” in the formulation, implementation and administration of targets by governments in different jurisdictions may dilute the effectiveness of this measure. One of the factors which contributes to the success of the National Pro Bono Aspirational Target in encouraging the provision of the pro bono legal services, is that it establishes a recognised benchmark and a standard way of measuring and comparing the amount of pro bono work which pro bono providers can use to track their performance against their peers. Having different targets in different jurisdictions would prevent this kind of comparison. (See also answer to Information Request 23.3)

INFORMATION REQUEST 23.4 – THE MOST EFFICIENT FORM OF PRO BONO TARGETS

Drawing on its experience of collecting data about the pro bono performance of law firms for the purpose of its reporting on the National Pro Bono Aspirational Target and its biennial National Law Firm Pro Bono Survey, the Centre considers that the figure of “hours per lawyer per year” provides the best way of measuring and comparing pro bono contributions. This is because an hour is a fixed constant across firms and it takes into account firms’ relative sizes. Being able to easily measure and compare pro bono contributions is important for evaluation and encouraging continually improving performance. (See also response to Information Request 23.3)

Measuring pro bono performance in dollars can be misleading because it is difficult to standardise and track the method of costing, with the likelihood of different monetary values being placed on the same work. For example the same work undertaken by a small firm lawyer may be charged out at a lower rate than a large firm lawyer. If the work was done within a community legal centre or legal aid, the monetary value attributed to it would be different again (much lower).

DRAFT RECOMMENDATION 23.4 – EVALUATION OF SERVICES PROVIDED BY PUBLICLY FUNDED PRO BONO SERVICE PROVIDERS

Where pro bono service providers receive government funding, the Centre agrees with the draft recommendation that this funding should be contingent upon regular, robust and independent evaluation of the service provided, consistent with other publicly funded services that are required to account for the public funding they receive and evaluate their service provision.

However it is also important to recognise in any evaluation methodology of pro bono services that receive public funding that they harness pro bono legal services which are, by their nature, different to publicly funded legal services. This is because they rely on the voluntary contributions of the legal profession which are a limited resource and cannot be assumed to be available.

Adequate resources need to be available to support the development of the systems required for these organisations to conduct such evaluation, which may include for example designing and providing training

for staff in new data collection and analysis processes and obtaining external expertise in evaluation methods.

The Centre encourages all pro bono service providers and law firms that undertake pro bono work to continually review and improve their evaluation methods. However for law firms and pro bono providers which do not receive any public funding the Centre is of the view that, consistent with the voluntary nature of pro bono work, it is appropriate for them to decide how they will evaluate the services they provide. The type of evaluation that law firms that undertake pro bono work might choose to undertake ranges from evaluation of the social impact of their pro bono work, including the extent to which it addresses unmet legal need, to the commercial impact of pro bono work on its business and lawyers.

The Centre notes that many law firms that undertake pro bono work are becoming more strategic about the way they direct their pro bono resources and increasingly interested in developing more sophisticated methods of evaluating their pro bono programs. However it is important to recognise that no evaluation of the operation of pro bono legal services can be undertaken without also considering the cost of coordinating and supervising pro bono legal work. Much pro bono work is undertaken in partnership with a community organisation or legal centre which also bears significant coordination costs.

INFORMATION REQUEST 23.5 – METHODS TO IMPLEMENT DATA COLLECTION ON PRO BONO SERVICES

In responding to Information Request 23.5, the Centre has focused on the following suggested potential methods of improving pro bono data, set out in the Commission’s Draft Report at page 747. The Centre notes that these are drawn from an article written by Cummings & Sandefur¹⁸ about pro bono legal work in the context of the United States, which has a significantly different pro bono structure and culture to Australia.

Standardised data collection about the work pro bono lawyers do and enhanced cost tracking

The Centre’s biennial National Law Firm Pro Bono Survey, which has been conducted three times since its inception in 2008, provides useful data about and a longitudinal picture of the pro bono work undertaken by large Australian firms with 50 or more lawyers. The survey is well established and supported by the profession, with 36 of the 51 firms identified as having 50 or more full time equivalent lawyers responding

¹⁸ Cummings, S. and Sandefur, R. 2013, ‘Beyond the numbers: What We Know – and Should Know - About American Pro Bono’, Harvard Law & Policy Review, vol. 7, pp. 83–111.

to the most recent survey conducted in 2012.¹⁹ These firms have a common understanding of the terms used in the survey.

The suggestions for the type of data that could be collected under the heading of “enhanced cost tracking” include both time-based and dollar-based measures of the cost of undertaking pro bono work. As explained in the response to Information Request 23.4, the Centre finds that dollar-based measurements are likely to be misleading, given the different monetary values that are placed on the same work, and suggests that collection of this kind of data would not be useful. The Centre considers the time-based figure of “hours per lawyer per year” to be the best way of measuring and comparing pro bono contributions, and this information is currently collected by the Centre in its survey.

However, the Centre’s large firm survey only covers twenty percent of the legal profession. Collecting similar data for the entire legal profession is important, but a much more difficult task given the number of practice involved and the fact that many smaller practices do not keep records of their pro bono work. With additional resources, this work could be undertaken by the Centre in partnership with law societies and bar associations. The Centre has previously scoped work of this nature, but has been unable to carry it out without adequate resources. Some law societies are asking their members about pro bono work in their annual practising certificate renewal processes and this should be encouraged. The use of standardised definitions, consistent with the practice of the Centre, would be desirable again in terms of making it easy to measure and compare results.

Another key way in which the Centre collects data about pro bono work is by reporting on the performance of signatories to the National Pro Bono Aspirational Target. There is a balance to be struck between the aspirational nature of the Target and ensuring the transparency and integrity of the Target through adequate reporting requirements. In this regard the Centre works towards standardisation of key terms, definitions and collection protocols through the Guidance Notes it publishes and reviews regularly for the Target.

Given the diverse range of work and areas of law that are undertaken as pro bono legal work, and the fact that pro bono legal work by definition excludes matters where legal aid is available, attempting to align the categories of data collection for pro bono work with those used by legal aid commissions and CLCs would be very difficult and not a fruitful exercise. The increasing internationalisation of law firms also creates an additional level of complexity to data collection on pro bono services. This makes the argument for standardisation even more compelling.

Social impact metrics and standardised client and lawyer satisfaction evaluations

As discussed in the Centre’s response to Draft Recommendation 23.4, the Centre holds the view that for pro bono providers which do not receive any public funding, it is consistent with the voluntary nature of

¹⁹ National Pro Bono Resource Centre, National Law Firm Pro Bono Survey Australian firms with fifty or more lawyers, Final Report, January 2013, p 8.

pro bono and appropriate for them to decide how they will evaluate the services they provide. The responsibility for broadly examining how effectively legal assistance services are meeting the legal needs of disadvantaged Australians must remain the responsibility of government and publicly funded legal services.

While the Centre can, and does, encourage pro bono providers to evaluate the social impact of their pro bono contribution, social impact is only one of many factors driving pro bono providers to undertake pro bono legal work and therefore only one of the goals against which an evaluation might be conducted. Other goals may include, for example, improving relationships with potential clients, or improving staff satisfaction, training, retention and morale. The Centre notes the suggestion made by Cummings and Sandefur that “linking data collection to firms’ self-interest may be an effective tool for creating a more transparent and sustainable system of evaluation”.²⁰

Where law firms have indicated an interest in developing methods of evaluating the broader social impact of their pro bono programs, the Centre has responded by conducting research and exploring options for evaluation tools. For example, the Centre organised preliminary workshops for interested law firm pro bono coordinators with the Centre for Social Impact. However this has not progressed beyond this initial exploration of the concept and possibility of developing such a tool.

As the Cummings and Sandefur article acknowledges, measuring social impact is complex. No matter which strategic planning methodology is applied, impact remains the most difficult to measure as it can only be seen in the long term and there are many external factors over time that cannot be controlled. The data required for such an exercise would be very resource-intensive to collect. As noted in the Deloitte Access Economics 2011 evaluation of the economic contribution of the PilchConnect program: “Many community impacts such as facilitating greater social inclusivity and advancing cultural values are very difficult, if not impossible, to quantify”.²¹

The Centre is not aware of any existing social impact metrics for pro bono legal work that can be immediately adopted. While the Pro Bono Institute in the United States has established a Taskforce on Pro Bono Measurement and Metrics to develop such tools, they have recently advised the Centre that the work is at a preliminary stage.

While it may remain difficult to measure whether stated goals are being met, the Centre agrees that is a worthwhile pursuit. At the very least, the evaluation frameworks that need to be put in place in an attempt to measure them may nevertheless be a useful planning tool in themselves that at least provide a framework for: defining objectives, outcomes, outputs and inputs; measuring performance against these; and setting priorities.

²⁰ Cummings, S. and Sandefur, R. 2013, ‘Beyond the numbers: What We Know – and Should Know - About American Pro Bono’, Harvard Law & Policy Review, vol. 7, p. 109.

²¹ Deloitte Access Economics, The economic contribution of the PilchConnect program, August 2011, p 31.

The Centre understands that in cases where data is collected on the impact of pro bono work, this is largely limited to feedback from clients on the pro bono assistance they have received - that is the impact only on the individual clients. However a recent evaluation of the QPILCH Self-Representation Service, in addition to surveying users of the service about their experience of it, also surveys judges, their associates and court registry staff on their knowledge of the service.

The Centre suggests that this kind of data is best collected by an independent third party, rather than by the pro bono provider, as clients may fear offending the pro bono provider and damaging their prospects of obtaining pro bono legal assistance in the future. This is a role which the Centre would be well placed to perform, but would need to do so in consultation with pro bono providers and clearing houses.

For pro bono providers that wish to evaluate their pro bono work in this manner, standardised surveys could be a useful tool for collecting data about client satisfaction with their pro bono lawyer.

21 May 2014
National Pro Bono Resource Centre