



# AUSTRALIAN PRO BONO CENTRE

## **Submission to the Standing Committee on Social Policy and Legal Affairs**

### **Inquiry into a better family law system to support and protect those affected by family violence**

**May 2017**

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## ABOUT THE AUSTRALIAN PRO BONO CENTRE

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The **Australian Pro Bono 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 by**

- 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 **Australian Pro Bono 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.

## SUMMARY

The Australian Pro Bono Centre (**Centre**) thanks the Standing Committee on Social Policy and Legal Affairs for its invitation to provide comments and submissions to the Inquiry into a better family law system to support and protect those affected by family violence (**Inquiry**).

The Centre is in a position to provide a national perspective on the capacity of pro bono legal culture and services in Australia to support and protect people affected by family violence, and how these services can be strengthened in order to provide access to justice for those individuals.

The Centre makes the following submissions regarding **Term of Reference 5**, with a focus on the capacity of lawyers who are family law practitioners:

**5. *How the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence.***

In response to this Term of Reference, the Centre makes the following recommendations:

**Recommendation 1:**

- That government support the current models of legal assistance for family law matters by upholding and expanding its commitment to provide funding for legal assistance services focused on family law.

**Recommendation 2:**

- That support be given to further research on the pro bono work of family law practitioners in order to:
  - identify ways to strengthen their capacity to provide legal assistance and support to those affected by family violence, given that they have little capacity to take on additional pro bono legal work in the ‘traditional sense’;
  - identify ways that family law practitioners can be better supported to continue to provide family law services to clients with no, or limited means; and
  - recognise the significant pro bono contribution that these family law practitioners are making and understand its resource implications.

## INTRODUCTION

The Centre understands **Term of Reference 5** to be about **family law practitioners**, in the sense of persons who have expertise, and whose main role is to work within, the family law system. This understanding will form the basis of our submission.

Of the large law firms with 50 or more lawyers that have pro bono practices, only a handful have lawyers who are family law practitioners. Other lawyers in these firms may be involved in a family violence matter from time to time, but there is limited capacity amongst these firms to provide pro bono legal assistance in matters concerning family violence, and **very limited capacity** to do so where the facts of the matter are interconnected with a family law proceeding (either contemplated or actual).

### 5 HOW THE CAPACITY OF ALL FAMILY LAW PROFESSIONALS—INCLUDING JUDGES, LAWYERS, REGISTRARS, FAMILY DISPUTE RESOLUTION PRACTITIONERS AND FAMILY REPORT WRITERS—CAN BE STRENGTHENED IN RELATION TO MATTERS CONCERNING FAMILY VIOLENCE

#### 5.1 Pro bono legal work cannot be a substitute for properly funded legal assistance services in family law matters

The Centre welcomes the Commonwealth Attorney-General's recent decision to renew funding to Community Legal Centres (CLCs) across Australia on 1 July 2017. The Centre notes that family law and family violence services are a key focus of the funding commitment. The Hon George Brandis QC, Hon Michaelia Cash and Hon Nigel Scullion jointly announced that "[a]s part of the Government's commitment to tackling violence against women and their children, the additional \$39 million for Community Legal Centres will prioritise frontline family law and family violence services."<sup>1</sup>

As at 2015, 40.3% of CLCs (or 50 CLCs) offered specialist programs in family law.<sup>2</sup> The Centre's research indicates that despite this focus of services on family law, the demand for legal services in family law and family violence remains high, particularly among those who are on a low income or experiencing disadvantage, and far outstrips the capacity of services provided by Legal Aid Commissions and CLCs, and the pro bono legal assistance offered by the legal profession.<sup>3</sup> Whilst CLCs provide much advice and preventative work, it has become increasingly difficult for individuals who are parties to family

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<sup>1</sup>The Hon George Brandis QC, the Hon Michaelia Cash and the Hon Nigel Scullion, 'Record federal funding for legal assistance' (Media Release, 24 April 2017), <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/SecondQuarter/Record-federal-funding-for-legal-assistance.aspx>.

<sup>2</sup> National Association of Community Legal Centres, *National Census of Community Legal Centres: 2015 National Report*, p 19, <http://www.naclc.org.au/resources/NACLC%20Census%20-%20National%20Report%202015%20-%20FINAL.pdf>.

<sup>3</sup> Australian Pro Bono Centre, *Pro bono legal services in family law and violence: Understanding the limitations and opportunities – Final Report (Family Law Report)*, October 2013, p 16, <http://probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf>.

law proceedings, or who should be initiating them, to obtain legal support to draft relevant documents (such as applications and affidavits). Increased financial support for Legal Aid Commissions is required to meet this need.

Pro bono practices of large law firms have found it easier to assist in matters concerning family violence (without a connection to family law proceedings) for reasons set out in 5.2 below. However, while pro bono legal work makes a small contribution to addressing unmet legal need, it is not, and cannot be, a substitute for substantial publicly funded legal assistance services such as legal aid and community legal centres, particularly in family law matters.

Given the flexibility that economies of scale provide, large law firms often have greatest capacity to undertake pro bono legal work. Numerous large and mid-sized firms<sup>4</sup> have well-developed pro bono programs focused on assisting individuals experiencing disadvantage and marginalisation. This work, however, relies heavily on partnerships with pro bono referral and triage organisations (such as Justice Connect and LawRight), CLCs, Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services. In June 2016, ten leaders of pro bono practices in large Australian law firms stated in an open letter:

*Virtually none of our pro bono work for low-income and disadvantaged people could be performed without partnerships and relationships with legal assistance services, including with CLCs. The individual clients we assist on a pro bono basis usually are referred to us by a legal assistance service or attend one of the outreach clinics we conduct with a legal assistance service. The delivery of many pro bono services by the private legal profession requires a partnership or collaboration with effectively functioning legal assistance services.*<sup>5</sup>

This reliance on partnerships to assist the disadvantaged and marginalised has been explained by pro bono coordinators in mid-sized Australian law firms:

*Our firms partner with CLCs in a wide range of ways, including through the provision of advice and assistance, secondments, and staffing of legal clinics. The CLCs use their unique position in the community to identify areas of greatest need and help us reach the clients most in need. Without the CLCs' specialised expertise, we would be unable to train and supervise our commercial lawyers who do not usually practice in the areas of law in which*

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<sup>4</sup> For the purpose of this submission, 'large and mid-sized firms' refers to law firms of 50 or more full-time equivalent lawyers.

<sup>5</sup> Nicky Friedman, Sarah Morton-Ramwell, Kate Gillingham, David Hillard, Catriona Martin, Michelle Hannon, Jillian Mitford-Burgess, Brooke Massender, Joanna Renkin and Karen Keogh, 'Funded legal assistance sector crucial to pro bono work', *The Australian*, 24 June 2016, <http://www.theaustralian.com.au/business/legal-affairs/funded-legal-assistance-sector-crucial-to-pro-bono-work/news-story/e5fbfccff90d10e39fe36139ac79a87>.

*unmet legal need is greatest, and would therefore be unable to take on this pro bono work.*<sup>6</sup>

However, the Centre's research indicates that in family law, very little pro bono legal work is done by large and mid-sized firms, despite the high level of unmet legal need in that area. According to the recent *Report on the Fifth National Law Firm Pro Bono Survey — Australian firms with fifty or more lawyers (Survey Report)*, family law was the highest nominated rejected area of law in Australian firms with fifty or more lawyers.<sup>7</sup> Reasons for this incongruity are explained in section 5.2 below.

#### RECOMMENDATION 1

That government support the current models of legal assistance for family law matters by upholding and expanding its commitment to provide funding for legal assistance services focused on family law.

### 5.2 Limitations and opportunities to strengthen the capacity of family law professionals undertaking pro bono work

Despite the fact that more lawyers and law firms are becoming increasingly involved in pro bono service delivery, obtaining pro bono legal assistance in family law matters is very difficult, with many pro bono providers and referral schemes simply not accepting applications for pro bono assistance in family law. In 2013, the Centre sought to identify opportunities to foster growth in Australian pro bono legal services concerning family law and family violence by undertaking research focusing on:

- the nature of pro bono legal work in family law matters and family violence matters;
- reasons for the low levels of engagement in family law matters by large and mid-sized firms; and
- the nature of pro bono legal work in matters where family law and family violence intersect.

The resulting report (**Family Law Report**)<sup>8</sup> found that understanding the reasons behind the difficulties of obtaining pro bono legal assistance in family law requires an appreciation of the unique nature of family law as a practice area and the unique nature of family law clients, and how this impacts on pro bono providers.

<sup>6</sup> Peter Seidel, Kate Gillingham, Michael O'Dea, Daniel Creasey, Jon Clarke, Scott Kennedy, Stephen Purcell, Jodie Wauchope, Jillian Mitford-Burgess, John Kell, John Wakefield, Mark Procajlo, Harriet Warlow-Shill, Joanna Renkin, Nigel Kemp, Victor Harcourt, Karen Keogh and Heidi Nash-Smith, 'The risks of cutting government funding to legal assistance services – an open letter from mid-sized Australian law firms', *Australian Pro Bono News: Issue 115*, 16 December 2016, <http://probonocentre.org.au/apbn/dec-2016/mid-size-firms-call-government-reverse-impending-funding-cuts/>.

<sup>7</sup> Australian Pro Bono Centre, *Report on the Fifth National Law Firm Pro Bono Survey — Australian firms with fifty or more lawyers (Survey Report)*, March 2017, p. 37, <http://probonocentre.org.au/wp-content/uploads/2017/03/Report-on-the-Fifth-National-Law-Firm-Pro-Bono-Survey.pdf>.

<sup>8</sup> Australian Pro Bono Centre, *Pro bono legal services in family law and violence: Understanding the limitations and opportunities – Final Report (Family Law Report)*, October 2013, <http://probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf>.

On one hand family law practitioners, who are best placed to provide pro bono assistance in family law matters, have little capacity to provide more assistance than they already do. This is largely due to the way they work in response to the unique nature of family law matters. On the other hand, as discussed above in 5.1, while large and mid-sized law firms may potentially have more capacity to undertake pro bono legal work, they face a number of other significant constraints to providing pro bono legal services in family law that also stem from its unique nature.

### ***Family law and family law practitioners***

The Family Law Report indicates that specialist family law practitioners, who are usually in smaller firms, take an ad hoc, individual approach to pro bono legal work that involves unpaid work ‘embedded’ or ‘woven into’ the work they regularly undertake for clients who have a grant of legal aid, or work done for a significantly reduced fee for clients who do not qualify for legal aid but are of limited means. This work, for example, may take the form of continuing to act for a client after their grant of legal aid has run out.

*Being a family law practitioner is almost a lifestyle choice. It's as much about how you provide services as it is about the specialised area of law. Pro bono is woven into family law. The clients need a really high level of support and even if the client runs out of funds to pay me or reaches their [legal aid] funding cap you still have to help. Because what's the alternative – ditching a client and leaving them with no outcome or a poor one? That's not the kind of lawyer I want to be. (Family law practitioner)<sup>9</sup>*

This form of pro bono work differs from the ‘traditional’ approach, where pro bono clients are distinct from fee-paying clients; pro bono matters are taken on ‘pro bono’ from the outset, and worked on separately from, and in addition to, other matters.

Due to the expertise required, family law matters are best managed by specialised family law practitioners. However, the research suggests that these practitioners are working in a way that leaves them with little capacity to take on pro bono clients in a traditional sense.

### ***Family law and large and mid-sized firms***

By contrast, many large and mid-sized law firms take an organised, systematic approach to pro bono work. These firms have pro bono practices that undertake increasing amounts of pro bono legal work, often strategically targeting legal need in areas where no publicly funded legal services are available. Although these firms may have the capacity to take on additional pro bono legal work, there are other issues that influence a firm’s decisions about the areas of law and the type of pro bono legal work they will undertake, including legal or commercial conflicts, and means and merit considerations.

In order to better understand these issues, the Centre developed an ‘Analysis Framework’ (**Framework**), comprising of **five factors** that are likely to be taken into account by a law firm with a

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<sup>9</sup> Ibid, p. 10.

structured pro bono program when deciding whether to take on a family law matter. Applying the Framework helps to explain why it is relatively difficult to obtain pro bono legal assistance from large to mid-sized law firms in a family law matter.

The Centre's research found that among pro bono coordinators of large and mid-sized law firms,<sup>10</sup> there was a broadly held view that the **scope of a firm's pro bono policy (Factor 1)** should not extend into areas including family law, which are considered to be government's responsibility and where legal aid funding is available.<sup>11</sup>

It was also found that large and mid-sized law firms rarely have **expertise (Factor 2)** in the areas of family law as a result of increased specialisation in the Australian legal profession. The multi-faceted and complex nature of family law matters makes it difficult to provide sufficient training to overcome lack of expertise in that area of law.<sup>12</sup>

The Family Law Report also indicates that **capacity (Factor 3)** also mitigates against accepting family law matters. Many large and mid-sized law firms believe that due to the extent of unmet legal need in family law, the firms' limited pro bono resources would not be able to make a significant impact.<sup>13</sup>

In addition, **discrete tasks (Factor 4)** are more likely to be accepted than family law matters. For lawyers with no expertise in family law, the size of the *Family Law Act 1975* (Cth) and the body of case law attached to it make it more difficult to find discrete tasks in that area of law.<sup>14</sup>

The last factor is the **willingness and interest** of lawyers within the firm to undertake the work (**Factor 5**). In the context of family law, issues relevant to willingness and interest ranged from the nature of family law clients, the emotive subject of family law disputes, to a concern that discrete tasks in family law would not be interesting to lawyers.<sup>15</sup>

### ***Matters involving family violence***

The Family Law Report indicates that mid-sized and large firms are more likely to undertake pro bono legal work in family violence matters (where no family law is involved) than in family law matters. Applying the Framework above, family violence matters are more likely to be within the firm's policy (**Factor 1**), within the firm's expertise (**Factor 2**) and capacity (**Factor 3**), comprised of discrete tasks (**Factor 4**) and aligned with the firm's willingness and interest (**Factor 5**).

By way of example, since Clayton Utz's pro bono practice began in 1997, the firm has recovered \$4,377,832 for victims of domestic violence, family violence, sexual assault and sex trafficking. The

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<sup>10</sup> The law firms that participated in and provided input and/or guidance into the Report include: Allens Linklaters, Ashurst Australia, Clayton Utz, DLA Piper, Gilbert + Tobin, Henry Davis York, Holding Redlich, HWL Ebsworth, Lander & Rogers, Minter Ellison, Norton Law Group, Phang Legal and TressCox Lawyers.

<sup>11</sup> The Family Law Report, p. 95.

<sup>12</sup> Ibid, pp. 11-13.

<sup>13</sup> Ibid, p. 17.

<sup>14</sup> Ibid, p. 18.

<sup>15</sup> Ibid, p. 19.



firm also successfully established a Women's Safety House and Men's Cooling Down Centre on Grootte Eylandt with the North Australian Aboriginal Family Violence Legal Service (NAAFVLS).<sup>16</sup>

Russell Kennedy's pro bono work focuses on providing services that strengthen the capability of lawyers and community sector workers to support women and children affected by family violence. In 2015, Russell Kennedy worked with Rosie Batty to set up the Luke Batty Foundation in honour of her late son, Luke. As part of its pro bono practice, the firm worked with the Foundation to establish its legal, taxation and governance structures. Russell Kennedy also provides pro bono legal advice to the Domestic Violence Resource Centre, and every year has a fundraiser for McAuley Community Services for Women.<sup>17</sup>

The Gilbert + Tobin pro bono practice also has a long-standing commitment to women and children fleeing domestic violence. For over ten years, the firm has assisted Redfern Legal Centre's Women's Domestic Violence Court Assistance Scheme at the Downing Centre in Sydney by providing lawyers each week to represent women seeking apprehended violence orders in an attempt to escape violence. In 2015, the firm also provided pro bono legal assistance to the Centre in relation to setting up a specialist Safety Action Group for women who are identified as being at high risk of violence.<sup>18</sup>

As the above examples demonstrate, providing pro bono assistance in family violence matters and addressing unmet legal need in this area is a key focus for various law firms and their pro bono practices. However, the Centre's research indicates that when legal issues regarding family law and family violence **interconnect**, the difficulties relating to family law may extend so far as to make the provision of pro bono legal services in family violence difficult for the firm as well.<sup>19</sup> The reasons for this include that:

- in most cases concerning family violence, there are additional family law matters that tend to be connected (for e.g. family separation or divorce);
- in some cases, it is impossible to advise clients on one aspect of the law (e.g. family violence) but not the other (e.g. other family law issues), especially if the legal issues cannot be sufficiently isolated or separated; and
- a lack of expertise in family law may make it difficult to provide pro bono legal assistance where family law and family violence matters overlap.

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<sup>16</sup> The Australian Pro Bono Centre, 'Clayton Utz's contribution to victims of family violence', *Australian Pro Bono News: Issue 106*, 16 February 2016, <http://probonocentre.org.au/apbn/feb-2016/clayton-utzs-contribution-victims-family-violence/>.

<sup>17</sup> The Australian Pro Bono Centre, 'Russell Kennedy's work to help victims of family violence – a case study', *Australian Pro Bono News: Issue 103*, 15 October 2015, <http://probonocentre.org.au/apbn/oct-2015/russell-kennedys-work-help-victims-family-violence-case-study/>.

<sup>18</sup> The Australian Pro Bono Centre, 'A profile of Gilbert +Tobin's pro bono work in the area of family violence', *Australian Pro Bono News: Issue 104*, November 2015, <http://probonocentre.org.au/apbn/nov-2015/profile-gilbert-tobins-pro-bono-work-area-family-violence/>.

<sup>19</sup> The Family Law Report, p. 106.

## **Conclusion**

Large law firms and their pro bono practices have responded to the unmet legal need as it concerns family violence, but where these matters interconnect with family law, it has been difficult, if not impossible for these pro bono practices to assist. This need must be met by experienced family law practitioners.

Given the limited capacity of family law practitioners to undertake more pro bono work, it is important to better understand how these practitioners can be supported in continuing to assist low income and socially disadvantaged clients where they are not being paid, or the grant of legal assistance from Legal Aid Commission only covers a small part of the work that they are doing for the client. Not enough is known about the pro bono work of family law practitioners as this work is currently not visible and 'embedded' into the work they regularly undertake for clients. Further research is therefore required to provide a better understanding of:

- the factors that motivate family law practitioners to undertake this work;
- the characteristics of the clients who are receiving this assistance;
- the impact of this work on legal need and access to justice;
- the relationship between this work and work done under a grant of legal aid;
- the ways that family law practitioners can be better supported to continue to provide family law services to clients with no or limited means; and
- the resource implications arising from the significant pro bono contribution that family law practitioners are making (for example, if this contribution was no longer provided).

A greater understanding of the extent and impact of the pro bono legal work undertaken by family law practitioners could also inform a discussion and debate about how to respond to unmet legal need in family law, particularly the ongoing development of legal aid policy.

Overall, pro bono legal assistance plays a small but important role in providing access to justice — often where no other service is available to assist. Although efforts should be made to support and grow the provision of pro bono legal services involving family law, it will always be limited by its voluntary nature and the interests, expertise and skills of those who choose to provide pro bono legal services.

### **RECOMMENDATION 2**

That support be given to further research on the pro bono work of family law practitioners in order to:

- identify ways to strengthen their capacity to provide legal assistance and support to those affected by family violence, given that they have little capacity to take on additional pro bono legal work in the 'traditional sense';
- identify ways that family law practitioners can be better supported to continue to provide family law services to clients with no, or limited means; and
- recognise the significant pro bono contribution that these family law practitioners are making and understand its resource implications.