

CHAPTER 9

PRO BONO LEGAL SERVICES

9.1 One area in which there have been major changes since the Committee's last report is the provision of pro bono legal services. Over the last five years the provision of such services in Australia has been transformed from fractured and unstructured services, often delivered by lawyers in their private time, to services that are coordinated between community centres and law firms and performed by lawyers in structured in-house pro bono programs.¹

9.2 This chapter discusses:

- developments in pro bono legal service provision since the *Third Report*;
- the lack of data on pro bono legal services;
- whether pro bono legal services are a substitute for legal aid funding;
- the mismatch of legal skills and community need;
- lawyers' conflicts of interests;
- limitations of lawyers' resources; and
- reducing the costs of litigation.

The Third Report

9.3 The Committee did not discuss pro bono services in great detail in the *Third Report*. However, the Committee considered that the Government had 'seriously misunderstood' the extensive involvement of the legal community in providing legal aid and pro bono services:

In failing to understand the complex structure in which such services are provided, the Government may have thought that reducing funding to one part of the structure would be overcome by additional contributions from the other components. This view manifestly misunderstands that the amount of legal aid provided in the past has only been possible, on the whole, because of the substantial contribution of the legal profession.²

1 National Pro Bono Resource Centre, *First Annual Report 2003*, p. 2.

2 *Third Report*, para 8.103, p. 157.

9.4 In particular, the Committee believed that the Government's restructure of legal aid administrative and funding arrangements were based on the Government's belief that:

... a greater percentage of the overall legal aid load can be shifted to the legal profession.³

9.5 The Committee's conclusion was based in part on observations of members of the legal profession of the increasing legal aid burden and the profession's limited capacity to take up this extra burden.⁴

9.6 The Committee had recommended that the Commonwealth Government sponsor a National Legal Aid Council to advise Government on legal aid matters and provide a vehicle for communication between users and providers of legal aid.⁵ The Committee recommended that this Council draft 'guidelines to cover the terms and conditions under which elements of the legal aid community provide legal aid and related services.'⁶ Additionally, the Committee recommended that 'there be full recognition of the contribution made by the legal aid community to the provision of legal services for the community, especially within the past two years.'⁷

9.7 In responding to the Committee's report, the Commonwealth Government recognised the contribution made by the legal aid community⁸ but rejected the other recommendations. The Government expressed the view that existing consultative mechanisms enabled it to receive advice on the legal aid system and that the Australian Legal Aid Assistance Forum had been established to promote communication within the legal aid community.⁹

Developments in providing pro bono legal services

9.8 There has always been some form of pro bono services in Australia's legal system. Individual lawyers have regularly offered their time, free of charge or for a reduced fee, to help individuals or organisations in need of legal assistance.

9.9 Mr Gordon Renouf, the former Director of the National Pro Bono Resource Centre, provided a brief overview of the history of Australian pro bono legal services in the Centre's first annual report.¹⁰ Until the last decade, little attention had been given to the role of pro bono legal services in increasing access to justice. Since then,

3 *ibid*, para 8.98, p. 156.

4 *ibid*, pp. 155-156; see also p. 21.

5 *ibid*, Recommendations 14 and 15, p. 135.

6 *ibid*, Recommendation 19, p. 157.

7 *ibid*, Recommendation 20, p. 157.

8 Government Response, *Senate Hansard*, 16 May 2002, p. 1773.

9 *ibid*, p. 1772.

10 National Pro Bono Resource Centre, *First Annual Report 2003*, 2003, p. 2.

a significant number of pro bono referral bodies have been established, with organisations such as the NSW Law Society, the NSW Law Foundation and the Victoria Law Foundation preparing reports or establishing pro bono projects. The Australian Bureau of Statistics first asked questions about pro bono work in its 1998/99 survey of the legal profession. Around the same time, several of the larger law firms began to establish structured in-house pro bono schemes or support for external services, often in partnership with community based organisations.¹¹

9.10 Anecdotal information suggests that the law firms see the structured and supervised provision of pro bono legal services as an important corporate social responsibility—lawyers generally see the opportunity to work on pro bono matters as an invaluable way to perform community service and as a way of injecting variety into their working life.

9.11 In August 2000, the then Attorney-General, the Hon Daryl Williams AM QC MP, hosted a conference in Canberra on pro bono legal services.¹² Following that conference he established the Pro Bono Task Force to develop a strategy for implementing the conference outcomes. In 2001 the Task Force recommended five broad actions:

- establish an Australian pro bono resource centre to promote pro bono work throughout the legal profession, assist and support pro bono service providers and make available resources and information to pro bono providers;
- produce a best practice handbook for managing pro bono work within law firms;
- support client-focused research;
- develop national professional practice standards for pro bono legal services; and
- foster a strong pro bono culture in Australia.¹³

9.12 In August 2002, the National Pro Bono Resource Centre was established by the Public Interest Advocacy Centre in partnership with several other organisations and with financial support from the Commonwealth Government and the University of New South Wales. It focused its efforts on building networks and partnerships and producing resources of benefit to the legal profession and community sector.¹⁴ The

11 *ibid*, p. 2.

12 *For the Public Good: The First National Pro Bono Law Conference*.

13 *National Pro Bono Task Force: Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services*, June 2001.

14 National Pro Bono Resource Centre, *First Annual Report 2003*, 2003, p. 2.

Commonwealth Government's financial support consisted of a \$1 million grant over four years, that is, until 2006.

9.13 In October 2003, the National Pro Bono Resource Centre hosted the Second National Pro Bono Conference in Sydney.¹⁵ The conference brought together representatives from community organisations, legal professional organisations, academics and law students, state and federal government legal officers, partners and pro bono coordinators of law firms, members of the Bar and judges to share experience and discuss emerging issues in pro bono law.¹⁶ The Attorney-General recognised the contribution of pro bono legal services in his speech at the Conference.¹⁷

Data on the extent of pro bono legal services

9.14 The Committee found it difficult to quantify the extent of pro bono legal services in Australia. This is partly because there is no universally accepted definition of what constitutes a pro bono legal service, although the term generally refers to a legal service that has been provided voluntarily and on a no fee or reduced fee basis. As the Australian Law Reform Commission explained in its 2000 report, *Managing Justice*:

Some lawyers equate work done at legal aid rates as 'pro bono' because of the low level of remuneration. Others include matters in which they have substantially reduced, but not waived, their fees. In some such cases, lawyers continue to act where paying clients run out of funds. Others lawyers apply a strict test that pro bono work is for the public good, such as 'test case litigation', not simply work without or for reduced charges.¹⁸

9.15 Many firms and legal professional associations do not keep statistics on the quantity or value of the pro bono work they or their members undertake or coordinate.¹⁹ There is also no nationally co-ordinated record-keeping of the services that are provided.

15 *Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003.

16 Speakers from the US, South Africa, Argentina and England also attended the conference to provide their perspectives.

17 Commonwealth Government, *Senate Hansard*, 16 May 2002, pp.1767-1773; The Hon Phillip Ruddock, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at <http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Alldocs/RWP16FDE03EBD917AF6CA256DD6001260E7?OpenDocument>.

18 Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, p. 305.

19 *ibid.*

9.16 The Australian Bureau of Statistics (ABS) estimated that in 2001-2002 solicitors and barristers in Australia provided a total of 2.3 million hours of pro bono work.²⁰ However, other sources estimate that the total is much higher. According to the Castan Centre for Human Rights Law, Australian solicitors and barristers perform 2.269 million hours of pro bono work each year.²¹ The Attorney-General referred to a similar figure for 2001-02 (2.3 million hours) in late 2003.²² The Pro Bono Resource Centre told the Committee of its concerns about the accuracy of the ABS statistics, pointing to sampling errors, disparity in record keeping practices and different opinions by law firms as to what constitutes pro bono work.²³ Nonetheless, whatever figures are used, it is clear that the legal profession's pro bono contribution is significant.

9.17 The Committee notes that comprehensive information on the types of clients and matters is also lacking. Submissions indicated that types of matters in which pro bono assistance is sought traversed a wide range of law, including commercial law, family law and criminal law. The statistics provided in submissions provided by community legal centres and law firms appeared to largely focus on particular areas of community need, largely reflected by the expertise of practitioners performing the work, rather than objectively indicating the total community need. Also, statistics provided by clearing houses indicate the community demand where no other help is available.²⁴

9.18 The Legal Aid Commission of South Australia suggested that the demand for pro bono legal services was increasing.²⁵ However, this view could not be confirmed due to the lack of reliable statistics.

Committee view

9.19 The Committee considers that accurate records of pro bono legal service provision would assist government by informing policy development in providing access to justice. These records should include the type of matter in which assistance was sought, type of client, source of referral and approximate cost in market rates of assistance provided.

20 Australian Bureau of Statistics survey, *2001-02 Legal Practices Australia*, 8667.0, tables 2.10 and 3.7.

21 Castan Centre for Human Rights Law, *Submission 76*, p. 8.

22 The Hon Phillip Ruddock, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at <http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Alldocs/RWP16FDE03EBD917AF6CA256DD6001260E7?OpenDocument>.

23 Mr Gordon Renouf, Director, Pro Bono Resource Centre, Paper presented at *Transforming Access to Justice – The Second National Pro Bono Conference*, 20 October 2003.

24 Public Interest Law Clearing House, *Submission 54*, pp. 18 & 23.

25 Legal Services Commission of South Australia, *Submission 51*, p. 4.

9.20 The Committee considers that the National Pro Bono Resource Centre is the most appropriate existing body to encourage a national approach to the collection of data on pro bono legal services. It notes that the Centre has noted this as a ‘future challenge’ in its annual report.²⁶ The Committee acknowledges that the Commonwealth government is providing the Centre with one million dollars over four years. However, the Committee considers that additional funding for the purpose of obtaining data collection would enable empirical data to inform the debate on this important aspect of the community’s access to justice.

Recommendation 48

9.21 The Committee recommends that the Commonwealth government provide additional funding to the National Pro Bono Resource Centre to enable it to encourage and provide support to law firms, community legal centres, pro bono referral schemes and legal aid commissions in recording and reporting statistics on pro bono service provision.

Structured service provision

9.22 The National Pro Bono Resource Centre’s submission outlined the current structures of pro bono legal service provision.²⁷ Generally, these are:

- in-firm pro bono (providing legal services in the same way as a paying client except that the service is offered for free or at a discounted rate);
- outreach services (lawyers providing legal advice at outreach locations, such as at the premises of community organisations);
- secondments to community legal organisations (generally the same as an outreach service except that the lawyer is supervised by a solicitor at the premises);
- specialist services (firms contributing resources to a specific community-based service—for example, the Shopfront Youth Legal Service in Sydney);
- volunteering (lawyers volunteering their time at community legal centres);
- multi-tiered relationships (providing resources, not necessarily legal resources, in partnership with other organisations to facilitate access to justice); and
- other pro bono opportunities.

26 National Pro Bono Resource Centre, *First Annual Report 2003*, p. 3.

27 National Pro Bono Resource Centre, *Submission 80*, pp. 5-6; Attachments 1, 2 & 3.

9.23 In larger metropolitan areas, law firms generally work in co-operation with community legal services or welfare organisations. One case in point is the PILCH Homeless Persons' Legal Clinic (HPLC), a co-operative effort of PILCH and the Council to Homeless Persons. PILCH employs a co-coordinator for the HPLC to organise lawyers from member firms who are willing to offer their services to crisis centres and welfare agencies which assist homeless persons.²⁸

9.24 There are numerous examples of similar co-operative efforts and not all are restricted to providing legal services for the end user. Often, larger firms will offer legal assistance to organisations (contract or employment advice, for example) and /or offer other resources including office facilities, library and research resources, administrative assistance, transport, manpower and fundraising.

9.25 These new arrangements are referred to as 'multi-tiered'²⁹ and 'demonstrat[ing] a new strategy'³⁰ in providing pro bono services, by taking a co-operative and pro-active approach to working directly with and serving the community. The emphasis is on providing a service which meets a need in a practical and real way as opposed to providing what lawyers are prepared to offer.³¹ It follows that if what lawyers are prepared to offer does not meet the stated need then steps need to be taken to ensure that lawyers are trained to provide skills which meet demand.

9.26 In the case of the ACT's First Stop Legal and Referral Service for Young People, the firm of Clayton Utz is one of four partner organisations whose focus is to assist people aged 12-25 by either helping to resolve legal matters or referring the young person to appropriate sources of assistance:

Clayton Utz wanted to do more than provide basic funding assistance to the service. David Hillard, the National Pro Bono Director at Clayton Utz explains, "We had a lot of enthusiasm from our lawyers for being involved in First Stop, but to be honest, we did not have a great depth of experience in many of the legal issues that we knew would affect First Stop clients. So we took steps to get that experience and train our lawyers." Prior to the service opening, Clayton Utz lawyers attended tailored training conducted by Legal Aid lawyers on topics such as criminal and family law. Training

28 Ms Paula O'Brien, Public Interest Law Clearing House (Victoria) Inc, *Committee Hansard*, 12 November 2003, p. 1.; see also Chapter 8 for a general discussion of legal assistance for homeless people.

29 National Pro Bono Resource Centre *Working Together: Multi-Tiered Pro Bono Relationships Between Law Firms and Community Legal Organisations*, p.1.

30 'From conservatism to activism: The evolution of the Public Interest Law Clearing House in Victoria' in *Alternative Law Journal*, Vol. 28, No. 1, February 2003, p. 11

31 National Pro Bono Task Force: *Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services*, p.12.

was also provided about specialist referral points in Canberra and referrals protocols were developed.³²

9.27 The benefits of structured provision of pro bono legal services include delivering more effective pro bono services and increasing effective legal services to disadvantaged clients and communities.³³ However, pro bono referral schemes do not appear to exist in all jurisdictions.³⁴

9.28 The Committee was interested to note a recent initiative in Victoria. The Victorian Attorney-General in June 2000 announced an initiative designed to increase the level of pro bono work undertaken by the private profession.³⁵ The Pro Bono Secondment Scheme Pilot which ran from March 2002 to December 2003 involved ten lawyers from six Melbourne law firms working for six months in nine centres (CLCs, specialist legal centres and one section of Victorian Legal Aid). A recent report has recommended the continuation and expansion of the scheme.³⁶

Committee view

9.29 The Committee commends the legal profession for its increasing support of pro bono legal services and the National Pro Bono Resource Centre for supporting the legal profession in matching community need with appropriately skilled lawyers.

9.30 While noting the Commonwealth Government's contribution to funding over four years, the Committee is concerned that the Commonwealth Government has not assured on-going funding for the Centre.

9.31 The Committee also considers the role of community legal centres and clearing houses as essential to the efficient and effective provision of pro bono legal services.

Recommendation 49

9.32 The Committee recommends that the Commonwealth Government commit ongoing funding to the National Pro Bono Resource Centre past 2006 to enable it to continue its work to improve the provision of pro bono legal services.

32 National Pro Bono Resource Centre, *Working Together: Multi-Tiered Pro Bono Relationships Between Law Firms and Community Legal Organisations*, p.6.

33 National Pro Bono Resource Centre, *First Annual Report 2003*, p. 2.

34 National Pro Bono Resource Centre, *Submission 80*, p. 6.

35 *Attorney-General's Pro Bono Secondment Scheme – Report on the 2002-2003 Pilot*, available at <http://www.justice.vic.gov.au>.

36 Pro Bono Secondments Steering Committee *Pro Bono Secondment Scheme: Report on the 2002-2003 Pilot Scheme*, April 2004, available at <http://www.justice.vic.gov.au>. Members of the Steering Committee included the Law Institute of Victoria, Victoria Legal Aid, the Department of Justice and the Federation of Community Legal Centres (Vic) and community and specialist legal centres.

Pro bono work as a substitute for legal aid funding

9.33 In its *Third Report*, the Committee referred to evidence that other parts of the legal system were subject to pressure and were 'increasingly unable, or in some cases, unwilling to fill the gaps caused by the Commonwealth's unilateral action' in changing the basis of legal aid funding.³⁷ The Committee called for 'full recognition of the contribution' of the legal aid community to providing 'legal services for the community, especially within the past two years.'³⁸

9.34 Many submissions to this inquiry argued that pro bono legal services should not be seen as a substitute for legal aid funding. They included representatives from the Commonwealth government,³⁹ community legal centres,⁴⁰ law firms,⁴¹ pro bono support groups,⁴² professional associations,⁴³ academic organisations⁴⁴ and legal aid commissions.⁴⁵ The Castan Centre for Human Rights Law best articulated the basis for this view:

Access to justice can never be dispensed in terms of right by pro bono assistance in the way that legal assistance can be guaranteed through [a legal aid commission] mandated with that obligation through legalisation, and adequately resourced by public funding.⁴⁶

9.35 National Legal Aid also expressed concern over the Commonwealth Government's 'increasing tendency ... to promote pro bono services as the answer to gaps in service provision'.⁴⁷ This tendency seems supported by the Attorney-General's recent statements:

37 *Third Report*, p. xxiii.

38 *ibid*, Recommendation 20, p. 157.

39 A representative from the Attorney-General's Department at the Second National Pro Bono Conference, Sydney, 20 October 2003.

40 Fitzroy Legal Service, *Submission 48*, p. 33; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 5; Community Legal Centres Association (Western Australia) Inc, *Submission 93*, p. 18.

41 Blake Dawson Waldron Lawyers, *Submission 63*, p. 10.

42 Public Interest Law Clearing House, *Submission 54*, p. 23; National Pro Bono Resource Centre, *Submission 80*, p. 2.

43 The Law Society of New South Wales, *Submission 79*, p. 3; Law Institute of Victoria, *Submission 87*, p. 10 & 12; The Law Society of South Australia, *Submission 92*, p. 3.

44 Castan Centre for Human Rights Law, *Submission 76*, pp. 8-9.

45 National Legal Aid, *Submission 81*, pp. 20-21; Legal Aid Commission of New South Wales, *Submission 91*, p. 41.

46 Castan Centre for Human Rights Law, *Submission 76*, p. 8.

47 *Submission 81*, pp. 20-21.

... pro bono is just one part of the delivery of justice in Australia. As well as pro bono work, legal aid, community legal services and fee for service all contribute to our justice system.⁴⁸

9.36 The South West Sydney Legal Centre argued that the level of pro bono work offered had reached saturation point and that such services would be most unlikely to make up the shortfall in legal aid funding.⁴⁹ One of the larger law firms, Blake Dawson Waldron, stated that pro bono services could not fill the gaps:

... even at full capacity and in conjunction with the pro bono programs of other firms, we are unable to have any great impact on the unmet demand for legal assistance from people who cannot pay for such assistance.⁵⁰

Law students

9.37 The ALRC in its report, *Managing Justice*, recommended that:

In order to enhance appreciation of ethical standards and professional responsibility, law students should be encouraged and provided opportunity to undertake pro bono work as part of their academic or practical legal training requirements.⁵¹

9.38 The ALRC noted that the legal profession generally supports properly supervised pro bono work as a compulsory part of undergraduate law studies,⁵² although making the provision of pro bono legal services a requirement for practising law was opposed.⁵³ The ALRC noted that the universities of Sydney and Wollongong have already introduced pro bono work as part of their course requirement for law students.⁵⁴ The Government responded that requiring law students to undertake pro bono work as part of their academic or practical legal training requirements was a matter for the legal profession.⁵⁵

48 The Hon Phillip Ruddock MP, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at <http://www.ag.gov.au>.

49 *Submission 34*, pp. 3-4; see also Northern Territory Legal Aid Commission, *Submission 82*, p. 17.

50 Blake Dawson Waldron Lawyers, *Submission 63*, p. 10.

51 ALRC, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, p. 308, recommendation 38.

52 *ibid*, pp. 307-308.

53 *ibid*, p. 306.

54 *ibid*, p. 308.

55 *Government response to Australian Law Reform Commission Report No 89 Managing Justice : A review of the federal civil justice system*, p. 19, available at <http://www.law.gov.au>.

9.39 Submissions to this inquiry noted that law students are currently used in some community legal organisations,⁵⁶ with some regarding this experience as valuable to the student's future professional development and work prospects.⁵⁷

Committee view

9.40 The Committee considers pro bono legal services to be an important and growing part of the response to the need for legal assistance. However, it is neither a substitute for an adequately funded legal aid system nor a panacea for overcoming gaps in other publicly funded legal services. Pro bono by its nature is a voluntary provision of services that is motivated by a person's social responsibility.

9.41 The Committee also considers that exposing law students to pro bono work is an invaluable way of establishing a strong foundation of social responsibility and engendering their commitment to future pro bono work.

Mismatch of pro bono services and community need

9.42 Some submissions indicated that there is a mismatch of available legal skills and unmet community need in pro bono service provisions.⁵⁸ Often large law firms specialise in areas of commercial and corporate law, whereas community legal centres argue that the greatest need for pro bono services is in family, tenancy, credit, criminal and social security law.

9.43 Submissions argued that law firms are increasingly taking on high profile cases—for example, native title and migration matters—but other areas of need are not adequately addressed. As the Legal Aid Commission of New South Wales stated:

[pro bono schemes] tend to be hit and miss, not targeted at the socially and economically disadvantaged but reflecting individual solicitors' priorities and interests.⁵⁹

9.44 The Federation of Community Legal Centres added:

... private lawyers are generally not experts in community law, they are often selective about the cases that they take on (eg often reluctant to do

56 Aboriginal Legal Rights Movement Inc, *Submission 16*, p. 16; Inner City Legal Centre, *Submission 25*, p. 1; Marrickville Legal Centre, *Submission 53*, p. 3; Human Rights Committee of the New South Wales Young Lawyers, *Submission 59*, p. 1; Combined Community Legal Centres' Group NSW, *Submission 60*, p. 5; Redfern Legal Centre, *Submission 61*, p. 8.

57 Roma Mitchell Community Legal Centre Inc, *Submission 15*, p. 7; Southern Communities Advocacy Legal and Education Service, *Submission 47*.

58 Northern Rivers Community Legal Centre, *Submission 22*, p. 2; Liberty Victoria – Victorian Council for Civil Liberties Inc, *Submission 29*, p. 8; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 29; National Pro Bono Resource Centre, *Submission 80*, pp. 8-9; Blake Dawson Waldron Lawyers, *Submission 63*, p. 3.

59 *Submission 91*, p. 41.

cases that take on government), they may prefer high profile cases rather than complex low profile family law matters, and they can withdraw assistance if paid work becomes more demanding.⁶⁰

9.45 In response, Blake Dawson Waldron, one of the larger law firms, commented that:

Due to conflict of interest or lack of expertise, the firm is frequently unable to act in areas of law where there is a strong demand for legal aid and pro bono services; namely immigration, family law, matters against lawyers or doctors, and matters against banks and insurance companies.

Where a gap in legal services is identified to the firm (usually by lawyers in the community legal sector) and the firm lacks the skills to assist, from time to time the firm will provide training to enable its lawyers to act in those areas.⁶¹

9.46 Another large firm, Freehills, noted that it would only accept pro bono referrals where it had relevant experience.⁶²

9.47 The National Pro Bono Resource Centre stated:

The mis-match between the expertise of private pro bono lawyers, particularly in the larger firms where the potential for expansion of pro bono programs exists, and the most common areas of legal need (and to some extent the reluctance to accept instructions in matters involving significant levels of litigation) are key reasons why pro bono services are unlikely to make any significant dent in the demand for publicly funded legal services in key areas of need including criminal and family law.

Nor are pro bono legal services likely to be able to provide routine assistance in many areas of civil law, especially those that require high levels of specialisation in the law and practice of the relevant area such as social security law, consumer credit law and migration law. It cannot be assumed that pro bono service providers will have the requisite level of expertise, capacity or resources, to take on any kind of matter, on a pro bono basis, at any given time.

Firms can, and do, provide or organise training (often in partnership legal aid bodies or CLCs) to enable lawyers to take on matters in which they do not have expertise, and for which there is a clear demand for, and short supply of, assistance⁶³

9.48 Ms Anderson, Acting Director of the National Pro Bono Resource Centre, told the Committee:

60 *Submission 50*, p. 29.

61 *Submission 63*, p. 3.

62 *Submission 75*, p. 3.

63 National Pro Bono Resource Centre, *Submission 80*, p. 9.

There are...a number of barriers that obstruct the provision of pro bono services, including conflicts of interest, disbursements and expertise, and the more general problem of the very limited resources of many legal practices, the rising costs of legal practices and the impact of tort reforms which have restricted important traditional practice areas.⁶⁴

9.49 The mismatch between lawyers' expertise and legal needs is accentuated in rural, regional and remote areas. In its December 2003 newsletter, the National Pro Bono Resource Centre stated that it had received:

... funding approval from the Law and Justice Foundation of NSW to undertake a project aimed at improving opportunities for and access to legal services for disadvantaged and marginalised people in regional, rural and remote (RRR) communities. The project will assist community legal centres and their clients in RRR areas of NSW and support the development of three pilot projects to deliver improved pro bono services in RRR areas.⁶⁵

Committee view

9.50 As pointed out elsewhere in this report, the Committee notes that there is no comprehensive data on the community's need for legal services.

9.51 Ascertaining the extent of the mismatch between community need and available legal skills may be resolved by clearly identifying the areas of community need on the basis of reliable data and training lawyers willing to provide pro bono services in those areas of need.

Recommendation 50

9.52 In conjunction with Recommendation 11, the Committee recommends that the Commonwealth Government provide additional funding to allow community legal centres, clearing houses and other pro bono services to collect detailed information on the community need for legal services.

Conflicts of interest

9.53 The National Pro Bono Resource Centre highlighted two types of conflict which may impede the provision of pro bono legal services by law firms.⁶⁶ The first is a conflict of interest where the firm of the lawyer providing pro bono work may have a prior relationship with the other party—for example, a commercial lawyer who has acted for a telecommunications company assists people with credit problems with that company.

64 Ms Jill Anderson, National Pro Bono Resource Centre, *Committee Hansard*, 13 November 2003, p. 78.

65 National Pro Bono Resource Centre, *Pro Bono News 6/2003 (December)*, available at www.nationalprobono.org.au/publications/index.html.

66 *Submission 80*, p. 7.

9.54 Larger firms are more likely to represent more clients and therefore the probability of conflicts increase—for example Blake Dawson Waldron stated that they are unlikely to be able to provide pro bono legal services in actions against doctors, lawyers, banks and insurance companies.⁶⁷ A law firm in areas with few legal service providers—for example, regional, rural and remote areas—also increases the probability of conflicts.

9.55 The second type of potential conflict occurs where the law firm has a commercial relationship with the opposing party and may perceive a disadvantage, for example, if a firm acts in a public interest matter against a government department with which they hope to provide other services.

9.56 The Public Interest Law Clearing House told the Committee that it had received a 'wide range of anecdotal evidence' from the legal profession that lawyers perceived a potential disadvantage to its commercial interests if it acts against its client or potential client and that:

PILCH has also been informed about a government department directing lawyers on its panel who perform specialist work not to accept any work against the department in any other area of law.⁶⁸

9.57 The National Pro Bono Resource Centre, in consultation with the legal profession, has asked the Commonwealth Government to consider a draft protocol which seeks to minimise conflicts of the second type.⁶⁹ This protocol seeks to prohibit government agencies from prejudicing or penalising legal service providers in any purchasing or procuring decisions relating to legal services where the service provider acted against the government in a pro bono matter. The Centre has suggested that the protocol be included in the form of Legal Services Directions issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*. The Attorney-General has stated that:

It is important that governments address the perception amongst lawyers that providing pro bono legal assistance in matters against the Government makes it less likely they will be asked to undertake Government legal work.

It is my belief that, subject to the usual conflict of interest rules, it is irrelevant whether or not legal providers have acted pro bono for clients against the Commonwealth.⁷⁰

67 *Submission 63*, p. 3.

68 *Submission 54*, p. 24.

69 *Submission 80*, Annexure 4.

70 The Hon Phillip Ruddock MP, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at <http://www.ag.gov.au>.

9.58 The Committee notes that the National Pro Bono Resource Centre has also recently written to state and territory Attorneys-General advocating the adoption of its draft protocol.⁷¹

Committee view

9.59 The Committee agrees with the Attorney-General that, subject to the usual conflict of interest rules, provision of pro bono legal services in actions against the government is irrelevant to the provision of legal services to the government. However, the Committee is concerned that this view may not be shared by departmental officers and notes anecdotal evidence that suggests there is a very real problem of perceived commercial conflict of interest.

9.60 The Committee considers that this risk could be easily minimised by providing clear directions to government officers. These directions would also go some way to allaying the profession's concerns over potential commercial disadvantages in performing pro bono work. The National Pro Bono Resources' Centre's suggestion that such directions could be included in Legal Services Directions issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903* would seem to have merit. State and territory governments should also consider adoption of such directions, preferably in the form of a binding instrument that governs the way in which government agencies conduct their legal affairs.

Recommendation 51

9.61 The Committee recommends that the Attorney-General issue binding directions to federal government agencies that the fact that a legal service provider has acted or is likely to act against the Commonwealth Government or its agencies in a pro bono matter is not to be taken into account to the detriment of the provider when decisions relating to the procurement or purchasing of legal services are made. The Committee urges state and territory governments to issue similar directions.

Limited resources of law firms

9.62 National Legal Aid summarised the fundamental pressure on law firms:

Private practitioners are unlikely to pick up cases pro bono where there is little or no prospect of fee recovery or which are not sufficiently significant to attract publicity or attention to the firm – which is after all a business and must bring in enough to survive.⁷²

71 National Pro Bono Resource Centre *Pro Bono News*, Issue 9, vol 3/2004.

72 National Legal Aid, *Submission 81*, p. 20; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 29.

9.63 Blake Dawson Waldron explained that its budget for pro bono work represents a percentage of its annual gross turnover.⁷³ The Northern Rivers Community Legal Centre, Blue Mountains Community Legal Centre Inc and Freehills all indicated that a rural or regional law firm's decreased capacity to deliver pro bono legal services because of the smaller profits of those firms in comparison to the larger city firms.⁷⁴ This reduced capacity exacerbates the problem of reduced pro bono legal service provision in rural, regional and remote areas.

9.64 The Committee notes that pro bono service providers may be unable or unwilling to meet the demands of a case that requires extended litigation. In family law matters in particular, there is a real risk that matters may be prolonged or unexpectedly raise complex issues. At the Second National Pro Bono Conference, members of the legal profession suggested that few firms will accept this risk by offering pro bono services in family law matters.⁷⁵

9.65 Because a recipient of pro bono services may require legal assistance throughout the entire process, it is of concern that he or she may be denied adequate legal representation when most in need. It also raises the question of the quality of the service the person receives.

9.66 Specific costs may also erode a lawyer's capacity to deliver pro bono legal services—for example, the ongoing annual cost of registering with the Migration Agents Registration Authority in order to provide pro bono services in migration matters (discussed in Chapter 7).⁷⁶

Proposed changes to Federal Court Rules

9.67 In March 2003, the Federal Court sought comments from the legal community on proposed Order 45 Rule 10 of the Federal Court Rules. This proposed rule is designed to ensure that the court knows the identity of any legal practitioner who may have prepared a document that is used by an otherwise unrepresented litigant.

9.68 The PILCH commented that the proposed rule would have an adverse impact on access to justice through discouraging the provision of some forms of legal services to

73 Blake Dawson Waldron Lawyers, *Submission 63*, p. 2; Legal Services Commission of SA, *Submission 51*, p. 25; National Pro Bono resource Centre, *Submission 80*, p. 9; Blue Mountains Community Legal Centre Inc, *Submission 38*, p. 6.

74 Northern Rivers Community Legal Centre, *Submission 22*, p. 13; Blue Mountains Community Legal Centre Inc, *Submission 38*, p. 6; Freehills, *Submission 75*, p. 7 (note their view that the Women's Legal Services NSW was an example of successful pro bono legal service provision in regional areas).

75 *Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003.

76 Refugee Advice and Casework Service (Australia) Inc, *Submission 66*, p. 6; see also, Blake Dawson Waldron Lawyers, *Submission 63*, pp. 6-7; Liberty Victoria – Victorian Council for Civil Liberties Inc, *Submission 29*, p. 8.

people who are unable to afford legal representation.⁷⁷ The PILCH commented that the proposed rule may reduce pro bono legal assistance, as lawyers who provide assistance falling short of full representation may no longer be willing to provide any legal assistance or may significantly reduce the scope of their assistance. This may occur through:

- requiring voluntary legal advisors to disclose their involvement in a matter, where that involvement falls short of preparing court documents, for example where written advice is given to a client on points to be made in a submission
- requiring voluntary legal advisors, including lawyers in community legal centres, to record their name on a court document where that lawyer does not have any control over the final version of the documents
- increasing the time and cost required in providing assistance
- raising the expectation of the client, court and opposing parties of the lawyer's involvement in the matter
- not providing clarity as to the context in which the voluntary lawyer provided assistance.⁷⁸

9.69 The Federal Court advised the Committee that, following consultations with the legal profession, it was decided not to proceed with this rule change.

Committee view

9.70 The Committee recognises the obstacles lawyers face in providing pro bono legal services. It considers that some of these impediments arise from the inability to separate the cost of offering free or discounted services from the costs of pursuing a commercial profit. However, some of these costs are able to be separately attributed and therefore may be addressed—for example, migration agent fees for non-profit organisations providing pro bono legal advice on migration law (discussed in Chapter 7).

Costs of litigation

9.71 Apart from lawyers' fees, other costs associated with legal actions, such as medical or other expert opinions, interpreter services and paying court filing fees, may be prohibitive. In some cases medical and other experts provide their services for free or their expenses are covered by access to a "disbursement fund".⁷⁹

77 Public Interest Law Clearing House, *Submission 54*, pp. 25-26; National Pro Bono Resource Centre's 25 April 2003 letter to the Deputy Registrar of the Federal Court – available at <http://www.nationalprobono.org.au/publications/fedcourt.pdf>.

78 Public Interest Law Clearing House, *Submission 54*, pp. 25-26.

79 *ibid*, pp. 28-31.

9.72 The National Pro Bono Task Force told the Committee that interpreter and transcript costs are a 'significant deterrent' to providing pro bono legal services and that the Australian Institute of Interpreters and Translators was unwilling to waive fees in pro bono cases because of the relatively low incomes of interpreters and translators.⁸⁰

9.73 The Access to Justice Advisory Committee recognised that court fees and transcript costs were another obstacle.⁸¹ While the courts can waive fees in cases of hardship, there is no 'regularized process for dealing with court fees in pro bono matters (as distinct from only hardship cases)'.⁸²

9.74 The ineffectiveness of costs orders in pro bono matters may also indirectly increase the cost of litigation. A cost order generally requires the costs of a litigant's solicitor to be paid by an opponent who has unduly wasted time or raised irrelevant issues. Costs orders are a means of sanctioning certain conduct. However, because in pro bono matters a lawyer is not paid, a cost order is ineffective as a sanction.

9.75 Anecdotal information suggests that some lawyers use delaying tactics against clients who are represented on a pro bono basis. Order 80 Rule 9 of the Federal Court Rules, however, allows a solicitor providing pro bono services to recover amounts where a costs order is made. This rule does not apply to other jurisdictions and there does not appear to be any similar order in other jurisdictions.

9.76 The possibility of a costs order may also deter a litigant from enforcing his or her rights. The PILCH recommended that although the court will take public interest factors into account when considering costs orders, the Commonwealth and State governments should develop and publish a policy on seeking costs against litigants and legal advisers in public interest and other pro bono matters against the Commonwealth and state departments and agencies.⁸³

Committee view

9.77 The Committee considers that more needs to be done to encourage other professions to provide pro bono services where necessary to pursue the rights of disadvantaged people.

9.78 The Committee acknowledges that the courts may waive fees in cases of hardship. However, this requirement may be too strict for improving the community's

80 Pro Bono Task Force *Recommended Action Plan For National Co-Ordination And Development Of Pro Bono Legal Services*, 24 June 2001, p. 20; Refugee Advice and Casework Service (Australia) Inc, *Submission 66*, p. 6.

81 Access to Justice Advisory Committee, *Access to Justice an Action Plan (1994)*, pp. 382-387.

82 Pro Bono Task Force *Recommended Action Plan For National Co-Ordination And Development Of Pro Bono Legal Services*, 24 June 2001, p. 19.

83 Public Interest Law Clearing House, *Submission 54*, p. 31.

access to justice. The Committee considers that this issue should be subject to further study.

9.79 The Committee is also concerned at the suggestion that some members of the legal profession may use delaying tactics to affect adversely those litigants who use pro bono legal services. The Committee considers that these tactics may be deterred by providing for costs orders as order 80 rule 9 of the Federal Court Rules allows, and considers that this option should be available in all courts.

Recommendation 52

9.80 The Committee recommends that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation.

The Committee's conclusion

9.81 The increased provision of pro bono legal services through more efficient screening and referral structures and increased support from the larger firms is to be commended. In particular, the work of non-profit organisations in mobilizing the legal profession to better organize and coordinate its pro bono services is to be commended.

9.82 However, the Government cannot rely on pro bono services as either an answer to the current level of legal aid or as a panacea to overcome the current gaps in legal aid's provision of access to justice.

