



# AUSTRALIAN PRO BONO CENTRE

**Submission to the Victorian Department of Justice and  
Regulation**

**Access to Justice Review**

**April 2016**

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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 Victorian Department of Justice and Regulation for its invitation to provide comments and submissions on Access to Justice.

The Centre makes the following submissions regarding Terms of Reference 1, 5, 8 and 9.

### 1. THE AVAILABILITY OF EASILY ACCESSIBLE INFORMATION ON LEGAL ASSISTANCE SERVICES AND THE VICTORIAN JUSTICE SYSTEM, INCLUDING ADVICE ON RESOLVING COMMON PROBLEMS

The Centre's Links to Legal Help and Self-help Legal Information are the only national, comprehensive information resource about legal assistance services available to people experiencing disadvantage or marginalization. These resources promote access to justice by enabling those experiencing unmet legal need to find help or resolve their legal problems.

### 5. THE PROVISION AND DISTRIBUTION OF PRO BONO LEGAL SERVICES BY THE PRIVATE LEGAL PROFESSION IN VICTORIA

#### 5.1 Ways to enhance the effective and equitable delivery of pro bono legal assistance

1. Although pro bono legal work in Australia is steadily growing, it is not, and cannot be, a substitute for substantial publicly funded legal assistance services such as legal aid and community legal centres.

2. Parties represented on a pro bono basis should be entitled to seek an award of costs. The case law in support of awarding costs pro bono litigants is now strong in Victoria but there are good reasons to clarify the position legislatively.

3. In relation to disbursement assistance, the Centre submits:

- that the Law Institute of Victoria, the Victorian Bar Council, and the Department of Justice and Regulation review the guiding principles for Law Aid with a view to amending them to explicitly provide that Law Aid have the function of being a pro bono disbursement assistance scheme in respect of pro bono matters;
- that there be no fee payable to Law Aid for a person to apply for disbursement assistance in a pro bono matter; and
- that the Department of Justice and Regulation agree to top-up (if necessary) the capital fund of Law Aid on an annual basis to meet the cost of Law Aid paying disbursements in pro bono matters (less any funds recovered).

#### 5.2 Opportunities to expand the availability of pro bono legal services in areas of unmet need

1. A key role of government in facilitating the expansion of pro bono legal work to address unmet legal need is to financially support the legal assistance sector's capacity to engage in pro bono partnerships and programs with law firms, and to support and train the many individual volunteers who are the 'lifblood of CLCs'. In particular, the Community Law Partnerships scheme should be supported, and preferably managed and administered by the Federation of CLCs.

2. There is also a role for government in endorsing or at least actively encouraging pro bono best practice. A successful pro bono program relies on the skill and dedication applied by law firms in developing and running their pro bono practices.

### 5.3 Options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel

The Centre submits that, when government next has an opportunity to review the pro bono encouragement mechanism in its legal Panel arrangements, growth in pro bono legal services will be achieved by:

- recognising and rewarding firms in tenders who are Aspirational Target signatories;
- amending the scope of 'Approved Causes' in the legal Panel arrangements to align it with the Aspirational Target definition of pro bono legal services,
- expressing the pro bono obligation of Panel firms in terms of hours per lawyer in the firm;
- considering expanding the number of firms to which the conditions apply; and
- requiring statutory bodies to participate in the Panel arrangements, rather than on an 'opt-in' basis.

## 8. THE RESOURCING OF VICTORIA LEGAL AID (VLA) TO ENSURE THAT GOVERNMENT FUNDING IS USED MOST EFFECTIVELY AND EFFICIENTLY AS POSSIBLE AND SERVICES ARE DIRECTED TO VICTORIANS MOST IN NEED

Engaging staff whose role is to liaise with referral schemes and pro bono providers may be a model for Victoria Legal Aid to consider as a means to providing increased support in areas of law in which there are the highest levels of unmet need.

## 9. OPTIONS FOR PROVIDING BETTER SUPPORT TO SELF-REPRESENTED LITIGANTS THROUGHOUT THE VICTORIAN JUSTICE SYSTEM

Opportunity exists for the Victorian State government to fund self-represented litigant schemes in the County and Supreme Courts in Victoria, focusing on areas of unmet legal need. Such schemes can benefit from the lessons learned in the QPILCH and Justice Connect schemes.

## 1 THE AVAILABILITY OF EASILY ACCESSIBLE INFORMATION ON LEGAL ASSISTANCE SERVICES AND THE VICTORIAN JUSTICE SYSTEM, INCLUDING ADVICE ON RESOLVING COMMON PROBLEMS

With the growth in unmet legal need across Australia, individuals experiencing disadvantage or marginalisation, and the community services that support them, need comprehensive information about legal assistance services available to them.

The Australian Pro Bono Centre has responded to this information need by developing two web-based resources on its website: **Links to Legal Help** and **Self-help Legal Information**.<sup>1</sup>

Links to Legal Help is a national guide to legal assistance services, consisting of:

- Links to Legal Help — for Individuals; and
- Links to Legal Help — for Not-for profit organisations.

Links to Legal Help provides current, step-by-step guides to navigating the government and community legal services available in each State in key areas of legal need. It then provides a State by State guide to pro bono legal service referral schemes. It is written in plain English and conveys information visually wherever possible, and also caters for CALD requirements by including resources in community languages.

Self-help Legal Information is a national guide to free, consumer-oriented legal information. It enables people to gain a better understanding of their rights, gain insight into the nature of their legal problems and in many cases either resolve their legal problems or proactively prevent problems from arising.

The fact that these resources operate nationally means they cater for Victorians with legal problems, including legal problems that cross State borders, or problems that arise in other Australian jurisdictions. Links to Legal Help and Self-help Legal Information are, to the Centre's knowledge, the only resources of this kind.

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<sup>1</sup> <http://probonocentre.org.au/legal-help/>.

## 5. THE PROVISION AND DISTRIBUTION OF PRO BONO LEGAL SERVICES BY THE PRIVATE LEGAL PROFESSION IN VICTORIA

This Centre is in a position to provide a national perspective on the development of pro bono legal culture and services in the State of Victoria. It can be said that Victoria has been a leader in the development of initiatives that have helped spur along the growth, structure and co-ordination of pro bono legal services in its State. This has involved various initiatives originating from the legal profession, Government, Victoria Legal Aid, and the Federation of Community Legal Centres.

### HISTORY OF THE DEVELOPMENT OF PRO BONO LEGAL SERVICES IN VICTORIA

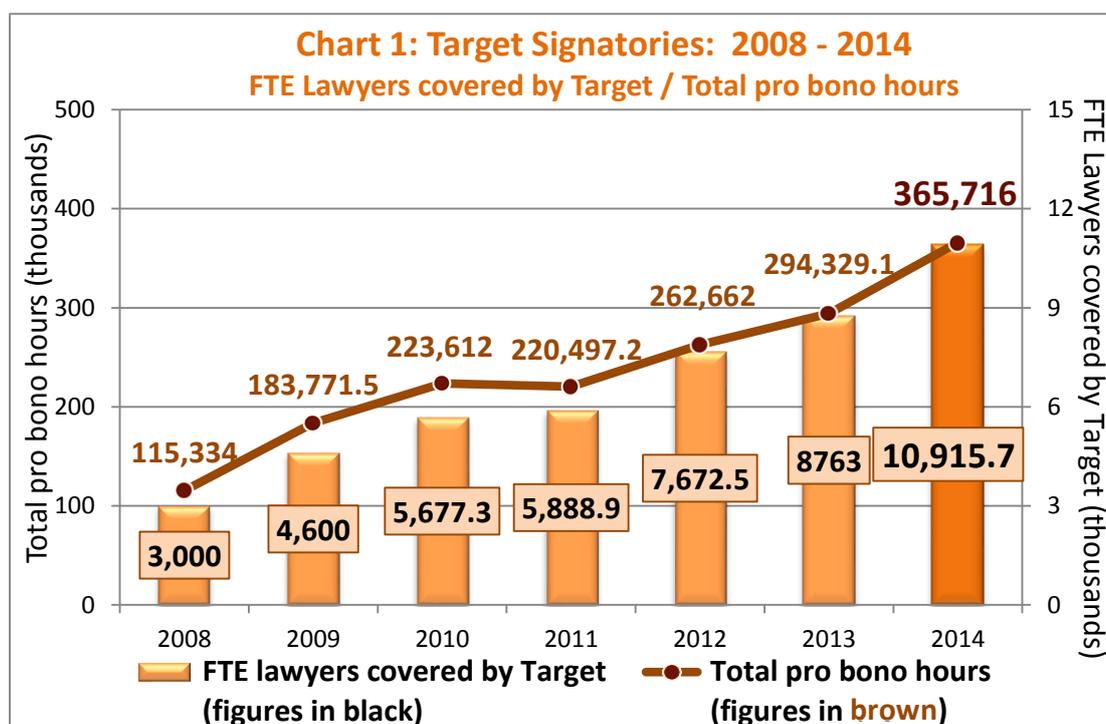
The following chronology provides some of the highlights:

Date	Event
1994	The Public Interest Law Clearing House (PILCH) (VIC) was established as a pro bono clearing house as a project of the Consumer Law Centre of Victoria, supported by Fitzroy Legal Service, six Melbourne law firms and the Victorian Bar Council.
1995	The Victorian Bar Legal Assistance Scheme was established on a voluntary basis by the Victorian Bar (administered by PILCH (Vic) from mid-2000).
1999	The Law Institute of Victoria Legal Assistance Scheme was established as a joint project of the Young Lawyer's section of the LIV and the Victoria Law Foundation (administered by PILCH (Vic) from October 2002).
June 2000	The Victorian Attorney-General Rob Hulls launched the Attorney-General's Pro Bono Secondment Scheme that encouraged law firms to second its lawyers to community legal centres in Victoria.
2002	The Victorian government implemented the government legal services panel arrangements which included a pro bono requirement for panel firms to provide pro bono legal services to the value of between 5% and 15% of the net worth of a government legal services contract.
Early 2005	Victoria Legal Aid recommended that the Attorney-General's Pro Bono Secondment Scheme be managed by the Federation of Community Legal Centres. VLA provided funding to the Federation for this to occur.
October 2005	The newly named Attorney-General's Community Law Partnerships was launched by Attorney-General Rob Hulls.
2006-2014	The Federation of Community Legal Centres held various Attorney General's Community Law Partnership forums bringing together law firms with CLCs and helping develop pro bono partnerships.
2012	Amendments to the <i>Legal Profession Act 2004</i> (Vic) removed restrictions that prevented holders of corporate practising certificates from engaging in pro bono legal practice, and the Legal Services Board authorised the National Pro Bono Professional Indemnity Insurance Scheme as providing valid PI insurance for in-house lawyers wishing to undertake pro bono legal work in Victoria.
1 July 2013	PILCH (VIC) merged with PILCH (NSW) to form Justice Connect.

1 July 2015	Attorney-General Martin Pakula announced changes to the pro bono conditions in the new Victorian Government Legal Services Panel arrangements, which will commence 1 March 2016 for a period of three years and four months. The minimum pro bono commitment will increase to 10 % (an increase from 5 %); there will no longer be a maximum pro bono commitment (previously 15%); and a greater focus will be placed on the role of community legal centres in facilitating access to justice.
December 2015	Department of Justice and Regulation releases <i>Government Legal Services Panel Report 2009-2015: Legal Panel Administration</i> , indicating pro bono services (including legal services, non-legal services and financial contributions) valued at over \$95 million have been provided under the Panel arrangements.

## THE ROLE OF GOVERNMENT IN FACILITATING PRO BONO LEGAL SERVICES

The steady growth in pro bono legal work undertaken by members of the Australian legal profession indicates that lawyers themselves see pro bono legal work as an increasingly important aspect of their professional lives. The graph below indicates the growth in the number of lawyers whose firms have signed up to the National Pro Bono Aspirational Target of at least 35 hours per lawyer per year, and the number of pro bono hours performed in those firms.



It is primarily the role of government to ensure access to justice for all Australians. Government has a clear role in facilitating the continued growth in pro bono services that address unmet legal need, by:

- **strengthening** the public funding of legal assistance services — pro bono legal work, being essentially voluntary in nature, cannot replace these services and relies on their operation in order to effectively target unmet legal need;
- **removing barriers** to pro bono legal work;
- **encouraging** lawyers to participate in pro bono legal work, congratulating them for their efforts, and encouraging firms to adopt best practice in their pro bono programs;
- **promoting** pro bono legal work by making it publicly visible; and

- **leveraging** the Government Legal Service Panel tendering arrangements to encourage, but not enforce, pro bono legal work, by simplifying the arrangements and adopting industry benchmarks.

The Centre's submissions discuss each of these measures in detail.

## 5.1 WAYS TO ENHANCE THE EFFECTIVE AND EQUITABLE DELIVERY OF PRO BONO LEGAL ASSISTANCE

### PRO BONO LEGAL WORK IS NOT A SUBSTITUTE FOR PUBLICLY FUNDED LEGAL SERVICES

Although pro bono legal work in Australia is steadily growing, it is not, and cannot be, a substitute for substantial publicly funded legal assistance services such as legal aid and community legal centres.

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

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

The limitations on responding to unmet legal need are not only related to the numbers of pro bono hours that the Australian legal profession is willing to contribute. They are also related to the areas of law and the types of clients which pro bono providers choose to assist, depending on their capacity, expertise, willingness and interests.

Given the flexibility that economies of scale provide, large law firms will often have greater capacity to undertake pro bono legal work than smaller firms. Large law firms predominantly undertake only a small amount of pro bono work in areas of law that are outside the traditional range of a commercial lawyer. The Centre's *National Law Firm pro Bono Survey 2014* indicates that in large law firm pro bono programs, governance, commercial agreements, Deductible Gift Recipient Status applications, intellectual property and employment law most commonly rate in the top five areas of practice.<sup>2</sup> This work is predominantly performed for not-for-profit organisations.<sup>3</sup>

Where large firms do initiate pro bono programs focused on areas of unmet legal need, these programs are often built around partnerships with community legal services (such as CLCs and pro bono referral organisations).<sup>4</sup> Although the provision of pro bono legal assistance should be encouraged to grow, meeting the legal needs of people who are experiencing socio-economic disadvantage also requires significant government funded legal services.

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<sup>2</sup> National Pro Bono Resource Centre, *Fourth National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers, Final Report*, December 2014, p 33, at [http://probonocentre.org.au/wp-content/uploads/2015/09/4th\\_National\\_Law\\_Firm\\_Pro\\_Bono\\_Survey\\_2014\\_Final\\_Report.pdf](http://probonocentre.org.au/wp-content/uploads/2015/09/4th_National_Law_Firm_Pro_Bono_Survey_2014_Final_Report.pdf).

<sup>3</sup> Ibid, p 38.

<sup>4</sup> Examples of such programs are discussed in more detail below in section 5.2.

## PARTIES REPRESENTED ON A PRO BONO BASIS SHOULD BE ENTITLED TO SEEK AN AWARD OF COSTS

The purpose of a costs order is to compensate the successful party in litigation for those costs necessarily incurred to obtain justice (the indemnity principle). However, the indemnity principle can only operate where a successful litigant is under an obligation to pay their lawyer.

Pro bono representation often creates a “condition subsequent”, where the client only has to pay the lawyer if they are able to recover costs from the other party. However, this creates a dilemma: the client has no obligation to pay the lawyer until a costs award is made, but costs cannot be awarded unless the client already has an obligation to pay the lawyer — a “condition precedent”.

As a result, the common law indemnity principle operates so that a litigant who is represented pro bono may not be able to recover his costs even if his claim is successful, whilst still being liable for the other party’s costs if his case is unsuccessful. However, the opponent of a litigant who is represented pro bono may benefit from not having to pay his opponent’s costs, even if he is unsuccessful. This imbalance presents opportunities for a litigant to exploit their disadvantaged opponent who is represented pro bono, having little incentive to settle or conduct proceedings expediently.

While the judicial position varies from State to State, there is Victorian authority in support of providing for costs orders in favour of pro bono litigants. Following the judgment of Basten JA in the NSW Court of Appeal case of *Wentworth v Rogers*,<sup>5</sup> the Queensland Court of Appeal held in *King v King*<sup>6</sup> that a clause in a pro bono costs agreement which provided for costs to be waived by the firm unless the client was successful (in which case the firm was authorised to seek recovery from the other side) was invalid as it was a condition subsequent.

However, the Victorian Court of Appeal in *Manieri v Cirillo*<sup>7</sup> upheld a pro bono costs agreement which provided for the recovery of costs under an order made if the client was successful, stating that the distinction between a condition precedent and a condition subsequent was “a triumph of form over substance”.

The Centre agrees with the Productivity Commission *Access to Justice* Recommendation 13.4<sup>8</sup> that parties represented on a pro bono basis should be entitled to recover legal costs, subject to the Rules of the relevant Court. The case law is now strong in Victoria but the Centre submits that there are good reasons to clarify the position legislatively. Legislative clarification of this issue would clearly distinguish between matters taken pro bono and matters taken on a speculative / no-win-no-fee basis.

The Centre does not, however, support an Access to Justice type Foundation model; as has happened in the UK. Under the UK model, the court may order that a payment, which is in respect of a litigant’s

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<sup>5</sup>*Wentworth v Rogers* (2006) 66 NSWLR 474,486.

<sup>6</sup>*King v King* [2012] QCA 81.

<sup>7</sup>*Manieri v Cirillo* [2014] VSCA 227 at [53].

<sup>8</sup> Productivity Commission, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, 2014, p 477, at [www.pc.gov.au/inquiries/completed/access-justice/report](http://www.pc.gov.au/inquiries/completed/access-justice/report). See also National Pro Bono Resource Centre, *Response to Access to Justice Arrangements: Productivity Commission Draft Report*, 21 May 2014, at <http://probonocentre.org.au/wp-content/uploads/2015/10/National-Pro-Bono-Resource-Centre-submission-210514.pdf>.

pro bono representation, be made to a Foundation that facilitates pro bono legal assistance.<sup>9</sup> The Centre submits that legislative change enabling costs to be awarded to litigants who are represented pro bono would be likely to cause law firms operating in Victoria to create a self-regulatory protocol under which they direct the proceeds of costs awards in pro bono matters to ends that make clear that it was, and remains, a pro bono matter.<sup>10</sup> A self-regulatory model would most efficiently and directly result in the growth of pro bono legal work.

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## DISBURSEMENT ASSISTANCE

Pro bono legal work is the provision of professional legal services by members of the legal profession without charge to the client. It is well established that the motivation for lawyers undertaking pro bono legal work stems from a sense of professional responsibility and ethical duty to further access to justice, particularly for those who are low income and socially disadvantaged or marginalized, and have no other likely access to the legal system. Pro Bono is not the making of charitable donations, nor community service work.<sup>11</sup> Law firms do engage in such activities but do so as part of a broader community engagement or corporate social responsibility program.

It follows that associated out-of-pocket costs incurred in the process of providing pro bono legal services (**disbursements**) should be seen as separate from the provision of the pro bono legal service. Firms have differing policies about whether, and to what extent, they will pay these disbursements. In the Centre's surveys, some firms have identified the issue of disbursements as a constraint, sometimes a barrier, to the provision of pro bono legal services. Disbursements most often identified in this category include the costs of expert reports, interpreters and translator's fees and court filing fees in some jurisdictions.

Some governments and law societies have identified this area as one where they can support the provision of pro bono legal services. For example, the Commonwealth recognised the need for such a fund when it introduced a new disbursement support scheme for Commonwealth non-criminal law matters in July 2012. New South Wales also has a pro bono disbursement assistance scheme (administered by the Law Society of NSW) that provides assistance for matters conducted on a free or substantially reduced cost basis and which have been referred through the Law Society's Pro Bono Scheme, the Bar Association's Legal Assistance Scheme, the Public Interest Advocacy Centre or through Justice Connect.<sup>12</sup>

Victoria has the Law Aid Trust established under Part VI (A) of the *Legal Aid Act 1978* (Vic). Whilst the purposes of the Trust are consistent with the Trustees providing assistance to those involved in pro bono matters including those matters where no award of damages or compensation is likely, one of the three guiding principles of the Trust (contained in a memorandum of agreement between the Law

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<sup>9</sup> *Legal Services Act 2007* (UK) s 194.

<sup>10</sup> A self-regulatory protocol was recommended by the Productivity Commission in its *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, 2014, p 476, at [www.pc.gov.au/inquiries/completed/access-justice/report](http://www.pc.gov.au/inquiries/completed/access-justice/report). See also National Pro Bono Resource Centre, *Response to Access to Justice Arrangements: Productivity Commission Draft Report*, 21 May 2014, at <http://probonocentre.org.au/wp-content/uploads/2015/10/National-Pro-Bono-Resource-Centre-submission-210514.pdf>.

<sup>11</sup> The definition of "pro bono legal services" is discussed further below in section 5.3.

<sup>12</sup> Details of schemes in other Australian jurisdictions can be found at <http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=11>.

Institute of Victoria, the Victorian Bar Council and the Department of Justice and Regulation) is that the fund be financially viable and self-sustaining.

As the Chair of the Trust indicated in a letter to the Centre,<sup>13</sup>

There is no doubt that there is merit in the view that assistance should be given to those pursuing remedies in pro bono matters in which no award of damages is claimed or contemplated. However, you will understand that in the view of the Trustees' obligation to ensure the fund is self-sustaining, the Trustees are not in a position to embark on a program generally to fund pro bono matters in those circumstances.

The Centre also notes that Law Aid maintains an application fee of \$150 (presumably underpinned by the same guiding principle), which is not found in the Commonwealth or NSW schemes, and which provides a barrier to access to the fund. It appears that Law Aid was set up, and operates essentially as a litigation-lending fund, rather than a pro bono disbursement assistance scheme.

The Centre further notes the following statement in the Law Institute of Victoria publication, *Advocating Justice for All*,<sup>14</sup> under the heading, "Improving Disbursement Assistance in Pro Bono Matters":

The LIV is calling for additional funding for Law Aid and amendment to Law AID scheme guidelines so that funding can be allocated according to access to justice needs.

The document further notes that the LIV has:

- considered the issue of expert witness fees and disbursements in pro bono matters, and has reviewed the Victorian disbursement assistance scheme Law Aid; and
- proposed amendments to the Law Aid Scheme guidelines, to improve access to the Scheme and its usefulness in the pro bono sector.

The Centre accordingly submits:

- That the Law Institute of Victoria, the Victorian Bar Council, and the Department of Justice and Regulation review the guiding principles for Law Aid with a view to amending them to explicitly provide that Law Aid have the function of being a pro bono disbursement assistance scheme, reimbursing or providing funds for disbursements in pro bono matters. The only criteria for approval of such applications should be that the matter has been placed through a pro bono referral scheme (Justice Connect, LIVLAS or Victorian Bar Scheme), or on certification from a practising Victorian lawyer that he/she is acting pro bono in the matter. Law Aid could set limits on the amount available in each category of disbursement.
- That there be no fee payable to Law Aid for a person to apply for disbursement assistance in a pro bono matter.
- That the Department of Justice and Regulation agree to top-up (if necessary) the capital fund of Law Aid on an annual basis to meet the cost of Law Aid paying disbursements in pro bono matters (less any funds recovered).

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<sup>13</sup> Letter from Michael Lombard, Chair, Law Aid Trust to John Corker, Director, National Pro Bono Resource Centre dated 24 July 2013.

<sup>14</sup> Law Institute of Victoria, *Advocating Justice for All*, 2010, p 8, <http://www.liv.asn.au/PDF/About/Media/AdvocatingJusticeForAllFinal>.

## 5.2 OPPORTUNITIES TO EXPAND THE AVAILABILITY OF PRO BONO LEGAL SERVICES IN AREAS OF UNMET NEED

The pro bono legal work done by the legal profession in Victoria is only able to respond to a small part of unmet legal need. The Law and Justice Foundation has identified that in Victoria, consumer law, criminal law, government, and housing law are areas where there is significant unmet legal need.<sup>15</sup> The Foundation has also identified that family and economic issues can be heavily intertwined, and that relationship breakdown, divorce and domestic violence can all result in multiple and severe adverse consequences, particularly for those experiencing disadvantage.<sup>16</sup> These are all complex areas of law, in which relatively few large law firms have expertise. As a result, there is a tendency for larger firms to focus their pro bono programs on assisting not-for-profit organisations in areas within their expertise, such as corporate governance and commercial law. While such programs may have social impact as part of a firm's corporate social responsibility program, they do not necessarily address the largest areas of unmet legal need experienced by individuals. And while smaller law firms may have relevant expertise in areas of unmet legal need, often they will lack the capacity to undertake substantial amounts of pro bono work.

Nevertheless, best practice law firms do dedicate a significant proportion of their program to assisting individuals rather than organisations. These firms engage in strategic planning and thinking about the balance to be struck between these two approaches, and a consideration of where the firm's lawyers are most likely to make a real difference through the application of the firm's finite pro bono capacity. It is vital to understand this dynamic to properly consider what opportunities there are for government to take action that may lead to an expansion of the availability of pro bono legal services in areas of unmet need.

### SUPPORT FOR CLCS TO ENGAGE IN PRO BONO PARTNERSHIPS AND PROGRAMS

A key role of government in facilitating the expansion of pro bono legal work to address unmet legal need is to financially support the legal assistance sector's capacity to engage in pro bono partnerships and programs with law firms, and to support and train the many individual volunteers who are the "lifeline of CLCs".

It is important to realise that much of the pro bono legal work that addresses unmet legal need is done in collaboration with community organisations, particularly pro bono referral and triage organisations (such as Justice Connect) and community legal centres (**CLCs**). There is a symbiosis between government's role in funding and supporting these organisations, and the opportunity for law firms to do more in addressing unmet legal need. The stronger these organisations are, the more possible it is to increase the availability of pro bono legal services.

It is crucial in successful law firm/CLC partnerships that the CLC has adequate, and adequately skilled, staff to develop and maintain relationships with law firms and to develop and administratively

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<sup>15</sup> Christine Coumarelos et al., *Legal Australia-Wide Survey: legal need in Australia, Report*, Vol. 14, "Access to Justice and Legal Needs", Law and Justice Foundation of NSW, August 2012, p 76.

<sup>16</sup> National Pro Bono Resource Centre, *Pro bono legal services in family law and family violence: understanding the limitations and opportunities, Final Report*, October 2013, p 38 <http://probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf>; Christine Coumarelos et al., *Legal Australia-Wide Survey: legal need in Australia, Report*, Vol. 7, "Access to Justice and Legal Needs", Law and Justice Foundation of NSW, August 2012.

maintain pro bono programs. Pro bono lawyers are utilised by CLCs in a variety of ways. The classic models of pro bono assistance involve referring cases directly to law firms or seconding pro bono lawyers to assist with CLC legal clinics. Pro bono secondees are also utilised to build the CLC's capacity by, for example, assisting with client triage. Regardless of which pro bono model is used, the CLC resources required to develop and run a pro bono program are substantial. This is especially the case for CLCs in remote areas, which often experience the highest levels of unmet legal need.

Perhaps most critically, CLCs must have capacity to adequately train and supervise their volunteers and pro bono lawyers from firms, whether the lawyers are secondees or responding to case referrals. Often significant training is required, involving legal education in unfamiliar areas of law and practice, practical training on working with clients who are experiencing disadvantage or marginalisation, and training in self-care or resilience.<sup>17</sup> After a period of formal training, CLC staff usually needs to continue to supervise and mentor pro bono lawyers, even when a supportive framework is provided by the firm.

The capacity of CLCs to maintain pro bono programs and to provide the necessary levels of training and supervision depends directly on the certainty and quantum of government funding. An opportunity for government to assist is to ensure that CLCs are financially supported to develop, enter into and maintain these relationships so as to leverage real benefit from their pro bono partnerships over time.

### **Community Law Partnerships scheme**

The Victorian Attorney-General's Community Law Partnerships was launched by Attorney-General Rob Hulls in October 2005 (previously the Attorney-General's Secondment Scheme which started in 2000). The scheme, initially operated through Victoria Legal Aid, and then transferred to the Victorian Federation of CLCs in 2005, has been a key driver in developing closer working relationships between law firms and CLCs in Victoria. The Centre has observed the evolution of this scheme and believes it to have played an important role in developing a culture shared by firms and CLCs about the importance and usefulness of pro bono legal services. The Scheme actively helped position CLCs to develop pro bono relationships,<sup>18</sup> by facilitating numerous valuable forums and reporting on ways of expanding opportunities for pro bono partnerships in Victoria. The forum events provided opportunities for CLCs to network with pro bono coordinators, and for both sectors to learn about each other. The Attorney-General attended some of these forums and was able to provide visibility and encouragement for pro bono generally through his attendance and speeches. Many partnerships that evolved from the forums continue to exist.<sup>19</sup> The appointment of a permanent Sector Development Officer at the Federation of CLCs in 2007 contributed greatly to the scheme's success.

The Centre understands that funding for the scheme is no longer provided and is concerned to see it continue and flourish.

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<sup>17</sup> See further National Pro Bono Resource Centre, *Australian Pro Bono Manual*, 2<sup>nd</sup> ed, Melbourne, Victoria Law Foundation, 2005, Chapter 1.14. The third edition is due to publish in 2016.

<sup>18</sup> See Federation of Community Legal Centres Victoria, *Attorney General's Community Law Partnerships, Final Report and Action Plan*, April 2007, [www.fclc.org.au/public\\_resource\\_details.php?resource\\_id=1236](http://www.fclc.org.au/public_resource_details.php?resource_id=1236).

<sup>19</sup> See for example Federation of Community Legal Centres Victoria, AG's Community Law Partnerships – Community Legal Centres and Firms Collaborating for Change, prepared for the National Access to Justice and Pro Bono Conference Sydney, 14th-15th November 2008, [http://probonocentre.org.au/wp-content/uploads/2015/11/300\\_Nash\\_A.pdf](http://probonocentre.org.au/wp-content/uploads/2015/11/300_Nash_A.pdf).

Importantly, the scheme's forums and workshops provide a clear opportunity for the Attorney General to demonstrate leadership and support the profession's pro bono legal work on a reasonably regular basis. They provide opportunities for government to support pro bono partnerships and to facilitate their visibility to CLCs and, importantly, to law firms (whose partners will attend an event if the Attorney-General is speaking). The Centre recommends that necessary action and funding be provided to ensure that these pro bono partnership forums continue, preferably managed and administered by the Federation of CLCs.

## ENCOURAGING PRO BONO LEGAL WORK

Government's role in encouraging pro bono legal work stems from its commitment to improve access to justice particularly for those that cannot afford to pay for legal support. The main way in which government does this is to adequately fund the service providers in the legal assistance sector, particularly Legal Aid and CLCs. The Victorian government has been successful in encouraging pro bono through the pro bono obligation in its legal Panel arrangements (see below), and through its support and encouragement for other pro bono initiatives such as the Community Law Partnerships scheme.

It is suggested that Government can also support the development and growth of pro bono legal services by acknowledging the pro bono contributions made by law firms, encouraging best practice in pro bono legal work, and speaking publicly and positively about this work, even when the pro bono legal work might involve a challenge to a government decision.<sup>20</sup>

It is also suggested that the Government can encourage firms to become signatories to the National Pro Bono Aspirational Target particularly through recognition in its legal Panel arrangements.

### 5.3 OPTIONS FOR EXPANDING EXISTING INCENTIVES FOR LAW FIRMS WITHIN THE VICTORIAN GOVERNMENT LEGAL SERVICES PANEL

The Centre reads this term of reference as inviting submissions about ways in which the Victorian Government Legal Services Panel arrangements that commence on 1 March 2016 (**legal Panel arrangements**) could be improved to increase the quality and quantity of pro bono legal services provided by Panel firms.

The Centre's submission relies on and expands on the findings and recommendations made by the Productivity Commission in its *Access to Justice Report*<sup>21</sup>.who stated that:

*If other large jurisdictions adopt the Aspirational Target [the Target], and firms in Victoria see a benefit from aligning the requirements, **the Victorian government may wish to reconsider adopting the Aspirational Target at a later date.** [emphasis added]<sup>22</sup>*

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<sup>20</sup> Centre notes the the new Panel arrangements require agencies not to prejudice law firms that act against government: Deed of Standing Offer for the Provision of Legal Services (Vic) cl 22.2(a).

<sup>21</sup> Productivity Commission, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, 2014, at [www.pc.gov.au/inquiries/completed/access-justice/report](http://www.pc.gov.au/inquiries/completed/access-justice/report).

<sup>22</sup> Productivity Commission 2014, *Access to Justice Arrangements, Inquiry Report No. 72*, Canberra, 838.

The pro bono conditions in the legal Panel arrangements first introduced in 2002 have played an important part in the development of a strong pro bono culture amongst law firms in Victoria. As government figures show, the arrangements have been associated with a significant increase in the pro bono contribution made by Panel firms. In the Centre's *Fourth National Law Firm Pro Bono Survey Final Report*,<sup>23</sup> 88 per cent of respondents agreed that the inclusion of the pro bono conditions in the Victorian and Commonwealth tender arrangements was useful in encouraging law firms to undertake pro bono legal work. The Centre supports the legal Panel arrangements but submits that they can be strengthened and improved to leverage a greater pro bono contribution from Victorian law firms.

For many firms, the 'pro bono obligation' is being easily met and has been for some years. This is so despite the Victorian government in 2015 increasing the pro bono obligation from 5-15% to a minimum of 10% of the value of the tender work. This is well demonstrated by the calculations contained in the submission by Clayton Utz, Ashurst and Allens to the Productivity Commission's Inquiry into Access to Justice Arrangements quoted on page 40 of the Justice Connect submission to this Review. These calculations contrast the resulting pro bono work from meeting a 15% pro bono obligation as against meeting the 35 hour Target in the Aspirational Target (see below).

The Centre notes that as at 1 February 2016 there are only 23 law firms on the new Victorian Panel and that statutory authorities can opt-in to Panel arrangements by contrast to the Commonwealth LSMUL Scheme that has 122 firms on its list, and all 167 Commonwealth agencies, departments and statutory authorities are bound to only use firms on the list. The Commonwealth Scheme uses the definition of pro bono services developed by the Centre in the National Pro Bono Aspirational Target, (measured in hours per lawyer per year).

As part of its submission to the 2014 Productivity Commission's *Access to Justice Arrangements Inquiry*, the Attorney-General's Department commented that:

*The department considers that the Target has been very effective in encouraging pro bono work. Since its introduction in 2007, the number of lawyers undertaking pro bono work has trebled to over 8,000 lawyers nationally. In 2011-2012, these lawyers undertook over 340,000 hours of pro bono work ...*<sup>24</sup>

*It should be noted that the relationship between the Target and the Legal Services Multi User List has also been very effective in encouraging pro bono work.*<sup>25</sup>

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<sup>23</sup> National Pro Bono Resource Centre, *Fourth National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers, Final Report*, December 2014, p 73, at [http://probonocentre.org.au/wp-content/uploads/2015/09/4th\\_National\\_Law\\_Firm\\_Pro\\_Bono\\_Survey\\_2014\\_Final\\_Report.pdf](http://probonocentre.org.au/wp-content/uploads/2015/09/4th_National_Law_Firm_Pro_Bono_Survey_2014_Final_Report.pdf).

<sup>24</sup> Since that time the number of lawyers covered by the Target has increased to 11,235.4 (compared to 3,000 in 2008) and the total pro bono hours performed has increased to 372,601.8 hours: Australian Pro Bono Centre, *Eighth Annual Performance Report on the National Pro Bono Aspirational Target*, October 2015, p 6, at [http://probonocentre.org.au/wp-content/uploads/2015/02/Eighth\\_Annual\\_Performance\\_Report\\_on\\_the\\_Aspirational\\_Target\\_2015.pdf](http://probonocentre.org.au/wp-content/uploads/2015/02/Eighth_Annual_Performance_Report_on_the_Aspirational_Target_2015.pdf).

<sup>25</sup> Attorney General's Department, Submission No 137 to Productivity Commission, *Access to Justice Arrangements Inquiry* (12 December 2013) at 41.

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## DEFINING PRO BONO SERVICES AND THE ASPIRATIONAL TARGET

It is suggested that there are three advantages in having the definition of pro bono legal services used in the Aspirational Target Scheme adopted in the Victorian legal Panel arrangements

1. The slightly broader range of legal work that falls under the scope of the definition of pro bono services in the Target scheme is likely to make it easier for small Victorian firms to undertake pro bono work in areas where they have expertise (for example advising not-for-profit organisations on governance issues).
2. It will make the reporting requirements for firms under the Victorian and Commonwealth schemes more closely aligned thus reducing the administrative burden for firms. The Centre notes that some respondents to the *National Law Firm Survey* described the Victorian Panel's reporting processes as "more cumbersome" and "more onerous" than the Commonwealth requirements.<sup>26</sup>
3. It will make the Victorian legal Panel Scheme more closely aligned with what has become an industry benchmark definition<sup>27</sup>.

The Centre also notes that the South Australian government has indicated to the Centre that it intends commencing a pro bono encouragement scheme in its tender arrangements from 1 July 2016 which will be based on the definition of pro bono legal services in the Aspirational Target.

The Centre's definition of **Pro Bono Legal Services** (as used in the Aspirational Target) is as follows:

1. *Giving legal assistance for free or at a substantially reduced fee to:*
  - a. *individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or*
  - b. *individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or*
  - c. *charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;*
2. *Conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;*
3. *Participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or*
4. *Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.*

*The following is **NOT** regarded as pro bono work for the purposes of the Centre's definition:*

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<sup>26</sup> Ibid, p 74.

<sup>27</sup> As at 31 December 2015, over 11,000 Australian lawyers were covered by the National Pro Bono Aspirational Target which is based on this definition.

1. *giving legal assistance to any person for free or at a reduced fee without reference to whether he/she can afford to pay for that legal assistance or whether his/her case raises an issue of public interest;*
2. *free first consultations with clients who are otherwise billed at a firm's normal rates;*
3. *legal assistance provided under a grant of legal assistance from Legal Aid;*
4. *contingency fee arrangements or other speculative work which is undertaken with a commercial expectation of a fee;*
5. *the sponsorship of cultural and sporting events, work undertaken for business development and other marketing opportunities; or*
6. *time spent by lawyers sitting on the board of a community organisation (including a community legal organisation) or a charity.*

The main differences between the scope of this definition and that of 'Approved Causes' are that the Aspirational Target definition covers a broader range of work for not-for-profit organisations than 'Approved Causes' and 'Approved Causes' allows 'other services or financial or in-kind assistance' to count. These are not included in the Aspirational Target definition.

This definition of **Pro Bono Legal Services** applies to:

- (a) tender arrangements for the Commonwealth LSMUL,
- (b) the National Pro Bono Aspirational Target, and
- (c) the biennial National Law Firm Pro Bono Survey.

The 126 firms appointed to the LSMUL must report to the Commonwealth annually on the number of hours of pro bono legal services performed, using the Centre's definition. In addition the 85 firms that are Target signatories must report to the Centre on their pro bono hours using the same definition. The definition is also used for the purpose of the Centre's biennial National Law Firm Pro Bono Survey of firms with more than 50 lawyers,<sup>28</sup> which attracts responses from over 80 per cent of the firms in this category.

Of the 23 firms appointed to the new Victorian Legal Services Panel, the Centre notes that 21 (91.3%) have also been appointed to the LSMUL — and so are already reporting annually on their pro bono programs using the Aspirational Target definition.

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<sup>28</sup> See <http://probonocentre.org.au/information-on-pro-bono/our-publications/survey/>.

## Non-legal and financial (in-kind) assistance

Under the new Panel arrangements, Pro Bono Services for an Approved Cause can include “other services or financial or in-kind assistance”,<sup>29</sup> which can include, without limitation, “the provision of staff, financial assistance, equipment, sponsorship or other in-kind assistance”.<sup>30</sup> The Centre notes that some firms have indicated that these items have been usefully counted by them towards meeting the pro bono obligation under the Panel arrangements, and have contributed to social outcomes by encouraging firms to give their time or to donate money to community legal centres.

Many law firms have established corporate social responsibility (CSR) programs or community engagement strategies that include the provision of non-legal services and/or financial assistance.

By making financial donations to community legal services, firms can help build the capacity of these services to develop and administer their pro bono partnerships. Whilst non-legal services and financial contributions fall outside the Aspirational Target definition of pro bono services, they are embraced by law firms, and are expanding as firms become more sophisticated in managing their overall community engagement activities. There is a role for government in encouraging these types of programs in law firms. The inclusion of ‘other services or financial or in-kind assistance’ by firms within the scope of ‘approved causes’ helps serve this purpose.

However, the primary means of improving access to justice by addressing unmet legal need is the provision of **legal** services, the matter that the Aspirational Target definition is solely concerned with. It is suggested that Victoria could consider a definition of ‘Approved Causes’ that combined the Aspirational Target definition and “other services or financial or in-kind assistance”.

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## THE PRO BONO OBLIGATION — HOW SHOULD PRO BONO SERVICES BE MEASURED?

The tendering process for the legal Panel Scheme requires tendering firms to commit to a “pro bono obligation” expressed in financial terms, under which the tendering firms committed to undertaking Pro Bono Services to the value (applying government client rates or the relevant lawyer’s average charge-out rates) of a nominated percentage of the legal fees received from Panel work. From 1 March 2016, Panel firms will be required to report annually (with quarterly updates) on both the financial value of their pro bono services, and on the hours of pro bono services per lawyer in the firm.<sup>31</sup>

The Centre submits that the pro bono obligation — and consequently the reporting requirements of Panel firms — is best tested in terms of **hours** of pro bono legal services.

Drawing on its experience of collecting data about the pro bono performance of law firms, 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 a firm’s overall size, rather than the value of Panel work done by the firm, which may be relatively small. For example, the new Panel arrangements require a large firm with a small government practice to undertake a modest amount of pro bono work relative to its size; whereas an

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<sup>29</sup> Deed of Standing Offer for the Provision of Legal Services (Vic) cl 11.1(a).

<sup>30</sup> Policy Guidelines for the delivery of Pro Bono Services for an Approved Cause under the government Legal Services Contract, cl 1.2.

<sup>31</sup> Deed of Standing Offer for the Provision of Legal Services (Vic), Annexure 3: Service Level Agreement cl 3.1.3.

approach based on every lawyer in the firm in the firm aspiring to undertake at least 35 hours of pro bono legal work per annum would leverage the firm's true capacity to do pro bono work.

An approach based on hours per lawyer in the firm is also consistent with the tendering and reporting requirements of the Commonwealth LSMUL. Under that scheme, panel firms of 50 or more lawyers are required to be Target signatories and to report the number of pro bono hours per lawyer performed. For these firms, having to record and report pro bono services twice, using two different methods, is an unnecessary administrative burden. Being able to easily measure and compare pro bono contributions is important for program evaluation and encouraging continually improving performance.

Finally, the imperative to engage in pro bono legal work is considered a professional responsibility of every individual lawyer. It exists irrespective of the lawyer's area of practice, clients, or the size or nature of the lawyer's firm. Measuring pro bono legal work by hours, rather than financially, makes pro bono referable to that individual responsibility.

The Centre supports Justice Connect's recommendation that future tenders for legal service providers could recognise firms who are Aspirational Target signatories and apply additional weight to those firms that are signatories. The Centre suggests consideration of a stronger position of requiring that tenderers be Aspirational Target signatories, with additional weight given to those firms who are meeting the Target.

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## REMOVING THE "OPT-IN" STATUS FOR VARIOUS BODIES

Under the new Panel arrangements, only the ten Departments identified in Schedule 5 to the Deed of Standing Offer are required to use the Panel arrangements to purchase all legal services. All other agencies, departments and authorities, however, will operate on an "opt-in" basis, and may purchase legal services other than through the Panel arrangements.<sup>32</sup> The Centre notes that the Department of Justice and Regulation website (as at 20 February 2016) indicates seven Departments and 21 Agencies bound by the Panel arrangements.

Under the Commonwealth LSMUL arrangements, in the 2014-2015 financial year, a total of 168 Non-Corporate and Corporate Commonwealth Entities reported legal services expenditure in the reporting period.<sup>33</sup> This is significantly in excess of the 28 departments and agencies using the Victorian arrangements.<sup>34</sup>

The Centre submits that Panel arrangements would be more effective in encouraging firms to engage in pro bono legal work if all departments, agencies and statutory bodies are required to use the Panel arrangements to purchase legal services.

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<sup>32</sup> Deed of Standing Offer for the Provision of Legal Services (Vic), cl 3.1(a), (b).

<sup>33</sup> Commonwealth of Australia Attorney General's Department, *Legal Services Expenditure Report 2014-2015*, p 6, <https://www.ag.gov.au/Publications/Documents/Commonwealth%20Legal%20Services%20Expenditure/Legal-Services-Expenditure-Report-2014-15.pdf>.

<sup>34</sup> See <http://www.procurement.vic.gov.au/State-Purchase-Contracts/Legal-Services-Panel>

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## IN SUMMARY

The Centre submits that, when government next has an opportunity to review the pro bono encouragement mechanism in its legal Panel arrangements, growth in pro bono legal services will be achieved by:

- recognising and rewarding firms in tenders who are Aspirational Target signatories;
- amending the scope of 'Approved Causes' in the legal Panel arrangements to align it with the Aspirational Target definition of pro bono legal services,
- expressing the pro bono obligation of Panel firms in terms of hours per lawyer in the firm;
- considering expanding the number of firms to which the conditions apply; and
- requiring statutory bodies to participate in the Panel arrangements, rather than on an 'opt-in' basis.

## 8 THE RESOURCING OF VICTORIA LEGAL AID (VLA) TO ENSURE THAT GOVERNMENT FUNDING IS USED MOST EFFECTIVELY AND EFFICIENTLY AS POSSIBLE AND SERVICES ARE DIRECTED TO VICTORIANS MOST IN NEED

The development of Australia's structured and coordinated pro bono sector has been a law firm led movement, and has largely avoided being a substitute for legal aid. It continues to take on a considerable amount of work that is unlikely ever to be funded by legal aid but where there are still high levels of unmet legal need, particularly civil law work such as discrimination, victims compensation and employment matters. This can be contrasted with the system in the UK where the level of substitution for work ordinarily or previously funded by legal aid is much higher. Any government initiatives need to recognise this feature which is a strength of the Australian pro bono system.

Nevertheless, Australia-wide the two highest areas of unmet legal need are in family law and criminal law matters, areas that consistently appear at the top of the list of matters rejected by large law firms for pro bono assistance.<sup>35</sup>

To achieve more efficient use of legal aid funding, in the context of further encouraging collaborative relationships between legal aid and pro bono legal service providers, requires a good understanding of what law firms are good at, what they are not good at, and the resources necessary within legal aid to make the most of what is possible with law firm support and collaboration.

The Department of Justice and Regulation, the Victorian Supreme Court and the County Court of Victoria now all have staff whose role is to liaise with referral schemes and pro bono providers. This may be a model for Victoria Legal Aid to consider as a means to providing increased support in civil law matters.

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<sup>35</sup> National Pro Bono Resource Centre, *Third National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers*, Final Report, January 2013, p 21, at <http://probonocentre.org.au/wp-content/uploads/2015/09/National-Law-Firm-Pro-Bono-Survey-2012-Final-Report.pdf>; National Pro Bono Resource Centre, *Fourth National Law Firm Pro Bono Survey: Australian firms with fifty or more lawyers*, Final Report, December 2014, p 35, at <http://probonocentre.org.au/wp-content/uploads/2015/09/4th National Law Firm Pro Bono Survey 2014 Final Report.pdf>; National Pro Bono Resource Centre, *Pro bono legal services in family law and family violence*, Final Report, October 2013, at <http://probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf>.

The increasing prevalence of self-represented litigants in Australian courts is a paradigm shift. With greater accessibility of legal information online, electronic court accessibility, and the increased difficulty of obtaining legal aid in certain matters, the Centre suggests that this is a phenomenon that is here to stay. A response is required from the Department of Justice and Regulation that includes a strategy that assists SRLs rather discouraging them.

Existing Self Representative Litigant (SRL) programs have attracted considerable support from law firm pro bono programs as they offer opportunities to provide time-limited “unbundled” pro bono services in a variety of areas of law. These programs enable firms to address unmet legal need while containing their involvement, which is particularly important given there can be a reluctance to take on litigation matters on a pro bono basis.

The Commonwealth government has supported the establishment of an SRL scheme nationally in the Federal Courts and specifically through Justice Connect in Victoria as well as in NSW, Tasmania and the ACT. The Justice Connect scheme is currently limited to matters in bankruptcy, Fair Work (employment), human rights / discrimination and judicial review. The Centre notes that both the Supreme Court of Victoria and the County Court of Victoria provide staff to liaise between the court and lawyers who may be willing to act on a pro bono basis. This is a relatively recent development and an important one in the court’s ability to obtain legal assistance for self-represented litigants. Government should continue to support these roles.

The Centre suggests that an opportunity exists for the Victorian State government to fund SRL schemes in the County and Supreme Courts in Victoria, focusing on areas of unmet legal need. The Centre understands Justice Connect is considering a pilot scheme in the Supreme Court of Victoria, and would endorse such a scheme.

The lessons learned from the experience of established SRL services, particularly the long-running QPILCH SRS (which operates in State as well as Federal courts including QCAT) should be considered in any plans to develop similar schemes in Victoria’s State courts and tribunals. An evaluation of the QPILCH scheme was conducted in 2012.<sup>36</sup> Lessons learned from QPILCH’s experience are also 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).<sup>37</sup> 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.

The QPILCH SRS 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 service can provide litigants with a number of appointments to assist them

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<sup>36</sup> Cate Banks, *Evaluation of effectiveness of Queensland Public Interest Law Clearing House Self Representation Service In Federal Court and Federal Magistrates Court Brisbane*, June 2012, at [http://www.qpilch.org.au/dbase/upl/qpilch\\_federal\\_court\\_pilot\\_evaluation\\_june\\_2012.pdf](http://www.qpilch.org.au/dbase/upl/qpilch_federal_court_pilot_evaluation_june_2012.pdf).

<sup>37</sup> National Pro Bono Resource Centre, *Pro Bono Partnerships and Models: A Practical Guide to What Works*, 20.5.1, at <http://probonocentre.org.au/information-on-pro-bono/our-publications/what-works/>.

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 QPILCH SRS 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.

**April 2016**

**Australian Pro Bono Centre**