



## Pro Bono Practices and Opportunities in Australia

### INTRODUCTION

Pro bono legal services remain an increasingly important focus for lawyers and law firms throughout Australia. Australia now prides itself as one of the leaders in the world in providing pro bono legal services. Although such efforts are not as widespread as in the United States, a more strategic push for the development of pro bono services in certain targeted areas is allowing for greater access to those in need of free legal services in Australia.

In 1992, the first formal pro bono referral scheme was established in Australia.<sup>1</sup> Since then, additional pro bono “clearing-houses” and legal assistance referral schemes have developed in response to concerns about access to justice. Whether they are focused on the public interest or on particular disadvantaged groups or individuals, referral schemes generally aim to provide assistance to those who would not otherwise be able to assert their legal rights. They do this mainly by connecting individuals and organizations with lawyers who are willing to assist them on a pro bono basis. Referral schemes also provide a focal point in the legal community for the coordination of a wide range of pro bono activities. Among other things, they undertake projects with their lawyer members, often in conjunction with community organizations, directed at a particular community problem or issue. These efforts have effectively increased access to justice for those who would otherwise not know how or have the means to seek legal help.

According to a recent survey (the “**2014 National Survey**”) by the Australian Pro Bono Centre (“**APBC**”, until recently known as the National Pro Bono Resource Centre)<sup>2</sup> the amount of pro bono legal work being done by large law firms in Australia has generally increased over the past few years despite large cuts in the total numbers of lawyers (due to the economic downturn). Of the 41 firms providing data on the number of pro bono hours recorded by their attorneys,<sup>3</sup> more than half reported an increased pro bono budget or target compared to the preceding two years, with only one firm reporting a decrease in pro bono targets or budgets. Across all respondent firms, attorneys participating in pro bono work spent an average of 31.7 hours per lawyer per year on such matters.<sup>4</sup>

### OVERVIEW OF THE LEGAL SYSTEM

#### Constitution and Governing Laws

Australia has a federal system of government, comprising federal (that is, the Commonwealth or national level government), state and territory jurisdictions. The Australian Constitution establishes the federal government and sets out the basis for relations between the Commonwealth, the states and the Australian territories.<sup>5</sup>

---

<sup>1</sup> This was the New South Wales Law Society Community Referral Service Pro Bono Scheme; see <http://www.lawsociety.com.au/community/findingalawyer/probono/index.htm> (last visited on September 4, 2015).

<sup>2</sup> The APBC announced its change of name on June 17, 2015, with the launch of a new website in September 2015; see [http://www.nationalprobono.org.au/news\\_detail.asp?id=135](http://www.nationalprobono.org.au/news_detail.asp?id=135) (last visited on September 4, 2015).

<sup>3</sup> The firms surveyed employed 50 or more full-time equivalent lawyers and included 24 of the 25 largest Australian firms: National Pro Bono Resource Centre, Fourth National Law Firm Pro Bono Survey: Australian Firms with 50 or more lawyers – Final Report, December 2014, available at <http://www.nationalprobono.org.au/page.asp?from=4&id=31> (last visited on September 4, 2015).

<sup>4</sup> National Pro Bono Resource Centre, Fourth National Law Firm Pro Bono Survey: Australian Firms with 50 or more lawyers – Final Report, December 2014 at 4.

<sup>5</sup> Parliament of Australia, “Infosheet 13 – The Constitution”, available at [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_13\\_-\\_The\\_Constitution](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_13_-_The_Constitution) (last visited on September 4, 2015).



An essential feature of the Australian system of government is that law-making, the exercise of executive power and the application of laws by a judicial power is divided between the three 'arms' of government, respectively, the Parliament, the Executive and the Judiciary. This division is referred to as the 'separation of powers doctrine'.<sup>6</sup>

The Australian Constitution gives the legislative power of the Commonwealth (i.e. the power to make laws) to the Parliament, which is comprised of the Queen (who is represented by the Governor-General) and two 'Houses' of elected representatives - the House of Representatives and the Senate. The Parliament is responsible for passing legislation, serves as a forum for the debate of public policy and authorises the Executive to spend public money, by agreeing to proposals for expenditure and taxation. A further function of Parliament is to provide from its membership the members of the Executive, as set out below. The Governor-General converts proposed laws into Acts of Parliament by assenting (on behalf of the Queen) to legislation that has been passed by the two Houses.

The Executive is comprised of the Queen, Prime Minister and Cabinet. Under the Australian Constitution, the executive power is vested in the Queen and is exercisable by the Governor-General. Practically however, the executive power is held by the Prime Minister and Cabinet as 'advisers' to the Governor-General. The Prime Minister is the elected leader of the party in government and the Cabinet is a policy-making body comprised of senior Ministers selected by the Prime Minister.<sup>7</sup>

The Australian Constitution also gives the Governor-General powers to act independently in certain matters, including the power to dissolve the House of Representatives and, in certain situations, both Houses of Parliament (called a 'double dissolution'). However, other than in exceptional circumstances, the Governor-General will follow the advice of the Prime Minister.<sup>8</sup>

## The Courts

The Australian Constitution vests the judicial power of the Commonwealth in the High Court of Australia, being the highest and final court of appeal in Australia, and other federal courts established by legislation. The latter category is currently comprised of the Federal Court, Family Court and Federal Circuit Court.

Under the separation of powers doctrine referred to above, the judiciary is independent and acts without interference from the parliament or executive. The Australian Constitution also guarantees the tenure and remuneration of judges to assist in securing judicial independence.<sup>9</sup> Federal judicial officers are appointed by the government and cannot be removed from office except by the Governor-General on an address from the Parliament on the grounds of proved misbehaviour or incapacity. The appointment of judges depends upon the terms of the governing statute and constitutional provisions; typically, judges are formally appointed by the Governor-General (who acts on the advice of the government).<sup>10</sup>

One of the High Court's main functions is to interpret the Constitution. The High Court may rule that a particular law is unconstitutional, or beyond the power of the Parliament to make and therefore invalid. Although Parliament may override the judiciary's interpretation of any ordinary law by passing or

---

<sup>6</sup> Parliament of Australia, "Infosheet 20 – The Australian System of Government", available at [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_20\\_-\\_The\\_Australian\\_system\\_of\\_government](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government) (last visited on September 4, 2015).

<sup>7</sup> Parliament of Australia, "Infosheet 20 – The Australian System of Government", available at [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_20\\_-\\_The\\_Australian\\_system\\_of\\_government](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government) (last visited on February 17, 2016).

<sup>8</sup> Parliament of Australia, "Infosheet 20 – The Australian System of Government", available at [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_20\\_-\\_The\\_Australian\\_system\\_of\\_government](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government) (last visited on February 17, 2016).

<sup>9</sup> Australian Government Attorney-General's Department, The Courts, available at <http://www.ag.gov.au/LegalSystem/Courts/Pages/default.aspx> (last visited on September 4, 2015).

<sup>10</sup> See, for example: Federal Court of Australia, Judges of the Court, available at <http://www.fedcourt.gov.au/about/judges> (last visited on September 4, 2015).



amending legislation, the Parliament is ultimately subject to the Constitution. Further, the Constitution cannot be changed by an Act of Parliament alone; a referendum of the people of Australia is necessary to effect any amendment to it.<sup>11</sup>

Each state and territory has their own laws and court system. State and territory courts fall within the responsibilities of the relevant state or territory Attorney-General or Minister for Justice.

## The Practice of Law

The Australian legal profession is comprised of two types of lawyers: solicitors and barristers. One of the primary differences between solicitors and barristers is the public's access to them; solicitors have direct contact with the public whereas lawyers that practice solely as barristers are specialist advocates and advisors and are generally instructed through solicitors. In New South Wales and Queensland, there is a split profession, meaning that there is a clear separation between barristers and solicitors.<sup>12</sup> In South Australia, Victoria, Western Australia and the Australian Capital Territory, the professions of barrister and solicitor are blended, but an independent bar is maintained for those that choose to practice solely as barristers. Similarly, the profession is also blended in Tasmania and the Northern Territory, however only a very small number of practitioners choose to operate as part of an independent bar.<sup>13</sup>

Foreign lawyers in Australia may practice either foreign law (subject to the applicable practising restrictions) or may apply to be admitted as Australian lawyers; the relevant conditions and requirements are set and applied by the legal practitioners board in the state or territory in which the lawyer intends to practice.<sup>14</sup>

According to a recent survey of the Australian legal industry, there were 66,211 practising solicitors in Australia as at October 2014.<sup>15</sup> It was reported that around 70.2% of practising solicitors work in private practice, about 15.8% work in-house (corporate), and around 9.6% in government.<sup>16</sup> The Australian Bar Association reports that there are approximately 6,000 practising barristers in Australia.<sup>17</sup>

There are no specific pro bono rules or requirements, such as a minimum number of hours, which solicitors and barristers are required to satisfy to maintain their practising qualifications. In April 2007, the APBC launched the National Pro Bono Aspirational Target (the “**Target**”), through which it seeks barristers, law firms and chambers of barristers to commit to a voluntary 35 hours of pro bono legal work per lawyer per year.<sup>18</sup> For the 2014/2015 financial year, the Target had 131 signatories (including 85 law

---

<sup>11</sup> Parliament of Australia, “Infosheet 20 – The Australian System of Government”, available at [http://www.aph.gov.au/About Parliament/House of Representatives/Powers practice and procedure/00 - Infosheets/Infosheet 20 - The Australian system of government](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government) (last visited on February 17, 2016).

<sup>12</sup> See <http://www.austbar.asn.au/the-profession> (last visited on February 16, 2016).

<sup>13</sup> See <http://www.austbar.asn.au/the-profession> (last visited on February 16, 2016).

<sup>14</sup> For example, in New South Wales, foreign lawyers may be admitted either as an Australian-registered foreign lawyer or as an Australian lawyer, see <http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/yourpractisingcertificate/practisingforeignlaw/index.htm> (last visited on September 4, 2015).

<sup>15</sup> The Law Society of New South Wales (prepared by Urbis Keys Young), The 2014 Law Society National Profile – Final Report, available at <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf> (last visited on February 16, 2016).

<sup>16</sup> The Law Society of New South Wales (prepared by Urbis Keys Young), The 2014 Law Society National Profile – Final Report, available at <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf> (last visited on February 16, 2016).

<sup>17</sup> See <http://www.austbar.asn.au/> (last visited on February 16, 2016).

<sup>18</sup> See [www.nationalprobono.org.au/target](http://www.nationalprobono.org.au/target) (last visited on February 16, 2016).



firms) covering approximately 11,235 lawyers.<sup>19</sup> Signatories are asked to adhere to and adopt a statement of principles relating to the Target and to report annually to the APBC on whether they have met the Target in the previous year.<sup>20</sup>

There is presently no continuing professional development (“CPD”) credit available to Australian lawyers for providing pro bono legal services. The APBC recently submitted to the Law Council of Australia that CPD rules should be amended to permit a lawyer who undertakes at least a day’s (7.5 hours) legal work on a pro bono basis to claim one CPD unit towards the required minimum ten units of CPD activity;<sup>21</sup> however, this proposal was not adopted.<sup>22</sup>

## Legal Regulation of Lawyers

Solicitors are represented by the Law Society of the state in which they practice,<sup>23</sup> and regulated by a legal practitioners board,<sup>24</sup> while the practice of barristers is governed by the relevant bar council or association.<sup>25</sup>

## LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

### The Right to Legal Assistance

There is no constitutional, legislative or common law right to free legal representation in Australia in either criminal or civil cases. The High Court of Australia has, however, discussed a common law obligation for courts to refuse to permit an unfair trial and a right to legal aid in certain circumstances for defendants who are unable to afford legal representation in serious criminal cases.<sup>26</sup>

### State-Subsidized Legal Aid

The system of pro bono in Australia complements a system of legal aid which uses public funds to help those in need of legal services. In 1977, the Australian Government enacted the Commonwealth Legal

---

<sup>19</sup> Australian Pro Bono Resource Centre, Eighth Annual Performance Report on the National Pro Bono Aspirational Target, October 2015 at 4, available at [http://www.nationalprobono.org.au/ssl/CMS/files\\_cms/Eighth\\_Annual\\_Performance\\_Report\\_on\\_the\\_Aspirational\\_Target\\_2015.pdf](http://www.nationalprobono.org.au/ssl/CMS/files_cms/Eighth_Annual_Performance_Report_on_the_Aspirational_Target_2015.pdf) (last visited on February 16, 2016).

<sup>20</sup> Australian Pro Bono Resource Centre, Eighth Annual Performance Report on the National Pro Bono Aspirational Target, October 2015 at 4, available at [http://www.nationalprobono.org.au/ssl/CMS/files\\_cms/Eighth\\_Annual\\_Performance\\_Report\\_on\\_the\\_Aspirational\\_Target\\_2015.pdf](http://www.nationalprobono.org.au/ssl/CMS/files_cms/Eighth_Annual_Performance_Report_on_the_Aspirational_Target_2015.pdf) (last visited on February 16, 2016).

<sup>21</sup> National Pro Bono Resource Centre, Submission to the Law Council of Australia – Legal Profession Uniform Law: Continuing Professional Development Rules, March 6, 2015, available at [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/NPBR\\_CMS\\_Submission\\_to\\_LCA\\_Pro\\_Bono\\_and\\_CPD\\_Rules\\_0603\\_2015.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/NPBR_CMS_Submission_to_LCA_Pro_Bono_and_CPD_Rules_0603_2015.pdf) (last visited on September 4, 2015).

<sup>22</sup> See the meaning of “CPD activity” under Rule 8 of the Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (NSW), available at <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+242+2015+cd+0+N> (last visited on September 4, 2015).

<sup>23</sup> For example, the Law Institute of Victoria, see <http://www.liv.asn.au/> (last visited on September 4, 2015).

<sup>24</sup> For example, the Victorian Legal Services Board, see <http://www.lsb.vic.gov.au/> (last visited on September 4, 2015).

<sup>25</sup> For example, the New South Wales Bar Association, see <http://www.nswbar.asn.au/> (last visited on September 4, 2015).

<sup>26</sup> *Dietrich v The Queen* [1992] HCA 57.



Aid Commission Act 1977 (“**LAC Act**”) which established cooperative arrangements between the federal government and state and territory governments under which legal aid would be provided by independent legal aid commissions to be established under state and territory legislation.<sup>27</sup>

The federal Attorney-General’s Department administers funding for the provision of legal aid services for federal law matters through legal aid commissions (“**LACs**”), and manages a community legal services program and other legal aid services for indigenous Australians.<sup>28</sup> State and territory governments fund legal aid services for cases brought under state and territory law. There are eight independent LACs, one in each state and territory. Funding is provided mainly by the federal, state and territory governments. At the federal level, the government has provided funding through the *National Partnership Agreement on Legal Assistance Services*. In the most recent 2014 – 2015 budget year, the federal government initially intended to provide A\$204.4 million funding for legal assistance, representing a decrease of approximately A\$15 million for LACs.<sup>29</sup> Following significant criticism, the government agreed to restore funding of A\$25.5 million (over two years to June 30, 2017) for LACs, community legal centres (“**CLCs**”) and Indigenous legal service providers.<sup>30</sup>

As the laws, legal practices, guidelines and funding of LACs differ across jurisdictions, so too do the services and assistance offered by each LAC. Eligibility for LAC services and grants of legal assistance also varies among LACs and can be confirmed by contacting the appropriate commission.<sup>31</sup>

LACs can grant aid for lawyers to undertake ongoing matters for their clients. However, grants of legal aid for representation in ongoing matters are not available to everyone. Aid will generally be granted only if: (i) the matter is of a type the commission may take on in accordance with Commonwealth and/or state government guidelines; (ii) the applicant passes a means test, based on the applicant’s income and assets and those of any financially associated person; and (iii) the matter is assessed as having merit. If a grant of aid is made, the case will then be referred to either a private practitioner or a lawyer from the commission’s in-house practice.<sup>32</sup>

Generally, some services will be provided by LACs free of charge and without means testing, such as legal information and referral services, advice and minor assistance (some commissions operate telephone hotlines which provide legal advice, or offer it face-to-face), and duty lawyers who provide advice and assist clients with restraint orders, seeking remands, applying for bail and/or presenting pleas in mitigation.<sup>33</sup>

---

<sup>27</sup> This Act was repealed in 1999 by the Statute Stocktake Act 1999, in response to a report in 1995 by the Access to Justice Advisory Committee, *Access to Justice - an Action Plan*, delivered to the Attorney-General and Minister for Justice. Among other things, the Report proposed to establish an Australian Legal Aid Commission, which was subsequently established. [Bills Digest No. 178 1998-99: Statute Stocktake Bill 1999].

<sup>28</sup> See <http://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Legal-aid.aspx> (last visited on September 4, 2015)

<sup>29</sup> J. Murphy, “Budget Review 2014-15 Index – Legal aid and legal assistance services”, Parliamentary Library, Parliament of Australia, May 2014, available at [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201415/LegalAid](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201415/LegalAid) (last visited on September 4, 2015).

<sup>30</sup> See <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Legal-aid-funding-assured-to-support-the-most-vulnerable-in-our-community.aspx> (last visited on September 4, 2015).

<sup>31</sup> Commissions can be contacted through National Legal Aid, which represents the Directors of each of the eight State and Territory LACs. See <http://www.nationallegalaid.org/> (last visited on September 4, 2015).

<sup>32</sup> National Pro Bono Resource Centre and Victoria Law Foundation, *The Australian Pro Bono Manual*, February 1, 2005 at 4.3.

<sup>33</sup> National Pro Bono Resource Centre and Victoria Law Foundation, *The Australian Pro Bono Manual*, February 1, 2005 at 4.3.



## Mandatory assignments to Legal Aid Matters

Australian solicitors are not obliged to accept matters, including legal aid cases (but subject to provisions of anti-discrimination legislation). Barristers are subject to the “cab-rank” principle, under which a barrister may be required to accept a brief from a solicitor to appear before a court in a field in which the barrister professes to practise;<sup>34</sup> however, this principle is subject to exceptions and it does not oblige a barrister to accept direct instructions from a person who is not a solicitor.<sup>35</sup>

## Unmet Needs and Access Analysis

As a general matter, the system of public legal aid does not adequately meet the demand for free legal services, largely due to the means and merit testing, which effectively excludes portions of the population who either (i) fall above the minimum means standards, rendering them financially ineligible, but who nonetheless have insufficient funds for legal representation or (ii) meet the minimum means standards but are seeking assistance on matters that do not meet the merit standards.<sup>36</sup> In addition, people who receive legal aid may be required to make a financial contribution and, if monetary sums are recovered, may be required to reimburse certain legal fees.

In some jurisdictions, legislation related to legal aid includes cost indemnity provisions with regard to persons who receive legal aid.<sup>37</sup> For example, the New South Wales Legal Aid Commission Act 1979 generally provides that, where a court or tribunal makes an order regarding costs against a person to whom legal aid is provided, the state’s LAC shall pay the whole of such costs, but this provision contains several exceptions to the general rule.<sup>38</sup> A practitioner prepared to undertake pro bono work should ensure that she or he is familiar with any such provision in the relevant jurisdiction.

Each LAC maintains its own complaints and disputes policies. By way of example, for complaints about its service, staff or private lawyers funded by it, Legal Aid NSW has set up an online complaints form and feedback page and also accepts written complaints. It is also possible to appeal to the Legal Aid Review Committee in respect of refused applications for legal aid grants. Complaints about administration or non-legal services can be taken to the NSW Ombudsman.<sup>39</sup>

## Alternative Dispute Resolution

In Australia, Alternative Dispute Resolution (“**ADR**”) is generally accepted as an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them and may be facilitative, advisory, determinative or, in some cases, a

---

<sup>34</sup> Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW), Rule 17, available at <http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2015-243.pdf> (last visited on September 4, 2015).

<sup>35</sup> Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW), Rule 21. See also G. Monahan, *Essential Professional Conduct: Legal Ethics*, Cavendish Publishing (Australia) Pty Ltd, 2001 at 15-17.

<sup>36</sup> Details of merit testing can be found at National Pro Bono Resource Centre and Victoria Law Foundation, *The Australian Pro Bono Manual*, February 1, 2005 at 4.3. The biggest gap in legal aid coverage is in the area of civil law, where it is difficult, if not impossible, to get a grant of aid for many kinds of cases.

<sup>37</sup> National Pro Bono Resource Centre and Victoria Law Foundation, *The Australian Pro Bono Manual*, February 1, 2005 at 4.3.

<sup>38</sup> Legal Aid Commission Act 1979 (NSW), section 47, available at <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/2.-legal-aid-commission-act/2.4.-part-3-provision-of-legal-aid> (last visited on September 4, 2015).

<sup>39</sup> See <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/how-to-complain-to-legal-aid-nsw> (last visited on September 4, 2015).



combination of these.<sup>40</sup> There are a growing number of voluntary and mandatory ADR schemes in Australia, and there are a number of factors that make ADR attractive to low income or disadvantaged members of the community, specifically: the cost of litigation, the reduced time of the dispute, and continuing government sponsorship of the concept of ADR.<sup>41</sup>

Lodging a complaint with an ombudsman is just one example of ADR. There is no cost involved in making a complaint and the complainant is not required to have legal representation. Australia has an ombudsman assigned for each state, along with a federal ombudsman. All government bodies are within the jurisdiction of the relevant ombudsman. There are also industry-based ombudsmen that resolve complaints made against their relevant industry members, the costs of which are recovered by the yearly membership fee paid by each member. Many of the industry-based ombudsmen adhere to the Australian Government's Key Practices for Industry-based Customer Dispute Resolution which stipulates that no application or other fee or charge is required from a complainant before a complaint is dealt with.<sup>42</sup> Unfortunately, research suggests that low income or disadvantaged members of the community who stand to benefit most are often not well informed of the ombudsman services available and fail to engage.<sup>43</sup>

## PRO BONO ASSISTANCE

### Pro Bono Opportunities

#### Private Attorneys

As explained above, there are no specific pro bono rules or requirements, such as a minimum number of hours, that solicitors and barristers are required to satisfy so as to maintain their practising qualifications; however, a range of pro bono programs have been established by law firms and other organizations in an attempt to promote pro bono work and facilitate involvement by legal practitioners and law students.

#### Law Firm Pro Bono Programs

According to the 2014 National Survey, employment law, governance, commercial agreements, applications for deductible gift recipient (“DGR”) tax status and intellectual property were the five practice areas most commonly receiving pro bono assistance.<sup>44</sup> The APBC has previously noted that:<sup>45</sup>

“Legal Aid funding for employment law matters is in many states limited if not non-existent. Obtaining DGR status from the Australian Tax Office is a complex process that can be vital for not-for-profit organizations to be able to receive tax deductible gifts and donations. Many do not have the resources or the expertise to prepare an application without expert legal assistance.”

---

<sup>40</sup> See <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx> (last visited on September 4, 2015).

<sup>41</sup> National Pro Bono Resource Centre and Victoria Law Foundation, *Alternative Dispute Resolution: Assisting people experiencing disadvantage*, June 2012 at 13.

<sup>42</sup> Australian Government Treasury, *Key Practices for Industry-based Customer Dispute Resolution*, February 2015 at 9.

<sup>43</sup> Australian Government Productivity Commission, *Inquiry Report: Access to Justice Arrangements*, December 3, 2014 at 327.

<sup>44</sup> National Pro Bono Resource Centre, *Fourth National Law Firm Pro Bono Survey: Australian Firms with 50 or more lawyers – Final Report*, December 2014 at 33.

<sup>45</sup> National Pro Bono Resource Centre, “*Survey of Large Law Firms Highlights Areas of Unmet Legal Need*”, December 8, 2010, available at [http://www.nationalprobono.org.au/news\\_detail.asp?id=77](http://www.nationalprobono.org.au/news_detail.asp?id=77) (last visited on September 4, 2015).



In contrast, the APBC has previously explained that because many large firms have limited expertise in matters involving family law and criminal law, such matters face the highest levels of rejected requests for pro bono assistance.<sup>46</sup>

The most common sources for new pro bono matters are: direct requests from current pro bono clients and LACs, internal projects and referrals from other organizations, with the balance of pro bono matters originating from pro bono referral schemes and organizations, and CLCs.<sup>47</sup> Most commonly, the type of pro bono assistance provided by law firms is providing legal advice, though transactional matters are a significant portion of pro bono work as well, followed by litigation.

### Community Legal Centres

In addition to LACs, Australians can also take advantage of CLCs for legal assistance. CLCs are independent, non-profit organizations that provide free referral, advice and assistance. There are around 150 CLCs in Australia that receive government funding under the Community Legal Services Program, which in 2013 – 2014 provided their clients with around 262,633 advices (for legal and non-legal matters).<sup>48</sup> They range from centres with no paid staff to offices of ten or more employees, with most having three to six staff and at least one employed solicitor. Many CLCs operate with the assistance of volunteer lawyers and law students. CLCs often experience a high turnover of staff, particularly in rural, remote and regional CLCs.

### Legal Department Pro Bono Programs

Lawyers working in-house and government lawyers in Australia are able to develop pro bono programs for their legal teams. One of the barriers for such legal department programs has been the lack of appropriate professional indemnity insurance; however, as discussed below, the APBC facilitates a national pro bono insurance scheme for certain approved projects. The APBC has also collated various resources regarding legal department programs, including models of in-house corporate pro bono, on its website.<sup>49</sup>

### Bar Association Pro Bono Programs

Each state and territory bar association or council in Australia engages in the promotion or facilitation of pro bono efforts by its member barristers. For example, the NSW Bar Association maintains a Duty Barrister Scheme in conjunction with local courts to help people who cannot afford a lawyer and who do not qualify for legal aid.<sup>50</sup> The Duty Barrister Scheme covers both criminal and civil proceedings.

Together with the NSW Attorney-General's Department, the NSW Legal Aid Commission and the Law Society of NSW, the NSW Bar Association is a founding member of Law Access NSW, a free “one stop shop” to legal information, services and assistance. Law Access NSW is available to all NSW residents

---

<sup>46</sup> National Pro Bono Resource Centre, “Survey of Large Law Firms Highlights Areas of Unmet Legal Need”, December 8, 2010. See also: National Pro Bono Resource Centre, Pro bono legal services in family law and family violence: Understanding the limitations and opportunities – Final Report, October 2013, available at <http://www.nationalprobono.org.au/page.asp?from=4&id=31> (last visited on September 4, 2015).

<sup>47</sup> National Pro Bono Resource Centre, Fourth National Law Firm Pro Bono Survey: Australian Firms with 50 or more lawyers – Final Report, December 2014 at 42.

<sup>48</sup> It has been noted that not all CLCs are funded under the Community Legal Services Program, so these figures are an underrepresentation of the total activities performed over the relevant period: National Association of Community Legal Centres, The work and clients of CLSP CLCs in numbers – 2013/14 financial year, updated November 2014, available at [http://www.naclc.org.au/cb\\_pages/reports\\_and\\_resources.php](http://www.naclc.org.au/cb_pages/reports_and_resources.php) (last visited on September 4, 2015).

<sup>49</sup> National Pro Bono Resource Centre, “In-House Lawyers”, available at <http://www.nationalprobono.org.au/page.asp?from=8&id=313> (last visited on September 4, 2015).

<sup>50</sup> New South Wales Bar Association, “Briefing Barristers: Legal Assistance”, available at <http://www.nswbar.asn.au/briefing-barristers/legal-assistance> (last visited on September 4, 2015).





but is particularly aimed at people who have difficulty accessing traditional community and government legal services such as those in regional areas with disabilities.<sup>51</sup>

### University Legal Clinics and Law Students

Most law schools across Australia encourage students to volunteer their time to CLCs, Legal Aid schemes or local clearing-houses or referral schemes. In contrast to law faculties in many other parts of the world, legal aid work and university-managed clinics have generally not been part of the law school curriculum in Australia; however, this is changing. Currently, there are at least 25 law schools in Australia offering clinical legal education programs.<sup>52</sup>

In response to growing demands of Australian law students for more social justice opportunities,<sup>53</sup> the APBC has published a guide for students focused on social justice careers, promoting volunteering opportunities and directing students to resources and materials on pro bono.<sup>54</sup> The guide discusses the many ways students can get more involved in such work, including doing pro bono legal work and volunteering while studying at university and during their practical legal training (“PLT”) placements. The APBC has recommended that students consider volunteering at CLCs or other community legal organizations, participating in clinical legal education at Australian universities, getting involved in internships/outreach Programs, taking PLT courses in public interest issues, and pursuing employment with LACs, government and non-governmental organizations (“NGOs”).

### Others

#### Professional association legal assistance schemes

Many professional associations coordinate pro bono legal assistance schemes. Each scheme determines eligibility for assistance based on its own guidelines, usually using a means and a merits test, but generally assistance is not provided under these schemes if another form of assistance is available to the applicant (such as assistance from a CLC or legal aid). Depending on the scheme, assistance may be provided on a without-fee, a reduced-fee, or a conditional-fee basis. To apply for assistance through these schemes, applicants need to complete an application form, divulge information about their case, and provide detailed information (including documentation) concerning their income, assets and expenditure.

#### Public Interest Law Clearing Houses (“PILCHs”)

PILCHs have been established by collaborations among groups including independent organizations, legal non-profits, private law firms, university law schools, community legal centres and individual attorneys. At present, PILCHs operate in New South Wales and Victoria (founded in 1992 and 1994, respectively) under the joint name of Justice Connect (as of July 1, 2013),<sup>55</sup> Queensland (“QPILCH”, founded in 2001),<sup>56</sup> South Australia (“JusticeNet SA”, founded in 2009),<sup>57</sup> and Western Australia (“Law Access Pro Bono Referral Scheme”, founded in 1992).<sup>58</sup> PILCHs’ operations are substantially funded by

---

<sup>51</sup> See <http://www.lawaccess.nsw.gov.au/Pages/about-us/about-us.aspx> (last visited on September 4, 2015).

<sup>52</sup> The Kingsford Legal Centre at the University of New South Wales publishes a guide to these courses, available at <http://www.klc.unsw.edu.au/node/27> (last visited on September 4, 2015).

<sup>53</sup> National Pro Bono Resource Centre, “Law Students Want More Social Justice Opportunities”, May 13, 2011, available at [http://www.nationalprobono.org.au/news\\_detail.asp?id=86](http://www.nationalprobono.org.au/news_detail.asp?id=86) (last visited on September 4, 2015).

<sup>54</sup> The guide is available at [http://www.nationalprobono.org.au/news\\_detail.asp?id=88](http://www.nationalprobono.org.au/news_detail.asp?id=88) (last visited on September 4, 2015).

<sup>55</sup> See <http://www.justiceconnect.org.au/> (last visited on September 4, 2015).

<sup>56</sup> See <http://www.qpilch.org.au/> (last visited on September 4, 2015).

<sup>57</sup> See <http://www.justicenet.org.au/> (last visited on September 4, 2015).

<sup>58</sup> See <http://www.lawsocietywa.asn.au/pro-bono-scheme.html> (last visited on September 4, 2015).



fees from member legal practices. PILCHs refer “public interest”<sup>59</sup> matters to member law firms and other members (for example, barristers and some corporations’ legal departments) for services to be provided on a pro bono basis. PILCHs will receive and assess requests for assistance and then contact member firms to see if they will accept a referral.

### Court-based pro bono referral schemes

Some courts have also established formal referral schemes under their own rules. These schemes aim to facilitate the provision of legal services to litigants who otherwise would not be able to obtain them in instances where doing so is in the interest of the administration of justice. Court registries generally maintain lists of firms and lawyers who have volunteered to participate in these schemes, and the referrals are generally made by the court to a court registrar for referral to a solicitor or barrister; for example, the Federal Court of Australia has made arrangements with the state and territory bar associations to enable it to refer a party to a lawyer for legal assistance in certain circumstances.<sup>60</sup>

The High Court of Australia also avails itself of pro bono assistance in some cases. There are instances where the Court has explored pro bono options through professional associations (generally comprised of lawyers, legal academics and law students) on behalf of litigants with little means and who appear to have an arguable case.

### Court duty lawyer schemes

Many Australian courts and tribunals now operate duty lawyer schemes as well. These schemes are often coordinated by the courts or tribunals, which maintain lists of lawyers available to provide limited assistance to unrepresented litigants. Firms interested in being a part of these kinds of schemes should contact their local professional association for more information.

## Historic Development and Current State of Pro Bono

### Historic Development of Pro Bono

Solicitors in Australia have a long tradition of providing pro bono legal services. Certain initiatives by the government and NGOs in recent years have led to greater access to and awareness of pro bono services. Moreover, in recent years there has been significant interest in providing free legal services by lawyers employed in the for-profit sector.

In 2001, the National Pro Bono Task Force made a recommendation to the Commonwealth Attorney-General that a National Pro Bono Resource Centre be established. The Centre (now known as the APBC) opened in August 2002 and is an independent, non-profit organization funded by the Commonwealth Attorney-General’s Department, the state and territory Attorneys-General and the Faculty of Law at the University of New South Wales.<sup>61</sup> The APBC aims to encourage pro bono legal services and supports lawyers and law firms to make it easier for them to provide pro bono legal services. Its work includes reviewing and reporting on pro bono legal work undertaken throughout the nation, making available information and resources to existing and potential pro bono legal service providers and promoting pro bono law to community organizations and the general public.

The APBC is not able to refer individuals to lawyers for help with a legal problem. Rather, the APBC promotes and supports pro bono through its independent role as advocate, broker, coordinator, researcher and resource provider. It directs individual case referrals to pro bono clearing-houses and referral agencies which exist in many Australian states.

---

<sup>59</sup> The meaning of “public interest” varies among PILCHs. For example, QPILCH considers a matter to be “in the public interest” if it “affects a significant number of people; or raises matters of broad public concern, or requires legal intervention to avoid a significant and avoidable injustice; or particularly impacts on disadvantaged or marginalized groups” (see [http://www.qpilch.org.au/resources/factsheets/Queensland\\_Public\\_Interest\\_Law\\_Clearing\\_House\\_Incorporated\\_\(QPILCH\).htm](http://www.qpilch.org.au/resources/factsheets/Queensland_Public_Interest_Law_Clearing_House_Incorporated_(QPILCH).htm)) (last visited on September 4, 2015).

<sup>60</sup> See <http://www.fedcourt.gov.au/attending-court/court-referral-assistance> (last visited on September 4, 2015).

<sup>61</sup> See <http://www.nationalprobono.org.au/page.asp?from=1&id=16> (last visited on September 4, 2015).



As a recent development, certain Australian states permit “nil fee” practising certificates for volunteer or pro bono-only legal practitioners, including Western Australia, Victoria and Queensland. In Victoria, this certificate restricts the holder to volunteering at a CLC (and a condition to that effect will be imposed on the practising certificate).<sup>62</sup> In Queensland, the holder may undertake legal work on a pro bono project approved by the Centre.<sup>63</sup> In Western Australia, the Legal Practice Board will similarly impose a “volunteer or pro bono only” condition on a practising certificate, upon request.<sup>64</sup>

Both the Victorian Government and the Commonwealth Government have certain pro bono requirements for the law firms that are on their advisory panels, including the law firms that are seeking panel appointments.<sup>65</sup> In Victoria, law firms must commit at least 10 percent of the value of the total hours billed under its panel arrangements to pro bono work.<sup>66</sup> Law firms seeking to be on Commonwealth Government panels must comply with the Commonwealth Legal Services Multi Use List conditions. One condition is that firms must commit to pro bono legal work by either being a signatory to the Target, or to nominate a target value of Pro Bono Legal Services (as defined in the Target) over a financial year.<sup>67</sup>

### Current State of Pro Bono

Pro bono legal work is defined by the APBC as:<sup>68</sup>

1. Giving legal assistance for free or at a substantially reduced fee to:—

- 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
- individuals or organizations whose matter raises an issue of public interest which would not otherwise be pursued; or
- charities or other non-profit organizations 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 organization (including a community legal organization) or at a referral service provider such as a Public Interest Law Clearing House.”

As discussed above, a key aspect of the pro bono framework in Australia is the use of formal pro bono schemes, often coordinated or established by professional associations, courts and PILCHs throughout Australia.

The average number of pro bono hours per lawyer across all reporting signatories to the Target (discussed above) from the 2014/2015 financial year was 33.2 hours per lawyer.<sup>69</sup>

---

<sup>62</sup> For further information, see [http://lsbc.vic.gov.au/?page\\_id=207](http://lsbc.vic.gov.au/?page_id=207) (last visited on September 4, 2015).

<sup>63</sup> For further information, see [http://www.qls.com.au/For\\_the\\_profession/Your\\_legal\\_career/Practising\\_certificates](http://www.qls.com.au/For_the_profession/Your_legal_career/Practising_certificates) (last visited on September 4, 2015).

<sup>64</sup> For further information, see <https://www.lpbwa.org.au/Legal-Profession/Practising-in-Western-Australia/Volunteer-or-pro-bono-only-condition> (last visited on September 4, 2015).

<sup>65</sup> For further information, see <http://www.nationalprobono.org.au/page.asp?from=0&id=274> (last visited on February 16, 2016).

<sup>66</sup> For further information, see <http://www.premier.vic.gov.au/new-legal-services-panel-delivers-record-pro-bono-commitment/> (last visited on February 16, 2016).

<sup>67</sup> For further information, see <http://www.nationalprobono.org.au/page.asp?from=0&id=274> (last visited on February 16, 2016).

<sup>68</sup> National Pro Bono Resource Centre, Fourth National Law Firm Pro Bono Survey: Australian Firms with 50 or more lawyers – Final Report, December 2014 at 21.



The 2014 National Survey reported that the core barriers to firms doing pro bono work in Australia are firm capacity, concern about conflicts of interest with fee paying clients, insufficient expertise in relevant areas of law, and lack of management / partner support within the firm. Other critical constraints include insufficient organization of firm pro bono programs, competing pressure to meet financial targets, commitment of individual lawyers across the firm, lack of information on pro bono opportunities and the ability to fund external disbursements.<sup>70</sup>

### Fee Waivers

Exemptions or waivers of court and tribunal fees (such as filing fees, setting down and daily hearing fees) may be available to those undertaking pro bono matters. In fact, the relevant legislation, rules or regulations for many Australian courts and tribunals expressly provide for fee waiver, exemption, remittal or postponement of fees. Other courts, like the Supreme Court of South Australia, do not have express fee waiver provisions in its governing rules or Acts, but interested parties are still able to apply for waiver by the court, using its prescribed forms.

In the Administrative Appeals Tribunal and in Commonwealth courts (including the High Court of Australia and the Federal Court of Australia) any party may apply to the registrar for a fee waiver. Fees may be waived if the registrar believes that the payment of the fee would cause financial hardship. Additionally, applicants may be eligible for a fee exemption if they (1) have been granted legal aid; (2) hold a particular benefit or concession card; (3) are a prison inmate or lawfully detained; or (4) are under 18 years of age, or in receipt of a youth allowance, Austudy or Abstudy payment.

### Professional Indemnity Insurance

Another major barrier to those doing pro bono work in Australia has historically been the many legal and insurance considerations that come along with it. Providing legal advice can result in liabilities, even when done on a pro bono basis. It is essential that those interested in doing pro bono work in Australia consider whether they are sufficiently insured before providing their services, as they can potentially be held liable for any negligence resulting from their services.

The APBC provides a professional indemnity insurance scheme to facilitate lawyers that work in corporations and government participating in pro bono work. This scheme is intended to remove one of the key constraints on in-house lawyers (who often do not hold insurance needed to cover pro bono work), by protecting such lawyers from civil claims that may arise.<sup>71</sup> This insurance may be applied for in respect of pro bono projects that have been approved by the APBC.

### Disbursement Assistance

The costs of disbursements and the procedures to apply for disbursement assistance often act as a barrier to litigants, even in instances where pro bono assistance is available. Limited disbursement assistance is available for pro bono matters, and the amount of disbursement funding available, if any, varies by jurisdiction. Some states and territories have funds that can be used, but the availability of funding is limited. It may not be possible for applications for assistance to be made until the disbursement has been incurred, and there are often significant exemptions and caps on amounts recoverable.

Disbursements can include (1) the costs of obtaining expert reports or transcripts of proceedings; (2) the cost of hiring an attorney; and (3) interpreter fees. However, many schemes impose limits prohibiting them from providing assistance in cases that are handled on a “no win, no fee” basis and are likely to

---

<sup>69</sup> Australian Pro Bono Resource Centre, Eighth Annual Performance Report on the National Pro Bono Aspirational Target, October 2015 at 4, available at [http://www.nationalprobono.org.au/ssl/CMS/files/cms/Eighth\\_Annual\\_Performance\\_Report\\_on\\_the\\_Aspirational\\_Target\\_2015.pdf](http://www.nationalprobono.org.au/ssl/CMS/files/cms/Eighth_Annual_Performance_Report_on_the_Aspirational_Target_2015.pdf) (last visited on February 16, 2016).

<sup>70</sup> National Pro Bono Resource Centre, Fourth National Law Firm Pro Bono Survey: Australian Firms with 50 or more lawyers – Final Report, December 2014 at 64-67.

<sup>71</sup> National Pro Bono Resource Centre, “National Pro Bono PI Insurance Scheme”, available at <http://www.nationalprobono.org.au/page.asp?from=8&id=236> (last visited on September 4, 2015).



result in damages or payment of compensation. Firms are advised to always check whether a client may be eligible for legal aid, as grants of legal aid usually cover both disbursements and costs.<sup>72</sup>

The general rule in Australia is that an unsuccessful party in litigation (even if represented on a pro bono basis) will reimburse the legal costs of the successful party – this is reflected in the costs rules of the courts. Australian courts do, however, exercise a broad discretion in respect of the awarding of costs and, particularly in proceedings brought for the public interest,<sup>73</sup> the courts may not award costs against an unsuccessful litigant. There is also potential for a public interest client to limit its exposure to an adverse costs order by way of an indemnity from an applicable legal aid scheme or even a litigation funder.<sup>74</sup>

### Key Resources

- *Australian Pro Bono Centre (formerly known as the National Pro Bono Resource Centre)*: <http://www.nationalprobono.org.au/home.asp> (last visited on February 16, 2016)
- *Justice Connect*: <http://www.justiceconnect.org.au/> (last visited on September 4, 2015)
- *QPILCH*: <http://www.qpilch.org.au/> (last visited on September 4, 2015)
- *JusticeNet SA*: <http://www.justicenet.org.au/> (last visited on September 4, 2015)
- *Law Access Pro Bono Referral Scheme (WA)*: <http://www.lawsocietywa.asn.au/pro-bono-scheme.html> (last visited on September 4, 2015)
- *National Legal Aid*: <http://www.nationallegalaid.org/> (last visited on September 4, 2015)
- *National Association of Community Legal Centres*: <http://www.naclc.org.au/> (last visited on September 4, 2015)
- *Pro bono Australia*: <http://www.probonoaustralia.com.au/> (last visited on September 4, 2015)
- *Centre for Asia-Pacific Pro Bono*: <http://www.cappb.org/> (last visited on September 4, 2015)
- *Law Access NSW*: <http://www.lawaccess.nsw.gov.au/> (last visited on September 4, 2015)

## CONCLUSION

Pro bono opportunities and access in Australia have significantly increased since the establishment of the first pro bono clearing-house in 1992. The heightened awareness and expanded activity in the realm of pro bono have been accomplished in large part through the efforts of the government, bar associations and various community partners. However, many areas remain to be developed, particularly with respect to the inclusion of legal aid and clinical courses within Australian law school curriculums.

Lawyers interested in providing pro bono services in Australia should visit the resources listed above and contact their local referral schemes, professional associations, courts, tribunals and clearing-houses to get involved.

September 2015

Pro Bono Practices and Opportunities in Australia

This memorandum was prepared by **Latham & Watkins LLP** for the **Pro Bono Institute**. This memorandum and the information it contains is not legal advice and does not create an attorney-client relationship. While great care was taken to provide current and accurate information, the Pro Bono Institute and Latham & Watkins LLP are not responsible for inaccuracies in the text.

---

<sup>72</sup> National Pro Bono Resource Centre and Victoria Law Foundation, *The Australian Pro Bono Manual*, February 1, 2005 at 4.5.

<sup>73</sup> For example, see *Ruddock v Vadarlis* [2001] FCA 1865; *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8.

<sup>74</sup> G. Namey, "Litigation costs: strategies for the public interest lawyer", *The 2010 Conference of the Civil Justice Research Group*, Melbourne, September 2010 at 5-6, available at <http://intranet.law.unimelb.edu.au/staff/events/files/LitigationcostsGN.pdf> (last visited on September 4, 2015).