



NATIONAL PRO BONO RESOURCE CENTRE

Submission to the Senate Legal and Constitutional Affairs Committee:

Inquiry into Access to Justice

April 2009

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About the National Pro Bono Resource Centre

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendation by the National Pro Bono Task Force to the Commonwealth Attorney-General. The Centre exists to support and promote the provision of pro bono services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

The Centre is an independent, non-profit organisation that aims to:

- Promote pro bono work throughout the legal profession;
- Undertake research and projects to inform the provision of pro bono legal services;
- Provide practical assistance to pro bono providers (including information and other resources);
- Develop strategies to address legal need; and
- Promote pro bono law to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth and States' Attorney-General's Departments, and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, Community Legal Centres (**CLCs**), pro bono referral schemes, Legal Aid, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and produces resources of immediate benefit to the legal profession and community sector.

1. Introduction

This submission makes the following comments in relation to the following Terms of Reference of the Inquiry:

- (a) the ability of people to access legal representation;
- and to a lesser extent:
- (b) the adequacy of legal aid;
- (c) the cost of delivering justice;
- (d) the adequacy of funding and resource arrangements for community legal centres; and
- (e) the ability of Indigenous people to access justice.

It discusses the amount of pro bono work that is undertaken, outlines some of the ways in which pro bono provides individuals with access to justice, and points to some of the gaps and limitations in the provision of pro bono services.

2. Recommendations

The Centre recommends as follows:

Recommendation 1 - That the 'Yes We Can Resolutions' from the National Access to Justice and Pro Bono Conference 2008 be adopted. See **Attachment A**.

Recommendation 2 - Professional associations and existing pro bono referral schemes in each state and territory should work together to provide a "one-stop shop" for pro bono referrals (including a single phone number) where this does not already exist.

Recommendation 3 – The Commonwealth, States and Territories should take steps to ensure that interpreting services are available in *all* courts and tribunals where necessary.

Recommendation 3a – The Commonwealth, State and Territories should ensure that telephone interpreting services are available without charge where required by *all* legal practitioners acting on a pro bono basis.

Recommendation 4 - That courts should be prohibited from making personal costs orders against legal practitioners acting pro bono and that the provisions that permit this in the Migration Act be reviewed.

Recommendation 5 - The Commonwealth, States and Territories should increase funding to CLCs and ATSILS so that they have sufficient resources to better utilise the pro bono legal services that are available.

Recommendation 6 - Parity in salary and working conditions should be pursued as a priority across the whole 'legal aid sector' to facilitate a career path for lawyers working at legal aid commissions, CLCs and ATSILS.

3. The ability of people to access legal representation

3.1 Introduction

Legal aid commissions, together with Community Legal Centre's (CLCs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS) play a fundamental role in meeting the legal needs of many

people in Australia who cannot afford legal services. Where assistance cannot be provided by legal aid, a CLC or an ATSILS, pro bono assistance may be available.

3.2 Pro bono referral schemes

The Australian legal profession has responded in many ways to improve the delivery of legal services. Recent years have seen the development of pro bono referral schemes operated by legal professional associations,¹ as well as Public Interest Law Clearing Houses (**PILCHs**) in Queensland, NSW and Victoria. In addition, some courts have established pro bono referral schemes.²

The following general comments can be made about the schemes:

- the schemes receive far more applications than they are able to refer;
- between 2005 and 2008, the schemes largely recorded increases in the numbers of inquiries for assistance;
- not all schemes provide free legal assistance: assistance under some schemes may be provided on a speculative, reduced fee, no fee or negotiated fee basis;
- apart from the schemes listed below, there are many other less formal pro bono schemes which run with the cooperation and/or assistance from professional organisations and courts and tribunals.

3.3 Statistics of Schemes' Inquiries and Referrals

Year	Inquiries/ Applications	Referrals	% applications referred
ACT Pro Bono Clearing House			
2005-2006	59	26	44%
2006-2007	57	27	47%
2007-2008	59	43	72%
NSW Law Society Pro Bono Scheme			
2005-2006	523	175	33%
2006-2007	*	*	*
2007-2008	*	154	*
Public Interest Law Clearing House (NSW)			
2005-2006	253	115	45%
2006-2007	353	129	36%
2007-2008	441	144	32%
NSW Bar Association Legal Assistance Referral Scheme			
2005-2006	253	115	45%
2006-2007	236	117	50%

¹ Includes the ACT Pro Bono Clearing House (operated by the ACT Law Society), the NSW Bar Association Legal Assistance Referral Scheme, the Law Society of NSW Pro Bono Referral Scheme, the Queensland Bar Association Pro Bono Scheme, Queensland Law Society Pro Bono Scheme, Northern Territory Law Society Pro Bono Referral Scheme, Law Institute of Victoria Legal Assistance Scheme (LIVLAS), Victorian Bar Legal Assistance Scheme (VBLAS), Law Access - Public Interest Law Clearing House (operated by the Law Society of Western Australia), and the Law Society of South Australia legal advice service.

² See for example the Federal Court Legal Assistance Scheme, Federal Magistrates' Court Legal Assistance Scheme, as well as schemes run through the Administrative Appeals Tribunal, Supreme Court of NSW and the District Court of NSW

Year	Inquiries/ Applications	Referrals	% applications referred
2007-2008	215	102	47%
Queensland Public Interest Law Clearing House			
2005-2006	200	77	38%
2006-2007	204	86	42%
2007-2008	212	59	28%
Bar Association of Queensland**			
2005-2006	*	24	*
2006-2007	*	32	*
2007-2008	*	27	*
Homeless Persons Legal Clinic (Victoria)			
2005-2006	523	443	85%
2006-2007	623	509	82%
2007-2008	770	623	81%
Public Interest Law Clearing House (Vic)			
2005-2006	616	216	35%
2006-2007	570	227	40%
2007-2008	627	236	38%
Victorian Bar Legal Assistance Scheme			
2005-2006	436	215	49%
2006-2007	454	250	55%
2007-2008	528	219	41%
Law Society of Western Australia Law Access Public Interest Law Clearing House			
2005-2006	*	*	*
2006-2007	*	*	*
2007-2008	*	*	*
Northern Territory Pro Bono Clearing House (commenced in June 2008)			
2008-2009	18	15	83%

*Results not available.

** Note - statistics provided by the Bar Association of Queensland do not include pro bono referrals made pursuant to Order 80 of the Federal Court Rules or those made through the Court of Appeal in relation to "serious crime".

It is important to note that statistics on the number of applications for pro bono assistance and the number of referrals is a crude measure of pro bono activity as matters vary considerably in size and complexity. See 3.7.

3.4 Other organised pro bono schemes in Australia

(a) Federal Courts

The Federal Court of Australia and the Federal Magistrates' Court (FMC) in each state and territory administer pro bono schemes referred to as the Order 80 scheme³ and Part 12 scheme⁴ respectively. These schemes require a litigant to be before the court in order to request pro bono assistance. The schemes enable a Judge or Magistrate to refer a self-represented litigant to a legal practitioner (usually a barrister) on the Court's Pro Bono Panel, which is maintained by Registrars of the Court. In the Federal Magistrates' Court, Magistrates also refer matters to external pro bono schemes and duty lawyer services. Referrals for pro bono assistance are generally confined to general federal law matters.

A recent report on the pro bono referrals made under the Order 80 scheme indicates that the scheme is not applied consistently across states.⁵ In less populous states, the ability of the profession to respond to the Order 80 Scheme is limited.⁶

A total of 1208 referrals have been made under the Order 80 Scheme since its commencement in 1998.⁷ Of these, 76% have been in migration matters; and 48% of all referrals have been made in Western Australia. With recent limitation on judicial review on accessibility of judicial review applications, the number of referrals in migration matters has significantly decreased. Order 80 referrals in migration matters fell from 113 in 2002 to 74 in 2003 to 1 in 2008.

Statistics on the number of referrals made through the Part 12 Scheme have been more difficult to obtain. A recent report generated by the Federal Magistrates Court in Melbourne indicates that 124 referrals have been made through the Part 12 Scheme since 2002 however this is likely to be less than the actual number of referrals made because the Principal Registrar is not notified in all instances when referrals are made. The Centre has not been able to obtain data on the referrals made through the scheme in other states.

(b) State Courts

Noting that the rise in self-represented litigants is clearly impacting on the administration of justice and their operations, courts and tribunals are individually and collectively considering strategies to secure legal representation for those otherwise unable to get assistance. In Victoria, the Court of Appeal has employed a self-represented litigants' coordinator to act as a contact point, explain procedures and help manage the expectations of self-represented litigants before the court. In New South Wales, Judges in the Supreme Court, District Court and Local Court can refer litigants to a lawyer on each Court's Pro Bono Panel through various legal assistance schemes. In Queensland, QPILCH has developed a Self-Representation Civil Law Service to assist eligible litigants in person with the conduct of their case in the civil trial jurisdictions of the Supreme and District Courts.

3.5 Duty solicitor schemes

Previous inquiries have found that duty lawyer schemes coordinated by courts, legal aid bodies, professional associations and groups of local lawyers are of enormous assistance to self-represented litigants and help to alleviate problems with inadequate pleadings and the preparation of evidence.⁸

³ Established under Order 80 of the Federal Court Rules.

⁴ Established under Part 12 of the Federal Magistrates' Court Rules.

⁵ For example, 17% of referrals have been made in NSW, 28% in Victoria, 3% in Queensland and 48% in Western Australia (source: data provided to the Centre by the Federal Court of Australia).

⁶ Note the exception of WA where almost half of all referrals have been made. Note SA accounts for 3%, with TAS and NT both less than 1%.

⁷ Based on figures to 30 June 2008. The Order 80 Scheme commenced in Victoria in 1998 and in 1999 in other states.

⁸ Senate Legal and Constitutional References Committee, *Report on legal aid and access to justice*, June 2004, 10.74, (**Fourth Report**) see

http://www.apf.gov.au/SENATE/COMMITTEE/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf

Duty lawyers typically provide initial one-off advice; identify cases which may be eligible for legal aid, preliminary consideration of means and merits and whether to refer the matter to another lawyer, but rarely have the resources to represent these individuals in court. Due to limited resources, duty solicitor schemes cannot assist all self-represented litigants and assistance is often restricted to those individuals that are, for example, likely to be imprisoned if convicted. In regional, rural and remote areas where duty solicitor schemes are extremely difficult to resource, individuals may not be able to obtain preliminary advice or representation at all. In courts where no funding is available, duty solicitors or barristers may be provided through a pro bono roster.

Where there is a real identified need for duty lawyer schemes (an indicator for which would be a large number of unrepresented litigants) the need should be met by publicly funding regular schemes rather than relying on the goodwill, availability and capacity of the private profession to provide the service pro bono. Publicly funded duty lawyer services can promote effective use of finite pro bono resources in that structured referrals can be made to pro bono practitioners where cases are outside legal aid guidelines and where representation is required.

The Centre notes the dilemma faced by Legal Aid Commissions in deciding whether to allocate these funds to providing or funding duty solicitor services or to meeting other needs (e.g. making full grants of aid to eligible applicants), if there are insufficient funds to meet all needs. This dilemma points to the need for legal aid funding to be increased to meet all of these needs and the full cost incurred by commissions in providing these services.

3.6 Pro bono legal services provided other than through an organised scheme

A significant amount of pro bono legal work is undertaken other than through an organised scheme. The Centre's recent *Report on the pro bono work of Australian solicitors* found that while 43% of clients were referred by either a CLC or a PILCH, 39% of pro bono work originates from direct requests from clients. One figure that may help put referral schemes into context is that in 2004-2005 financial year, the total number of referrals from all the professional associations and PILCH referral schemes was just over 1000. During the same period, five firms with structured pro bono programs handled over 2100 matters.⁹ The Centre recognises that the importance of quantitative output can be easily overstated and that it is often the quality of service delivery, and the unquantifiable saved and avoided costs of providing assistance in both casework and other kinds of assistance that is significant. However these figures illustrate the point that there are many referral pathways to pro bono. Some of the 2100 matters handled by the five firms may have originated through pro bono schemes but many will have come directly via the outreach effort of a firm's pro bono coordinator or directly from a community legal centre or other community organisation.

3.7 Amount of pro bono undertaken

The Centre recently conducted three surveys on the pro bono work by the legal profession. These surveys culminated in reports on the pro bono legal work of individual solicitors (**Solicitors Report**),¹⁰ barristers (**Barristers Report**)¹¹ and 25 large Australian law firms (**Law Firm Report**).

According to the Solicitors Report, about \$250 million of pro bono legal work was undertaken by Australian solicitors in 2007 and the figure continues to rise.¹² On average, this amounts to every

⁹ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, (2007) p120 (hereinafter referred to as Mapping)

¹⁰ National Pro Bono Resource Centre, *Report on the Pro Bono Legal Work Done by Australian Solicitors*, December 2007, available at

http://www.nationalprobono.org.au/ssl/CMS/files_cms/SolicitorSurveyReport-Final.pdf

¹¹ National Pro Bono Resource Centre, *Report on the Pro Bono Legal Work Done by individual Australian Barristers*, November 2008, available at

https://wic030u.server-secure.com/vs155205_secure/CMS/files_cms/Barristers%20report%20FINAL.pdf

¹² Note that respondents to this survey were self-selecting (with 45% of them from firms with greater than 10 partners). The figure was calculated based on a blended hourly rate of \$250 over 1,000,000 hours.

solicitor giving one week per year of their time free of charge to the community.

The Barristers Report found that on average, barristers undertook approximately 44.5 hours of pro bono legal work in the previous year, though the nominal value of this work was difficult to quantify.

According to the Law Firm Report, 25 of Australia's largest law firms undertook about \$48.5 million of pro bono legal work in the past year. These firms delivered a total of about 194,500 hours of pro bono legal work or an average of 3,740 hours a week. These figures are based on the firms' actual records.

3.8 Gaps and limitations in the provision of pro bono legal services

(a) Rising unmet legal need

Although pro bono legal services aim to bridge the gap between legal need and government funded legal services, the demand for pro bono assistance continues to exceed the ever-increasing pro bono services available. The extent of unmet needs is clearest where there are gaps in publicly funded legal services, and individuals fall outside legal aid means and/or merits tests but do not have sufficient means to pay for private legal assistance.

Anecdotal evidence from large law firms suggests that the demand for pro bono legal services has increased considerably in the past three years, with some firms reporting a 'substantial' or 'significant' increase in the number of pro bono inquiries.¹³ Many firms have reported an increase in direct requests from the general public and CLCs.

Increase in self-represented litigants

In 1998, the Senate Legal and Constitutional References Committee *Inquiry into the legal aid system: Third Report* concluded that an indicator of how well the legal aid system was [not] working was the number of litigants who appear before the courts without legal advice or representation.

The rise in the number of self-represented litigants before Australian courts and tribunals is now well documented.¹⁴ In 2004, the number of Self-Represented Litigants (SRLs) appearing in some courts exceeded 50%.¹⁵

Self-represented litigants are not a homogenous group and appear before courts and tribunals for a variety of reasons including inability to pay for legal representation, lack of availability of legal aid, or choice.¹⁶

The link between self-representation and restricted availability of legal aid funding and its effects on access to justice appears to be clear. In the 2004 Senate *Inquiry into Legal Aid and Access to Justice*, the committee noted that:

Various reports and research projects, including those by the Australian Law Reform Commission and the Family Law Council, have established a strong link between cuts to legal aid funding and the rising incidence of self-representation, particularly in the Family Court. While some individuals may choose not to have a lawyer because, for example, they perceive that they will have a tactical advantage, evidence to this Inquiry suggests that reduced legal aid funding is directly responsible for the lack of representation of many others.¹⁷

¹³ Based on a survey conducted by the Centre in April 2009.

¹⁴ Mapping, above at 9, p65

¹⁵ Speech by Justice Murray Wilcox at the Australian Institute of Judicial Administration and the Federal Court of Australia Forum on Self-Represented Litigants, Sydney, 17 September 2004: <http://www.aija.org.au/online/SRLForumReport.pdf>

¹⁶ Australian Institute of Judicial Administration and the Federal Court of Australia, *Report on the Forum on Self-Represented Litigants* (17 September 2004) see <http://www.aija.org.au/online/SRLForumReport.pdf>

¹⁷ Fourth Report, above at 8

More recently a survey of self-represented litigants in the Queensland Court of Appeal found that the primary reason for not retaining a lawyer was financial.¹⁸ 85% of respondents indicated that they applied unsuccessfully for legal aid at some stage in the litigation.¹⁹ These litigants are often unfamiliar with the substantive law or the legal system, placing them at a significant disadvantage compared with represented litigants and overburdening court resources.

(b) Pro bono coordination

The effective coordination and referral of pro bono matters is essential at state and national levels in order to improve access to pro bono representation and to make the most of a finite resource.

PILCH (Vic) provides an efficient model for the coordination of pro bono referral schemes.²⁰ The broad support from the legal profession in Victoria that PILCH (Vic) enjoys has allowed it to provide a 'one-stop-shop' for pro bono legal services in Victoria. This has significant administrative benefits by facilitating easy referral to all schemes. The number of inquiries to, and referrals from, PILCH (Vic) continue to rise from year to year. And they have developed stand alone specialist services - SRV, PILCH Connect.

From a client perspective, PILCH (Vic)'s single pathway avoids confusion and the 'referral roundabout' by enabling staff to readily direct clients to the appropriate scheme and while this model may not fit all jurisdictions, better coordination of service delivery should be an objective in each state and territory. It requires broad acceptance of better coordination models as a worthwhile goal and then active support from existing referral schemes, legal professional bodies and government. The model is beneficial to members of the public and the legal profession but also all other agencies and organisations who are seeking information or assistance about pro bono legal work.

Queensland is the only other state with a single pathway that coordinates pro bono referrals between QPILCH, the Queensland Bar Association and the Queensland Law Society.²¹ Other states, such as Western Australia, South Australia and the Northern Territory, have a single entry point as there is only one pro bono referral scheme in operation. In New South Wales, Laurie Glanfield, Director General of the Attorney-General's Department (NSW), has appointed a Pro Bono Legal Services Coordination Committee with a view to identifying ways that pro bono referrals in NSW can be improved.

Recommendation 2 - Professional associations and existing pro bono referral schemes in each state and territory should work together to provide a "one-stop shop" for pro bono referrals (including a single phone number) where this does not already exist.

(c) Rural, regional and remote

The relative lack of access to legal services for disadvantaged people in rural, regional and remote areas is well-accepted. Rural, regional and remote CLCs report on a high need for advice and representation in areas such as family law, contract and debt matters, criminal law, domestic violence, employment and discrimination, and guardianship and estate matters. To date, pro bono services are disproportionately provided in cities. Moreover, it is likely that many rural firms, like other small firms, are already providing significant levels of pro bono legal services and have limited

¹⁸ Survey conducted by the Queensland University of Technology, see Tony Woodyatt, 'Working Together: Self-Representation', paper presented at the National Access to Justice and Pro Bono Conference (November 2008) available at http://www.a2j08.com.au/papers/Woodyatt_T.pdf

¹⁹ Ibid

²⁰ QPILCH recently announced the pilot of a one-stop-shop which involves coordination between the referral schemes of the Queensland Bar Association, Queensland Law Society and QPILCH.

²¹ QPILCH was granted funding for a one-year pilot from January 2009 to coordinate a broader range of pro bono referrals between the three schemes.

capacity to provide additional pro bono assistance. It is also likely that many of these smaller practices are finding conditions harder as a result of difficulties in rural areas generally, and as a result of the so-called 'tort-reforms' and resultant restrictions on an important traditional area of practice. As mentioned above, conflicts of interest are also more likely to occur in small practices and communities. Disbursements are also likely to be higher for rural pro bono clients, especially travel and telephone costs. There is also evidence that referrals for pro bono assistance for people from rural, regional and remote areas are likely to be for matters which are more serious.

(d) Complex litigation

Many community legal centres and referral agencies including PILCHs have difficulty in arranging pro bono assistance for complex or lengthy litigation. Many lawyers, barristers and law firms are unable to commit resources to such litigation. The problem is exacerbated where a matter has progressed without legal assistance for much of its history or has a fractured history of legal assistance. Without legal assistance in the early stages of a matter pleadings are often inadequate or incomplete and evidence ill-prepared, making the task of a pro bono solicitor even more arduous. For more information, see *Funding Litigation: The Challenge*.²²

(e) Mismatch between expertise and areas of need

While ever there is a mismatch between the skills and knowledge of pro bono lawyers and the services typically required by pro bono clients, pro bono will have limited capacity to provide access to legal representation in key areas of need. Few commercial firms have expertise in community law such as social security law, consumer credit law, migration law, criminal or family law. Yet these are areas of significant unmet demand for legal assistance, particularly in regional, rural and remote areas. Concerned about professional liability issues associated with practicing in an area without the relevant expertise, it is unsurprising that law firms have been reluctant to take on such matters unless training has been made available.

Although some law firms organise training in partnership with legal aid bodies or CLCs to enable lawyers to take on matters where there is clear demand but no expertise (such as in apprehended violence order applications and victim's compensation matters), this can place undue pressure on the already stretched resources of legal aid and CLCs and may not be the most appropriate use of their resources or expertise.

4. Adequacy of legal aid

See the 'Yes we Can' Resolutions in Attachment A.

4.1 Limitations of pro bono

Pro bono work is not a panacea to the current inadequate funding of Legal Aid, ATSILS and CLCs. Despite evidence that the amount of pro bono legal work undertaken is on the rise, it is necessary to be realistic about the services that the legal profession can provide in light of their limited resources and areas of expertise. The legal profession provides excellent pro bono legal services to disadvantaged people however these services must complement rather than be a substitute for appropriately funded legal services by Government.

²² John Corker, "Funding Litigation: The Challenge" [2007] UNSWLRS 2 available at <http://www.austlii.edu.au/au/journals/UNSWLRS/2007/2.html>

Legal aid funding in Australia is, by international standards, grossly inadequate. Australia spends just \$22 per person on legal aid.²³ This figure is well below the national expenditure on legal aid in England, Wales, Scotland and the Netherlands. In England and Wales, which are regarded as having the best resourced legal aid system, £2.1 billion (\$AUD 4.9 billion) is spent on legal aid per annum. With a population of 53.8 million, this equates to an annual spend of \$91 per head on legal aid.²⁴ In Scotland and the Netherlands, the annual spend per head on legal aid is AUD\$73 and AUD\$52 respectively.²⁵ These statistics were raised at the National Access to Justice and Pro Bono Conference in November 2008 and highlight the inverse correlation between inadequate funding for legal aid and the increasing pressure on pro bono legal services.

In the mid 1990s, Commonwealth funding for Legal Aid dropped significantly as a proportion of total legal aid funding. Prior to 1996, the Commonwealth made a proportionately greater contribution to legal aid than the States and Territories. In the 2008/2009 financial year, the estimated income of legal aid commissions in Australia is in the order of \$494 million of which only \$151 million, or roughly 31%, will be received under Commonwealth grants.²⁶

Inadequate legal aid funding in Australia has long been identified as a significant barrier to access to justice.²⁷ Numerous inquiries have raised concerns about the impact of this decrease in funding with limited impact. In particular, the 2004 Senate Legal and Constitutional Affairs Committee (**Committee**) Report on its Inquiry into Legal Aid and Access to Justice (**Fourth Report**) recognised the detrimental impact that current legal aid arrangements have on ability of legal aid commissions and CLCs to meet community need for legal assistance. This was broadly attributed to the significant reduction in Commonwealth funding for legal aid in 1996 and to the introduction of restrictions on how Commonwealth funding can be allocated.²⁸

Many submissions to similar inquiries have argued that pro bono legal services should not be seen as a substitute for adequately funded legal aid.²⁹ The Castan Centre for Human Rights Law articulated the basis for this view in its submission to the Third Inquiry on Access to Justice:

Access to justice can never be dispensed in terms of right by pro bono assistance in the way that legal assistance can be guaranteed through [a legal aid commission] mandated with that obligation through legalisation, and adequately resourced by public funding.³⁰

By significantly reducing legal aid funding, the Government effectively shifted the burden of providing publicly funded legal services for disadvantaged people to community legal centres and the private legal profession. As mentioned in 3.7, the Solicitors Report found that Australian

23 Magistrate Tony Parsons, 'How big is the gap? Restoring the Australian Legal Aid System', p6, presented at the National Access to Justice and Pro bono Conference, Sydney, 13-15 November 2008, http://www.a2j08.com.au/papers/Parsons_T.pdf.

24 Ibid, p3

25 Ibid, p3 and p6

26 Hamish Gilmore, 'A new national policy for legal aid - who misses out', National Access to Justice and Pro Bono Conference (November 2008) available at http://www.a2j08.com.au/papers/Gilmore_H.pdf

27 Reports from similar Senate Inquiries in 1997 and 1998 all acknowledged the inadequacy of Commonwealth funding for legal aid.

28 Since 1997, state and territory legal aid commissions have been restricted to allocating Commonwealth funding to matters arising under Commonwealth laws. See Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Second Report*, June 1997

29 They included representatives from the Commonwealth government, community legal centres, law firms, pro bono support groups, professional associations, academic organisations and legal aid commissions. See Fourth Report, above at 8, 9.34

30 Castan Centre for Human Rights Law, Submission 76, cited in Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, June 1998, at 9.34 http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/ch09.htm

solicitors undertook about \$250m worth of pro bono work in 2007.³¹ This is 25% more than the \$151 million that will be received by legal aid commissions under Commonwealth grants in the 2008/2009 financial year.³² About \$48.5m of pro bono legal work was undertaken by 25 of Australia's largest law firms in the past year.³³ Further, the Barristers Report found that legal aid fees in some states are so 'absurdly low' that some barristers would rather work for free.³⁴

The inadequacy of legal aid funding by the Commonwealth has placed significant pressure on the community legal sector and other pro bono providers to meet the shortfall in legal aid funding. Anecdotal evidence gathered from consultations with law firms and pro bono referral schemes suggests that an increasing number of people are turning to pro bono providers for assistance, with many organisations reporting 'sharp' or 'significant' increases in requests for pro bono legal assistance in the past few years.³⁵ This is likely to increase sharply again as the effect of global economic downturn impacts on Australians and unemployment rises.

Since civil law legal aid programs were shut down or dramatically reduced in 1997, disadvantaged individuals have had to rely almost entirely on the pro bono legal work of CLCs and the private legal profession for assistance in civil law matters. NSW is one of the few states that has managed to support a limited civil law legal aid program, with programs for elder law, coronial inquiries, and other advice services. However, while demand for pro bono assistance may be acute in civil law matters because considerable restrictions apply to the availability of legal aid, pro bono services can meet only a small amount of unmet legal need in civil law matters. The Centre therefore supports the Law Council of Australia's call for the restoration of a national civil legal aid program.

5. Cost of Delivering Justice

See the 'Yes we Can' Resolutions in Attachment A.

5.1 Availability of interpreters and translators

Following a review of Australia's compliance with the *International Covenant on Civil and Political Rights*, the UN Human Rights Committee released its Concluding Observations which recommended (among other things) that the Australian Government should 'take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people... including interpreter services'.³⁶

This recommendation highlights that applicants must have the capability to understand and interact with the legal system in order to have access to justice. Where a party or witness in any proceedings does not understand or speak the language in which the proceedings are conducted, or is deaf, they may require interpreting or translating assistance. The availability of assistance of an interpreter or translator alone is not enough. Access to justice requires both the ability to access to interpreting services, and the ability to obtain free interpreting services or pay for an interpreter.

The unavailability of properly accredited interpreting services in all courts presents a significant barrier to access to justice. Due to the high cost of interpreters and translators, CLCs and their clients rarely, if ever, have the capacity to pay for interpreters and translators. The PILCHs in NSW, Victoria, Queensland and some professional associations are able to access translation and

³¹ Calculated at a blended rate of \$250 per hour over 1,000,000 hours. See Solicitors Report, above at 11

³² Hamish Gilmore, above at 27

³³ See Law Firm Report, above at 12

³⁴ Barristers Report, above at 11

³⁵ Information obtained from surveys conducted by the Centre in April 2009 (unpublished)

³⁶ Consideration of reports submitted by states parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, 95th session, Geneva, 16 March- 3 April 2009, Concluding observations of the Human Rights Committee

<http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>

interpreting services for pro bono matters, however these services are not always available to pro bono lawyers that take on a matter pro bono but require interpreting or translating services to communicate with their client. Some firms have a policy of covering the cost of disbursements up to a ceiling (e.g. \$300) but this is quickly exhausted when used for interpreting and translating services. Where a client does not have the capacity to pay for the interpreter and a law firm is unable to cover the cost of the service, the client is effectively denied access to pro bono legal representation.

Recommendation 3 – The Commonwealth, States and Territories should take steps to ensure that interpreting services are available in *all* courts and tribunals where necessary.

Recommendation 3a – The Commonwealth, State and Territories should ensure that telephone interpreting services are available without charge where required by *all* legal practitioners acting on a pro bono basis.

5.2 Disbursements

The cost of disbursements and the procedures for applying for disbursement assistance can act as a barrier for litigants trying to access the justice system and assert their rights, even where pro bono assistance is available. Disbursements may include the costs of obtaining expert reports or transcripts of proceedings, the cost of counsel and interpreters fees.

The lack of funds to pay disbursements associated with pro bono matters is a commonly cited barrier to pro bono. Although many practitioners are willing to act pro bono, they may not be willing or able to meet the costs of disbursements associated with the matter. Hence where an individual does not have the capacity to pay these disbursements and cannot obtain disbursement assistance, it is unlikely that the matter will proceed.

Although the court fee waiver scheme allows most fees to be waived where a party can demonstrate financial hardship, disbursement funding currently available, if any, differs between jurisdictions. Some states and territories have a fund that can be utilised, however the availability of funding is limited, and applications for assistance can sometimes be made only once the disbursement has been incurred and there are often significant exemptions (such as, for example, the exclusion of counsel's fees) and caps on the amount that can be recovered.³⁷ Some funds also have application fees, apply means and merits tests, and limit assistance to cases where damages are likely to be recovered.

Some funds have limitations that reduce their accessibility, such as an application fee, or a condition that an application can only be made once the disbursement has been incurred. Other limitations include caps on the amount that can be recovered, means and merits tests, and conditions that limit assistance to cases where damages are likely to be recovered. Practitioners comment that obtaining funding for reimbursement of disbursements, if available at all, is difficult and time consuming and anecdotal evidence suggests for at least two of the funds applications have been declining in recent times. Details of the way the various State and Territory based litigation and disbursement assistance schemes now operate are set out in the Australian Pro Bono Manual.³⁸

The Centre encourages professional associations to conduct a review of their existing disbursement schemes with a view to determining how the schemes can be streamlined to improve access to disbursement assistance in pro bono matters.

5.3 Cost orders in public interest litigation

The risk of an adverse costs order in can deter litigants and their representatives from pursuing

³⁷ Mapping, above at 9, p107

³⁸ National Pro Bono Resource Centre, *Australian Pro Bono Manual* (2005)
<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=11>

meritorious public interest matters and enforcing their legal rights. The deterrent is even more substantial where the matter concerns an unresolved area of law and legal representatives cannot provide a clear indication on the likely outcome of the case. As a result of these barriers, important legal issues affecting the community may not be debated and resolved.

This impediment undermines the right to a fair hearing contained in article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR). An essential component of the right to a fair hearing is that a party is able to present his or her case under conditions which do not place them at significant disadvantage compared with the other party. The costs and disbursements associated with litigation impact disproportionately on disadvantaged individuals, creating a restriction on the right to access the courts and contrary to the right to a fair hearing.

Courts have the discretion not to award costs against an unsuccessful litigant and some courts have made orders protecting public interest litigants against adverse cost orders.³⁹ Notwithstanding this, in the absence of greater guidance on when courts should make Protective Costs Orders (PCOs), the law relating to PCOs in public interest matters requires legislative clarification.

Numerous pro bono organizations are advocating for legislative reform in the area of costs in public interest and pro bono litigation. QPILCH, in a research paper titled 'Costs in public interest proceedings in Queensland' recommends that consideration of the public interest, and whether a person is being represented pro bono, be mandatory considerations when a costs order is sought.

The paper also calls for the Commonwealth government to adopt a policy 'which would lead to either amendment of the Uniform Civil Procedure Rules or development of specific legislation to implement a regime that clearly limits costs, undertakings as to damages and security or costs orders against public interest litigants'. PILCH (Vic) is also advocating the adoption of guidelines for cost orders in public interest litigation to create an environment that is more conducive to public interest work.

The risk of an adverse cost order is a particular barrier in test-case litigation. In the Tampa litigation in 2001, the Commonwealth government sought costs against the parties represented by pro bono lawyers. In its judgment, the Full Federal Court acknowledged the invaluable role that pro bono representation played in ensuring that the proceedings and the important questions to which they gave rise, were pursued and resolved with expedition and efficiency - but the risk remains.⁴⁰ Legislative amendments, such as those to the *Migration Act*, which require lawyers *before a matter is initiated*, to certify that it has reasonable prospects of success, allow the court to penalize lawyers where it finds that a matter has been initiated or run without reasonable prospects of success. This can have a chilling effect on pro bono by deterring lawyers from assisting disadvantaged people to pursue their rights.⁴¹

Recommendation 4 - That courts should be prohibited from making personal costs orders against legal practitioners acting pro bono and that the provisions that permit this in the *Migration Act* be reviewed.

6. Adequacy of funding and resource arrangements for CLCs

See the 'Yes we Can' Resolutions in Attachment A.

³⁹ For the High Court, see section 26 of the *Judiciary Act 1903* (Cth) and *Oshlack v Richmond River Council* (1998) 193 CLR 72. For the Federal Court, see section 43 of the *Federal Court Act 1976* (Cth) which provides that 'the award of costs is in the discretion of the Court or Judge'.

⁴⁰ Black CJ and French J in *Ruddock v Vadarlis* (No. 2) 115 FCR 229 at para [28] cited in *Mapping*, above at 9, p110.

⁴¹ *Mapping*, above at 9, p131

Gaps in legal service provision arising from inadequate legal aid coverage are partially filled by CLCs. As a result of staffing and financial constraints, many CLCs cannot provide representation in court or tribunal proceedings, with others limited to providing one-off advice rather than ongoing legal assistance. Funding constraints further limit the capacity of CLCs to undertake outreach work at welfare services. While the Centre commends the Rudd Government's \$10m one-off payment to CLCs in 2008, it considers that additional funding is needed. Salaries of CLC employees are so low by comparison to legal aid and the private profession that the recruitment and retention of staff has become increasingly difficult, particularly in regional, rural and remote areas. This directly impacts on the ability of CLCs to provide disadvantaged people with the legal assistance that they need as well as take full advantage of the pro bono legal services that are available.

In 2007, the Centre conducted a national survey of CLCs and their use of pro bono assistance in between March and July 2007. 70% of CLCs surveyed by the Centre said that without pro bono assistance, key services such as advice clinics, complex casework and litigation, could not be delivered at current levels. CLCs attract significant volunteer support from the private legal profession with more than 2,200 lawyers around Australia regularly providing free legal services to clients at CLCs. The report also found that CLCs are increasingly turning to law firms to meet the demand for pro bono services, resulting in increased secondments and referrals. Some firms have provided consecutive secondees to a CLC for many years. However some CLCs do not receive any pro bono assistance at all and experience real difficulties getting the kind of help they need – particularly in the smaller States and Territories and in regional, rural and remote areas.

Recommendation 5 - The Commonwealth, States and Territories should increase funding to CLCs and ATSILS so that they have sufficient resources to better utilise the pro bono legal services that are available.

7. Ability of Indigenous people to access justice

See the 'Yes we Can' Resolutions in Attachment A.

The UN Human Rights Committee's Concluding Observations on Australia's compliance with the *International Covenant on Civil and Political Rights* recently recognised that the Australian government should:

[t]ake effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, **including indigenous people** and aliens. The State party should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, **including interpreter services**.⁴² (our emphasis)

Indigenous Australians are one of the most disadvantaged groups in Australia and experience higher rates of contact with the legal system than other Australians. Indigenous legal services play a critical role in helping indigenous people access the legal system. Research indicates that Indigenous Australians rely on ILOs and are relatively less likely to seek help from mainstream providers to resolve their legal issues due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers. As a result, Indigenous Australians are less likely to obtain legal assistance in areas that are not provided by ILOs, such as civil law, despite being particularly vulnerable to credit and debt and employment problems.

Pro bono services to Indigenous Australians in regional or remote areas are likely to be limited by the fact that small legal practices in rural areas may have limited capacity to assist. Larger firms are

⁴² Consideration of reports submitted by states parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, 95th session, Geneva, 16 March- 3 April 2009, Concluding observations of the Human Rights Committee <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>

generally located in metropolitan areas and, without training, are unlikely to have the expertise in areas of legal need nor the cultural sensitivity necessary for the effective delivery of legal services.

One of the biggest issues facing ILOs nationally relates to the salaries of solicitors. As result of inadequate funding, salaries offered to solicitors at ILOs are so far below those offered by legal aid and the private profession that it is very difficult for them to recruit and retain experienced staff, particularly in regional, rural and remote areas. In its submission on Legal Aid and Access to Justice Funding for the 2009-2010 Federal Budget, the Law Council of Australia demonstrated the point by contrasting the salary of a Level 1 and Level 2 Solicitor at the Aboriginal Legal Rights Movement (\$41,000 - \$47,000) with that paid to an equivalent lawyer at Legal Aid (\$50,000 - \$65,000).⁴³ Further, the disparity between the salaries of lawyers at ATSILS and Legal Aid Commissions increases with experience.

See also **Recommendation 5** above.

Recommendation 6 - Parity in salary and working conditions should be pursued as a priority across the whole 'legal aid sector' to facilitate a career path for lawyers working at legal aid commissions, CLCs and ATSILS.

National Pro Bono Resource Centre
30 April 2009

⁴³ Law Council of Australia, Submission on Legal Aid and Access to Justice Funding for the 2009-2010 Federal Budget, 9 January 2009, see http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=212CC6C1-1E4F-17FA-D2A6-BB3D7124DA2F&siteName=lca