

# ***Pro Bono Practices and Opportunities in Australia***

***Excerpt from: A Survey of Pro Bono Practices and  
Opportunities in Selected Jurisdictions***

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Prepared by **Latham & Watkins LLP** for the **Pro Bono Institute**

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*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* clearinghouses 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* activity. 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.

## **I. *Legal Services and the Legal Profession in Australia***

The Australian legal profession is comprised of two types of lawyers: solicitors and barristers. Solicitors are regulated and represented by the Law Society<sup>2</sup> of the state in which they practice, while the practice of barristers is governed by the Bar Council.<sup>3</sup> One of the primary differences between solicitors and barristers is the public's access to them. Whereas solicitors have direct contact with the public, barristers are generally instructed through solicitors.

Australia has a federal system of government, comprising federal, state and territory jurisdictions.<sup>4</sup> The Australian (Commonwealth) and State and Territory governments are each responsible for the provision of legal aid for matters arising under their laws.<sup>5</sup>

### **A. 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 Aid Commission Act 1977 ("LAC Act") which established cooperative arrangements between the Australian 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>6</sup>

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<sup>1</sup> The New South Wales Law Society Community Referral Service Pro Bono Scheme. Information about the Pro Bono Scheme is available at: [www.lawsociety.com.au/community/findingalawyer/probono](http://www.lawsociety.com.au/community/findingalawyer/probono).

<sup>2</sup> For example, the Law Institute of Victoria (<http://www.liv.asn.au/>).

<sup>3</sup> For example, the New South Wales Bar Association (<http://www.nswbar.asn.au/>).

<sup>4</sup> *The Australian System of Government*, House of Representatives Info Sheet, No. 20 March 2008.

<sup>5</sup> *Information and Resources*, National Pro Bono Resource Center Pro Bono Manual, Chapter 4.3.

<sup>6</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].

Legal aid for both Commonwealth and State matters is primarily delivered through State and Territory legal aid commissions (“LACs”), which are independent statutory agencies established under State and Territory legislation. The Australian Government funds the provision of legal aid for Commonwealth family, civil and criminal law matters under agreements with State and Territory governments and LACs. The majority of Commonwealth matters fall within the family law jurisdiction.<sup>7</sup>

Each state and territory in Australia has a LAC. As the laws, legal practices, guidelines and funding of LACs differ across jurisdictions, so do too 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>8</sup>

As a general matter, this 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>9</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. Finally, in some jurisdictions, legislation related to legal aid includes cost indemnity provisions with regard to persons who receive legal aid.<sup>10</sup> For example, the New South Wales Legal Aid Commission Act of 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 carve outs and exceptions to the general rule.<sup>11</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.

## B. Community Legal Centers

Community legal centers (“CLCs”) are independent, non-profit organizations that provide free referral, advice and assistance to approximately 400,000 people each year.<sup>12</sup> There are around 200 centers in Australia. They range from centers 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.

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<sup>7</sup> National Legal Aid, *A New National Policy for Legal Aid in Australia*, 2007, pg 2.

<sup>8</sup> Commissions can be contacted through the National Legal Aid, GPO Box 9898, Hobart, Tasmania, 7001.

<sup>9</sup> Details of merit testing can be found at *Information and Resources*, National Pro Bono Resource Center Pro Bono Manual, Chapter 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>10</sup> *Information and Resources*, National Pro Bono Resource Center Pro Bono Manual, Chapter 4.3.

<sup>11</sup> Legal Aid Commission Act 1979 (NSW), s 47, available at: <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/98153001149550409656.pdf>.

<sup>12</sup> *Information and Resources*, National Pro Bono Resource Center Pro Bono Manual, Chapter 4.4.

## II. *Pro Bono Opportunities in Australia*

Solicitors in Australia have a long tradition of providing *pro bono* legal services; however, certain initiatives by the government and NGOs in recent years have led to greater access to and awareness of *pro bono* services.

In 2001, the National Pro Bono Task Force made a recommendation to the Commonwealth Attorney-General that a National Pro Bono Resource Center be established. The Center opened in August 2002 and is an independent, non-profit organization funded by the Commonwealth Attorney-General's Department, the State and Territory Attorney-Generals and the Faculty of Law at the University of New South Wales.<sup>13</sup> The Center aims to encourage *pro bono* legal services and support lawyers and law firms to make it easier for them to provide *pro bono* legal services.<sup>14</sup> 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 Center is not able to refer individuals to lawyers for help with a legal problem. Rather, the Center 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* clearinghouses and referral agencies which exist in many Australian states.

In April 2007, the Center 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>15</sup> Over 5,700 lawyers across Australia have signed up to the Target, and a 2009 performance report indicated that lawyers who had signed up to the Target performed an average of 41.9 hours of *pro bono* work in the financial year from July 1, 2008 through June 30, 2009.<sup>16</sup>

### A. PILCH

Independent Public Interest Law Clearing Houses ("PILCHs") have been established by collaborations among groups including independent organizations, legal non-profits, private law firms, university law schools, community legal centers and individual attorneys. At present, PILCHs operate in New South Wales (founded in 1992), Queensland (founded in 2001), Victoria (founded in 1994), South Australia (founded in 2009), and West Australia (founded in 1992). PILCHs' operations are substantially funded by fees from member legal practices. PILCHs refer "public interest"<sup>17</sup> matters to member law firms and other members (for example, barristers and

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<sup>13</sup> [www.nationalprobono.org.au/about/index.html](http://www.nationalprobono.org.au/about/index.html).

<sup>14</sup> "Submission to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice," National Pro Bono Resource Center, October 2003, *available at*: [www.nationalprobono.org.au/ssl/CMS/files/cms/senateinquiry.pdf](http://www.nationalprobono.org.au/ssl/CMS/files/cms/senateinquiry.pdf)

<sup>15</sup> See [www.nationalprobono.org.au/target](http://www.nationalprobono.org.au/target).

<sup>16</sup> "Lawyers Aspiring to do More," National Pro Bono Resource Center, Media Release, 1 October 2009. In addition to the *pro bono* organizations described herein, various additional organizations offering *pro bono* services in different areas or on a smaller scale are described on the Center's website at [www.nationalprobono.org.au/about/index.html](http://www.nationalprobono.org.au/about/index.html).

<sup>17</sup> The meaning of "public interest" varies among PILCHs. For example, QPILCH (Queensland) 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

some corporations' legal departments) for services to be provided on a *pro bono* basis. PILCHs receive and assess requests for assistance and then contact member firms to see if they will accept a referral.<sup>18</sup>

## B. Australian High Court

The Australian High Court, established by the Constitution of Australia, is the supreme court in the nation's court hierarchy and the final court of appeal. One of its major functions is interpreting the Constitution of Australia.<sup>19</sup>

Nowadays, even the High Court 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.

## C. Pro Bono Bar Council Programs

Several bar associations have recognized and sought to address the need for a system to meet the growing demand for legal assistance from the courts, community organizations and the general public. For example, the Victorian Bar established the Victorian Bar Pro Bono Scheme ("VBPBS")<sup>20</sup> in 1995.<sup>21</sup> The Scheme is run in the state of Victoria on a voluntary basis and is funded by the Victorian Bar with support from the Legal Practice Board. VBPBS is administered by PILCH and is staffed by full-time employees and volunteers.<sup>22</sup>

VBPBS provides a referral for *pro bono* advice and representation in cases which call for the retainer of a barrister. Matters referred to barristers cover diverse areas of law including family, crime, migration, contract, trusts, tort, personal injury, transport accidents, employment, debt recovery, tenancy and discrimination.

Any member of the Victorian Bar who has expressed a willingness to provide assistance on a *pro bono* basis and whose practice covers a wide range of areas of law may become a member of VBPBS. In 2008-09, over 630 barristers volunteered to participate the scheme, more

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disadvantaged or marginalized groups" ([http://www.qpilch.org.au/01\\_cms/details.asp?ID=64#228](http://www.qpilch.org.au/01_cms/details.asp?ID=64#228)). PILCH New South Wales interprets "public interest" to include "issues that particularly impact on disadvantaged, vulnerable and marginalized groups or raise matters of broad public concern" (<http://www.pilchnsw.org.au/assistance.html>).

<sup>18</sup> For more details, see [www.pilchnsw.org.au](http://www.pilchnsw.org.au), [www.qpilch.org.au](http://www.qpilch.org.au), [www.pilch.org.au](http://www.pilch.org.au), [www.justicenet.org.au](http://www.justicenet.org.au) and [www.lawsocietywa.asn.au](http://www.lawsocietywa.asn.au).

<sup>19</sup> *The Australian System of Government*, House of Representatives Info Sheet, No. 20 March 2008.

<sup>20</sup> Formerly known as the Victorian Bar Legal Assistance Scheme.

<sup>21</sup> Other prominent bar association-run pro bono schemes include: ACT Pro Bono ClearingHouse (Australian Capital Territory); NSW Bar Association Legal Assistance Referral Scheme (New South Wales); Law Society NY Pro Bono ClearingHouse (Northern Territory); JusticeNet SA (South Australia); Law Society of Tasmania's Pro Bono ClearingHouse (Tasmania); and Law Access Pro Bono Referral Scheme (WA) (Western Australia). Links to the homepages of and additional information regarding each of these organizations are available at: <http://www.nationalprobono.org.au/page.asp?from=7&id=129>.

<sup>22</sup> [www.vicbar.com.au/b.7.asp](http://www.vicbar.com.au/b.7.asp); see also *Pro Bono Referral Schemes in Australia*, National Pro Bono Resource Center, May 2006, pg 40; <http://prod.pilch.roadhouse.com.au/VBPBS>.

than 35% of the state's practicing barristers. Many other barristers, although not formally registered as members, have welcomed requests to assist when approached.<sup>23</sup>

Members of the community in need of legal assistance can telephone the VBPBS office who will then send out an application form. Completed forms and necessary documentation must then be provided by applicants for assessment by VBPBS administrators; however, the application process may be circumvented when the request for assistance is urgent.

In order to be eligible for assistance from VBPBS, applicants must have first sought legal assistance from Victoria Legal Aid<sup>24</sup> and cannot otherwise be eligible for assistance from CLCs or "no-win-no-fee" firms.<sup>25</sup> VBPBS does not consider itself a substitute for legal aid. In addition, an applicant must be a resident of Victoria and the case must have legal merit and require the assistance of a barrister. The applicant must then pass a means test showing that he or she does not have the financial ability to obtain legal assistance from any other source.

#### D. International Pro Bono Advisory Group and Disbursement Assistance Fund

In July 2009, the Attorney-General of Australia established the International Pro Bono Advisory Group to better coordinate and develop international *pro bono* work and strengthen the partnership between government, the legal community and the non-government sector in order to facilitate projects that address international law and justice needs.<sup>26</sup> The Attorney-General also established the International Pro Bono Disbursement Fund, funded through a one-off grant of AUD\$100,000, to encourage the provision of international *pro bono* legal work by making grants to help meet the costs associated with undertaking such work. Barristers or law firms eligible for such funding may apply before 30 June 2011.<sup>27</sup>

#### E. Student Participation

Most law schools across Australia encourage students to volunteer their time to CLCs, Legal Aid schemes or local clearinghouses or referral schemes. However, in contrast to law faculties in many other parts of the world, legal aid work and clinics are generally not part of the law school curriculum in Australia.

### III. *Conclusion*

*Pro bono* opportunities and access have significantly increased since the establishment of the first *pro bono* clearinghouse 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

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<sup>23</sup> "PILCH – Annual Report 2008-09." Pg. 7. [www.pilch.org.au/Assets/Files/PILCHAnnualReport08-09.pdf](http://www.pilch.org.au/Assets/Files/PILCHAnnualReport08-09.pdf).

<sup>24</sup> [www.vicbar.com.au/b.7.1.asp](http://www.vicbar.com.au/b.7.1.asp). Victoria Legal Aid is a statutorily mandated and government funded organization that provides information, referrals, advice and legal representation in matters of family, civil and criminal law in the state.

<sup>25</sup> *Pro Bono Referral Schemes in Australia: A History of Professional Association & Law Firm Schemes*, National Pro Bono Resource Center, May 2006, pg 42. "No-win-no-fee" firms operate on contingency-fee bases and generally do not charge legal fees unless a client's claim is successful.

<sup>26</sup> Information about the group is available at: [www.ag.gov.au/www/agd/agd.nsf/Page/International\\_Pro\\_Bono\\_Advisory\\_Group](http://www.ag.gov.au/www/agd/agd.nsf/Page/International_Pro_Bono_Advisory_Group).

<sup>27</sup> More information, guidelines for applicants and applications are available at: [www.nationalprobono.org.au/page.asp?from=8&id=279](http://www.nationalprobono.org.au/page.asp?from=8&id=279).

associations and various NGOs. However, many areas remain to be developed, particularly with respect to the inclusion of legal aid and clinical courses within Australian law school curriculums.