

Federation of Community Legal Centres (Vic) GROWING PRO BONO POSITION PAPER

Ratified at the General Meeting on 27 March 2002

CLC STRATEGY FOR GROWING PRO BONO EFFECTIVELY

Develop a Policy

Community Legal Centres currently don't have a policy position on "growing pro bono" which is the main reason for the development of this paper. Given Community Legal Centres are major users, supporters and innovators in the "growing and maintaining" of pro bono work it has come as something of a surprise to find that Governments have decided to take a major role in this area. There is clearly a need for Community Legal Centres to look at what opportunities these initiatives present as well as what threats.

The development and adoption of a policy position would enable the Federation to lobby more effectively on pro bono issues.

Muster Support

The State Attorney General is keen to be proactive in the area of pro bono and will only amend the model if he is convinced there are clear reasons and significant support for changes. Unless concern is raised from a number of stakeholders there is a real risk that we will not influence the model being proposed. The Federation needs to meet with, discuss and develop alliances with these key players:

- Law Institute of Victoria
- The Victorian Bar
- Victoria Law Foundation
- Victoria Legal Aid
- Law firms involved in existing pro bono projects
- PILCH
- Victorian Council of Social Services
- Anglicare
- National Association of Community Legal Centres
- Law Council of Australia

Lobby Attorney Generals

The Federation also needs to put its position strongly to the State Attorney General, Department of Justice and the Commonwealth Attorney General. Our concerns need to be put clearly but in the context of their being a viable alternative to the present proposal. This alternative involves a principled partnership approach and will build on support from key players.

PRO BONO: THE CURRENT STATE OF PLAY

The Role of Government in Growing Pro Bono Legal Work

The Commonwealth Government and the Victorian State Government have indicated a strong interest in growing pro bono legal services. It is something of a paradox that after almost a decade of governments generally trying to reduce expenditure, encourage market solutions and contract out a number of it's functions that both levels of government should now focus on pro bono legal services as something that they want to grow and influence.

At another level there is no paradox, governments are always looking for opportunities to value add and to make changes and "improvements" which don't cost anything. The influence of globalism, smaller government and market based solutions has meant that governments have started repackaging themselves and to some extent repositioning themselves.

One of the interesting issues about government seeking to influence and grow a voluntary activity such as pro bono legal work is what role the government should play from a practical, economic and ethical perspective.

The Changing Role of the Legal Profession

At the same time as changes have occurred in the role that governments try to play there have been changes in the way that pro bono has been perceived by legal firms in recent years.

There is a long tradition of social welfare within the legal profession with most lawyers undertaking pro bono legal work in their own time on a case-by-case basis for those in need. An Australian Bureau of Statistics Report released in August 2000 showed that solicitors donated around 1.8 million hours and barristers a further 489,000 hours in pro bono work in 1998/1999.

However, the concept of pro bono has received new attention with the development of concepts such as "social entrepreneurship" and the notion of "corporates" being socially responsible. Law firms have also developed a more holistic approach to staff recruitment, development and retention with many firms believing that a commitment to pro bono attracts talented and dedicated staff and creates a sense of unity and accomplishment within the workplace. While some firms are interested in pro bono work for social justice reasons, a greater recognition of the direct benefits to firm and staff and the development of corporate responsibility are very real factors. Law firms are following the lead of corporations in other fields, such as the Body Shop, who have taken the notion of "corporate" as active citizen quite a long way.

Some law firms are now looking at pro bono as a basis for project development or relationship building rather than simply doing some free casework. Pro bono partnerships give firms the opportunity to involve non-legal as well as legal staff and therefore provide a sense of involvement and satisfaction across the firm. Partnerships also allow the firm to be involved in projects that have social as well as legal outcomes and that are more able to be translated into a corporate philosophy, culture and image. Certainly in the USA there is a trend towards law firms developing a number of pro bono partnerships as a more strategic, effective and rewarding approach as opposed to undertaking a broad range of ad hoc pro bono work.

While these trends are evident, there continues to be a great diversity in pro bono practices. This includes individual solicitors undertaking pro bono work on a case-by-case basis; small to medium firms incorporating pro bono casework as part of the firm philosophy and practice; and medium to larger firms entering strategic pro bono programs and partnerships. This diversity needs to be fostered rather than ignored by government policy.

So the notion of pro bono is no longer necessarily synonymous with old fashioned charity. Whether "new pro bono" is simply 21st century charity or whether it is something quite different is probably a contentious issue. However the fact global, regional and virtual links are expanding while nation states and government are trying to withdraw the extent to which they take responsibility for disadvantage suggests major changes are occurring.

The Changing Role of the Law

The volume of legislation in operation and the complexity of the legal system continue to grow in spite of attempts at plain English and periodic attempts to tidy up the legal system. If the law was seen as some sort of solution to social problems in the seventies by the eighties and nineties it was increasingly "law and order" which became more popular.

While the seventies and eighties saw the growth of many different groups pushing for law reform and social justice issues the nineties and noughties have been influenced by economic rationalism, deregulation and many appeals to market based solutions rather than legislated ones. Much of this change is encapsulated by use of the term globalism. The enthusiasm to introduce international policy and legal changes to facilitate "global" business and commerce has not been matched by better standards for occupational health and safety, education or environment. However new alliances have been formed, between groups in different countries and with different constituents, to advance some of these issues and to bring new energies and perspectives to growing problems.

More law firms have become transnational and the role of the law and of pro bono in a world of growing inequalities and global linkages needs to be thought out.

Relationship of Pro Bono Legal Work to Legal Aid

Legal aid can in some senses be seen to have grown from pro bono. In the fifties and sixties government funding of legal assistance was almost non-existent. The increased involvement of volunteers in the seventies in Community Legal Centres and social movements had significant impact on law reform issues and more generally led to greater emphasis on "access to justice" and legal change. One outcome of this was the development of government legal aid programs.

One of the concerns now is that governments will use pro bono to help deflect concerns that the legal aid system is under funded and that greater fragmentation of services will occur. Pro bono initiatives and programs can extend the capacity and range of legal aid related services but can also create fragmentation of effort, duplication and obscure the parlous state of the legal aid system. Pro bono may supplement legal aid but cannot substitute for it.

Relationship of Community Legal Centres to Pro Bono

There is a diversity of approaches, opinions and responses within the Community Legal Centre sector about the development of pro bono work. Examples of pro bono work ranges from partnerships with firms to establish legal projects, secondment of lawyers to Community Legal Centres, donation of resources, and recruitment of volunteers. While there has been some enthusiasm, there has also been significant concern about governments not wanting to properly fund the legal aid system. Many people have expressed mixed feelings.

There is potential for "growing pro bono" to have both positive and negative effects. If the government starts to exercise more direct control over where volunteer legal work is done and for whom, then the very notion of the work being done "voluntarily" starts to go out the window. How this will affect the attitude of the "volunteer" (conscript?) and the service getting the benefit of the "volunteer" is not clear.

Community Legal Centres have the benefit of a very large contribution of pro bono work from lawyers, community members and other service providers. There is no detailed audit of how much pro bono work is contributed to Community Legal Centres each year. However there is evidence that it was at least 60 effective full time staff three years ago. This is considerably higher than the level of volunteer support that used to exist in CLCs in South Australia a couple of years ago, which was 12 EFT. If the government starts to shape the system will this mean that Community Legal Centres will lose volunteers or lose committed volunteers?

Pro Bono Work and Political Independence

The political independence of legal aid providers is essential to the proper operation of the legal system. There have been a number of relatively recent examples of government interference in public interest matters that illustrate that this matter is of real

concern. At a Commonwealth Government level the Environment Defender Offices has been banned from spending their funding on litigation. The previous Victorian state government spent large sums of money to oppose Community Legal Centres' attempts to gain access to private prison contract details. Most recently the Commonwealth government decided to pursue applicants who used pro bono lawyers in the Tampa case for legal costs, despite the public interest nature of the case.

If the government controls a significant amount of "voluntary" pro bono work how long will it be before that work can only be devoted to a narrow "government approved" list of matters or people. The political control of pro bono in this way would be a serious erosion of our democratic system and individual's human rights.

Conflict of Interest

Firms may decline to take on a pro bono matter where they have an actual or commercial conflict of interest. The definition of commercial conflict of interest is particularly wide and may arise when a firm is unwilling to act in a pro bono matter because of concerns that past, existing or potential clients will question a law firm's alliances. PILCH has anecdotal evidence that a number of law firms have had government work reduced or stopped because they took on a pro bono matter in a particular area of law or on a particular issue. Some law firms are reluctant to take on pro bono work involving any government for this reason.

There is a need for government departments to acknowledge the value of public interest test cases and to recognise that if government contracts are directly linked to pro bono law firms are going to be even less likely to take on cases that would embarrass the government.

Building Bridges

Growing pro bono is not simply a supply problem. There is already significant commitment to pro bono within the legal profession and a significant level of unmet legal need within the community. What is required is building better connections/models which link supply and demand. Most successful pro bono projects grow out of evolving relationships that enable connections between those with needs and those with resources and information to be effectively made. This requires problems and needs being articulated in a way that is heard by providers. It may be that the most disadvantaged or most isolated (such as those in rural / outer-suburban areas) are less able to make linkages with pro bono providers. Community Legal Centres have an important role to play in articulating the demands of those in need in terms that law firms can respond to.

Mandatory Minimum Percentage Pro Bono Contribution for Government Tenders

In Victoria, the State government has set a minimum percentage pro bono contribution of between 5% and 14% of the total cost of the tender for law firms that are tendering for government contracts. While tenders closed on 12 February 2002 and will come into force on 1 July 2002, much of the detail of this new scheme is still to be worked out.

This new scheme has raised a number of concerns:

- the Victorian Government tender contracts provide that pre-existing pro bono work will not be taken into account. This has already led a number of firms to withdraw from existing pro bono programs and to withdraw from the pilot pro bono secondment scheme.
- Pro bono is very broadly defined in the tender documents. This could see a move away from more traditional concepts of pro bono work that includes public interest cases and assistance for those individuals in need to a concept that may include work done for a partner's yacht club or son's motor vehicle accident.
- Under the tender process, pro bono priorities will be set each year by the Attorney General. This paves the way for politically motivated decisions that direct pro bono work away from public interest test cases that raise important issues for the government and community. The independence of pro bono is necessary to safeguard discussion and dissent on important issues of governance and human rights.
- The setting of annual priorities and the lack of longer term strategic direction will undermine effective pro bono partnerships and promote token, short-term projects and commitments. This policy would go against the current trend in law firm pro bono work in Australia and the USA. It would also create significant uncertainty amongst pro bono partners such as legal aid providers who would be unable to develop longer term pro bono strategies.
- There has been minimal consultation with stakeholders such as Community Legal Centres and the guidelines and processes are still unclear.
- While the Victorian tender process recognizes the pro bono work done by law firms that tender for government work, generally medium to large Melbourne based firms, it fails to embrace the diverse range of pro bono work undertaken by other law firms and by individuals.
- It is unclear how an equitable distribution of work between rural / city and small / large players will be ensured.

FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) PRO BONO POLICY PRINCIPLES

1. Protect Diversity and Existing Pro Bono Arrangements

Pro bono work has grown and developed organically over many years through the efforts of the legal profession, legal aid providers and community players. This has led to a diverse range of pro bono arrangements that reflect a positive and healthy system in a politically plural society. Existing pro bono contributions need to be acknowledged and protected under government policies.

2. Political Independence

Pro bono work must be independent from political decision-making. Pro bono work contributes significantly to public interest test cases that address important issues of governance and human rights. By testing points of law and generating public discussion and dissent, pro bono work plays an important role in safeguarding our democratic processes and institutions. This pro bono work should not be subject to government interference. Lawyers should not fear a government backlash against them in tenders if they conduct public interest pro bono work against government.

3. Voluntary Essence of Pro Bono

Further pro bono work is by its nature a voluntary contribution by the legal profession. An attempt to control pro bono by the government fundamentally changes what pro bono is – it is no longer a voluntary contribution, underpinned by a commitment to community and social justice and promoted by professional ethics. Government tenders should take into account pro bono contributions of firms but should not prescribe particular contributions. Rather than adopting such a mandatory approach, pro bono should be grown by adopting indicative policies and a facilitation role.

4. Strategic and Sustainable Approach

Government needs to adopt a strategic and sustainable approach to growing pro bono. Clear and considered policies need to be developed that set best practice standards and policy principals. Policies need to provide a solid framework that is not susceptible to setting short-term priorities. The introduction of the mandatory minimum pro bono requirement in government tenders is a good example of the confusion and unintended consequences that are produced when definitions and processes are not strategically developed – the withdrawal of law firms from established pro bono partnerships and from the recently launched state pro bono pilot secondment scheme due to the new provisions in the tender process.

5. Partnership Approach

Pro bono has been developed over many years by all players. Any approach to grow pro bono requires that these players are involved: Law Institute of Victoria, The Victorian Bar, Community Legal Centres, existing pro bono schemes (including PILCH), Law Foundation of Victoria, Victoria Legal Aid, Victorian Council of Social Services. The government's role is one of facilitator: to bring together pro bono players, to develop policy and practice principals and to coordinate better outcomes. This approach recognizes that there is already a significant commitment to pro bono within the legal profession and significant need in the community, but that what is needed is better connections and linkage of pro bono supply and demand. PILCH for example is a model of linking demand and supply, as is the Youth Legal Service. Some of the policy work done by Voluntas helps articulate "good practice" and promotes a collaborative approach to growing pro bono. Collaboration between the Victorian Bar Council Pro Bono Scheme, Law Institute Legal Assistance Schemes and PILCH again highlights both a new model and a commitment to collaboration between different players.

6. Pro Bono Not a Substitute for Legal Aid

The growing of pro bono does not detract from the government's responsibility to adequately fund legal aid. Pro bono work supplements, rather than replaces, statutory legal aid services. Without the infrastructure and framework provided by Community Legal Centres and Legal Aid, pro bono work would sit in a vacuum. In particular, Community Legal Centres play a vital role in identifying need and facilitating pro bono work to be done for the most disadvantaged people in the community.

7. Equity

The growing of pro bono must address issues of equitable distribution. Those people from rural or outer-suburban areas have more trouble accessing pro bono services. Those groups that are able to articulate their needs, network with the right people and develop an effective strategy are more likely to be successful in developing pro bono partnerships. There is a need to ensure that pro bono work is not concentrated in a few areas but is more equitably distributed to those in need. Assistance to facilitate pro bono relationships to rural and regional areas needs to be directly provided and coordinated.

8. Monitoring and Evaluation

A partnership to grow pro bono must undertake some monitoring and evaluation of changes and developments in pro bono work. It is important that strategies that aim to grow pro bono work, do not simply shift that work from one focus to another, or worse, diminish pro bono contributions through poor policy and strategies. Effective monitoring and evaluation will provide a basis for future policy and strategy development.