New Zealand lawyers, pro bono, and access to justice

University of Otago Legal Issues Centre
Kayla Stewart, Bridgette Toy-Cronin and Louisa Choe
Executive Summary

This report summarises the results of a study about the provision of pro bono legal services in New Zealand. Pro bono legal services – free legal assistance provided by qualified lawyers – is often pointed to as an option for assisting more New Zealanders to access legal services. This is in recognition that a large portion of the population does not qualify for legal aid (particularly civil legal aid) and cannot afford to pay a lawyer. To increase the amount of pro bono legal services available, the New Zealand Law Society President recently suggested New Zealand lawyers should aspire to deliver 35 hours per year (the same aspirational target as Australia). Little is known about the amount of pro bono services being offered, who is receiving them, and lawyers attitudes to providing more pro bono. We, therefore, designed a study to provide more information about the pro bono landscape in New Zealand, to help inform policy discussions on this issue.

The study was conducted in two phases from September 2018 to February 2019 as part of a wider project about free and low cost services offered by lawyers. The first phase was a survey of the profession, which 360 lawyers completed. The survey included questions about how lawyers define pro bono, how much pro bono work they perform and for which clients, and whether they regard providing pro bono legal services as a professional obligation. The second phase involved qualitative interviews with 23 lawyers to elicit more detailed information about attitudes to pro bono work and how pro bono service provision operates in Aotearoa.

The results of the study suggest there is little shared understanding of what constitutes pro bono legal services. This is a significant impediment to any discussion about pro bono legal services, the amount of provision, who is providing the services, and the design of policy to encourage the provision of more pro bono services. The study also identified a blurring between legal aid services and pro bono. The underfunding of legal aid has meant that lawyers either consider legal aid is a form of pro bono or lawyers are offering pro bono to supplement legal aid. This is problematic in that pro bono legal services – which should be directed at those who do not qualify for legal aid but cannot afford a private lawyer – are being offered to litigants who qualify for legal aid.

The results also suggest that were the NZLS to implement an aspirational target of 35 hours per annum, most lawyers would fall short of this target. While 41 percent of lawyers are exceeding the target, more than a quarter are doing no pro bono work that enhances access to justice. The remaining quarter are doing some access to justice focused pro bono work, but less than the suggested aspirational target. Furthermore, pro bono services are not distributed fairly either within the profession as service providers, or across the public, as service recipients.

The study makes ten recommendations focussed on three key themes: (1) that the profession develops a shared definition of pro bono, focussed on pro bono that enhances access to justice, and that this definition be the basis for all programmes, targets and incentives for carrying out pro bono; (2) that a national clearinghouse for pro bono be introduced to minimise the administrative burden on lawyers providing pro bono and more equitably distribute pro bono services among the public; (3) that the legal profession associations encourage an increase in the amount of pro bono service via a number of mechanisms including regulatory reform and the introduction of an aspirational target.
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Introduction

Most New Zealanders will encounter a justiciable problem or legal dispute at least once during their lifetime and some will encounter many more.¹ Our vision for New Zealand is that when people face a legal problem, they will be able to access assistance with resolving that problem, should they want that help. At the moment, affordable assistance is scarce.² Private legal services are too expensive for most New Zealanders and legal aid provision is very limited. This leaves a large proportion of the New Zealand population in the “justice gap”, unable to access legal assistance for problems as they arise. It is well documented that unmet need has a raft of negative consequences, impacting “… individuals, their families, the justice system, the economy and the society”.³

Pro bono legal services – free legal assistance provided by qualified lawyers – is often pointed to as an option for closing the justice gap, or at least to assist in bridging it. We consider that pro bono is one of a suite of strategies that has the potential to increase access to justice. We note that there are other important tools including legal aid and reducing the price of privately funded legal services through various strategies.⁴ However, if pro bono is to form part of the strategy for increasing access to free and low cost legal assistance, we need to understand how pro bono is currently offered and how its distribution can be changed and/or increased to ensure more people have access to this service. This project aims to provide that understanding.

The report begins by surveying the current discussion about pro bono in New Zealand and what is already known about the pro bono landscape. We then outline the method used in the study and present results from the study including how New Zealand lawyers define pro bono, how they select pro bono cases, and their perceptions of pro bono. The report concludes with a discussion and recommendations for supporting more – and more equitable – access to pro bono services for the New Zealand public.

Pro bono services in New Zealand

Pro bono is being discussed as a means of increasing access to legal services in New Zealand. Tiana Epati, President of the New Zealand Law Society (NZLS), has said she would like to see an aspirational pro bono target of 35 hours per annum for New Zealand lawyers, as has been implemented in Australia.⁵ There have been repeated calls for a pro bono clearinghouse in New Zealand.⁶

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⁵ Craig Stephen “Finding a match: how well does pro bono work in New Zealand?” LawTalk 928 (New Zealand, 10 May 2019).
Clearinghouses operate “to match needy clients with pro bono lawyers … guided by priorities that [are] set centrally or agreed upon by stakeholders after careful discussion”. So far, neither initiative has been implemented.

In contrast, aspirational targets and other pro bono initiatives such as mandatory pro bono and clearinghouses have been commonplace in other jurisdictions for some time. For example, the aspirational pro bono target was introduced into Australia in 2007: “It reflects what many lawyers are already doing and represents the minimum number of hours of pro bono legal services that all lawyers should aspire to undertake”. Similarly, Australia has a long history of operating clearinghouses, for example the Australian Capital Territory Pro Bono Clearing House.

While there is interest in increasing the amount of pro bono available in New Zealand, two preliminary questions are useful to answer before we can begin that discussion: what do we mean when we say “pro bono” and how much of this do we already do?

**What is “pro bono”**

Any meaningful discussion about pro bono must begin with a definition of what the term means. The Australian Pro Bono Centre (APBC), for the purpose of setting aspirational targets, uses a detailed definition. Their definition focuses on three key elements which underlie the aim of providing access to justice: the work must be legal work (rather than general voluntary work); it must be free or at a substantially reduced fee; and, it must be offered to people in need. It is useful to read the APBC definition in full:

1. Giving legal assistance for free or at a substantially reduced fee to:-
   a. individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or
   b. individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or
   c. charities, other not-for-profit organisations or social enterprises, in each case where their sole or primary purpose is to work in the interests 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;

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7 Scott Cummings and Rebecca Sandefur “Beyond the Numbers: What We Know - and Should Know - About American Pro Bono” (2013) 7 Harv L & Pol'y Rev 83 at 89.

8 In 2019, Community Law did seek funding for pro bono infrastructure but was unsuccessful. Auckland Community Law Centre Pro Bono: Unlocking potential through the Litigant-in-Person challenge (Auckland, 2019) at 2.


10 The Law Society of the ACT “act pro-bono clearing house” (2020) < www.actlawsociety.asn.au>

11 Australian Pro Bono Centre, above n 9 (Bold text appears in the original).
3. Participating in the provision of **free community legal education** on issues affecting low income or disadvantaged members of the community or on issues of public interest; or

4. Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

The following is **NOT** regarded as pro bono work for the purposes of this statement:

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

The NZLS also offers a definition of pro bono for New Zealand practitioners in its practice briefing on pro bono services. The NZLS notes that for lawyers, providing pro bono can be an effective and practical way to address concerns about access to justice. NZLS define pro bono as follows:\textsuperscript{12}

[Pro bono] refers specifically to legal professional services which are provided free of charge if an individual who requires legal advice or services, either cannot afford legal services or does not qualify for legal aid. It can also capture services provided at a reduced rate – “low bono” work.

This definition, with its focus on access to justice, would seem to align with much of the APBC’s definition. It is, however, very brief and omits the clarifications and exclusions of the APBC’s definition.

Despite the NZLS using this definition in its pro bono practice briefing, in other contexts the NZLS appear to endorse a more flexible definition of pro bono. For example, in the official NZLS magazine *LawTalk*, a number of articles have been published discussing the “pro bono” contributions of the profession. One article outlined the various pro bono contributions of a large firm, including:\textsuperscript{13}

[A] pro bono programme [that] also recognises partner and staff involvement in a category of community contribution they call ‘industry thought leadership’, capturing time spent working on boards across community organisations, charities, and industry support groups, sharing their knowledge and expertise.

\textsuperscript{12} New Zealand Law Society “Practice Briefing: Guidance for Lawyers Undertaking Pro Bono work” (July 2018) <www.lawsociety.org.nz>

\textsuperscript{13} Craig Stephen “Wide range of projects for Kensington Swan pro bono team” *LawTalk* 909 (New Zealand, 4 August 2017).
In another article titled “Lawyers for good: How pro bono work contributes to society” the article discusses both pro bono and voluntary work carried out by lawyers, somewhat distinguishing them but then blurring the categories. For example, in one paragraph, the author defines pro bono and then refers to lawyers “contributing expertise” to “the Student Army following the Christchurch earthquakes, an individual setting up a scholarship with charitable status at her old school, another acting as treasurer for the local marae, a co-ordinator for a mentoring programme, and a volunteer firefighter”.

These activities do not necessarily meet the NZLS’s own definition of pro bono and they fall outside the APBC definition. Both of those definitions have two key elements: pro bono service needs to be the provision of legal services in response to unmet need. If it is free legal work performed for those who are not in need, it could be more properly considered a “favour” or “freebie”, or in some cases simply a debt that turned out to be uncollectable. If it is free non-legal work, then it is more properly called “volunteer work”, or if run by a firm, a programme for corporate social responsibility. The moral obligation to perform volunteer work or make charitable donations, or for firms to engage in programmes that demonstrate they are responsible corporate citizens, are not specific to the legal profession. These are moral obligations that are common to the whole society.

For the term “pro bono” to be used, the service needs to be free legal work for those with unmet needs. Only this type of work responds to the most commonly claimed reasons for the obligation to perform pro bono, as summarised by Rhode. First, “the value to society of addressing unmet legal needs and the profession’s responsibility to contribute to that effort”. In New Zealand, the first fundamental obligation of a lawyer listed in the Lawyers and Conveyancers Act 2006 is “the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand”. This can be read broadly as a duty to ensure that those appearing before the courts are, where possible and where the litigant desires it, properly represented. Representation ensures litigants can access their legal rights in a complex system (fulfilling an element of the rule of law) and that the courts are smoothly administered (the court staff and judges are not required to explain the system and assist the litigants). Pro bono work is a way to ensure these obligations are met in a situation where many consumers are otherwise unable to afford legal services.

Second, “the value to lawyers, individually and collectively, of such pro bono contributions”. The value that individual lawyers derive from doing pro bono work are many and varied. They include training, experience, leadership opportunities, psychological benefits from altruistic behaviour, and development of new expertise. In addition to benefits to individual lawyers, firms who have a pro bono programme secure further benefits including using the programme to attract high quality graduate lawyers, increasing morale among existing lawyers, and attracting paying clients. For the profession as a whole, there is also a significant benefit both in terms of reputation, and in

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14 Donovan Jackson “Lawyers for good: How pro bono work contributes to society” LawTalk 914 (New Zealand, 2 February 2018).
16 Rhode, at 430.
17 Rhode, at 430.
18 Fiona Mcleay “The legal profession’s beautiful myth: surveying the justifications for the lawyer’s obligation to perform pro bono work” (2009) 15 IJLP 249, at 252.
justifying their reserved areas of work,\textsuperscript{19} despite significant market failure for reserved services in that many New Zealanders are unable to afford them. The justification offered by Justice Kirby for pro bono captures both the element of duty and reputational benefit: “The bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under the law”.\textsuperscript{20}

The NZLS’s definition, and the more specific APBC definition, are therefore useful in clarifying what activities can be considered pro bono. We call work that meets the APBC definition “access pro bono” in the balance of this report. The types of work excluded by the APBC definition, while important in other ways, do not respond to lawyers’ claims to a special status or recognise lawyers’ rights and responsibilities.

\textbf{Quantifying pro bono}

An agreed definition of what counts as pro bono work is the first step towards being able to quantify the amount of pro bono being carried out in New Zealand. Without knowing what pro bono is, we cannot begin to count it, and without counting it we cannot see what contribution it could make to closing the justice gap. If we are to use targets, we also need to be able to count and report pro bono time.\textsuperscript{21}

Existing data on how many hours of pro bono work (access pro bono or otherwise) are undertaken in New Zealand is very limited. This is not unique to New Zealand, as the “contribution of professionals to the public good has not enjoyed systematic study in the social sciences”.\textsuperscript{22} A lack of shared definition is one barrier to quantification, but so too is limited record keeping:\textsuperscript{23}

\begin{quote}
Much of the work is by private arrangement, often undocumented, on particular ‘worthy’ cases. Firms and legal professional associations often do not keep statistics on the quantity or value of the pro bono work they or their members undertake or coordinate.
\end{quote}

These limitations mean that the small amount of existing research provides limited insight. For example, the University of Waikato Institute for Business Research on Law Firm Practice Comparison 2015 surveyed 82 New Zealand firms,\textsuperscript{24} and specifically asked the participants about pro bono work (“2015 Law Firm Study”).\textsuperscript{25} Participants were asked to approximate the “Proportion of Practice Time Spent on Work of a Legal Nature Done Pro Bono”. Pro bono was never defined, so the reporting relied on the respondents’ interpretation. Furthermore, because

\begin{quote}
\textsuperscript{19} Lawyers and Conveyancers Act 2006, s 24.
\textsuperscript{20} Mcleay above n 18 at 250 quoting a 2002 speech by Justice Kirby.
\textsuperscript{22} John Western, Toni Makkai and Kristin Natalier “Profession and the Public Good” (2001) 19 LIC 21 at 30.
\textsuperscript{24} The 2015 Survey included responses from 82 firms: 24 firms with 1 equity partner; 23 firms with more than 1 and up to 3 equity partners; 25 firms with more than 3 and up to 6 equity partners; and 10 firms with more than 6 equity partners.
\textsuperscript{25} University of Waikato Institute for Business Research Law Firm Practice Comparison 2015 Report (University of Waikato, 2015).
\end{quote}
approximations without records were used, it is difficult to know how reliable the figures were. Participants were provided with an option to move directly to the next question – “if this item does not apply or is unknown”. Forty three (out of 82) of the participants selected that option. Unfortunately, the data does not allow us to tease out whether these firms do not engage in pro bono work, or the quantum of pro bono work was simply not known.

While the 2015 Law Firm Study is limited by its lack of clear definition and the number of firms that did not answer the pro bono question, it does provide some limited data. Of the 39 firms that did respond to the pro bono question, the majority (33) of firms spent less than 5 per cent of the practice’s time on pro bono legal work. Interestingly, it was only the smaller firms (sole practitioner and small firms) that dedicated over 5 per cent of the practices time to pro bono legal work.

It is also interesting to note the types of firms that did respond to the pro bono question. As firm size increased, the responses to the pro bono question decreased: 63 per cent of sole practitioners responded; 52 per cent of small firms responded; 32 per cent of medium firms responded; and 40 per cent of large firms responded. Of course, we cannot tell whether the other firms just did not have the data available, or whether they are not providing pro bono work. In any case, more information is certainly needed to understand how much larger firms are providing.

Surveying firms only provides some of the pro bono picture in New Zealand, as the “traditional pathway for providing pro bono assistance” is through community law centres (CLS) and Citizens Advice Bureaux (CABs). These organisations are independent charities operating as part of networks throughout New Zealand. All CLCs and some CABs provide legal advice, and some CLCs also provide representation. The Auckland Community Law Centre also operates a pilot scheme, providing pro bono assistance to eligible clients in the bankruptcy and employment jurisdictions. While CLCs have employees, many also operate legal advice clinics staffed by volunteer lawyers. Lawyers, including those working as in-house counsel, can join the rosters of these organisations. Lawyers contribute approximately 3,000 pro bono hours to CABs annually. Over 1,200 lawyers volunteer with CLCs, and a report for 2015-2016 found volunteer CLC

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26 The data from this survey was collected for a very specific purpose: To allow contributing law firms to benchmark their performance against other contributing law firms. Therefore, the sample size is small (it was an intensive survey that only 82 firms participate in) and we do not have all the necessary demographic details to comment on the representativeness of the sample. Nonetheless, it is one of the few studies to provide quantitative information about pro bono legal work in New Zealand, so is still helpful.

27 Small firms include practices with over 1 and up to 3 equity partners; Medium firms include practices with over 3 and up to 6 equity partners; Large firms include practices with more than 6 equity partners.

28 New Zealand Law Society, above n 12.

29 In-house lawyers would otherwise be unable to provide pro bono services because the Lawyers and Conveyancers Act 2006, s 9, states that a lawyer is guilty of misconduct who, being an employee, provides regulated services to the public other than in the course of his or her employment. Sections 10(5) and 31(4) provide exceptions to s 9 for lawyers providing regulated services under the auspices of a community law centre or citizens advice bureau.

30 Craig Stephen “Citizens Advice — providing 3,000 pro bono hours a year” LawTalk 920 (New Zealand, 3 August 2018).

31 Community Law “Our Lawyers” <https://communitylaw.org.nz>
lawyers contributed 13,516 hours of legal advice. Nearly 12,000 of this was “case work” and the remainder was information and education services.  

**Structure of the profession**

It is worth pausing to note that while this report is about lawyers and pro bono services, discussing lawyers as if they are a homogenous group hides the many divisions that lie within the profession. These divisions are along a number of lines including practice area, scale of practice, type of practice, and income from practice. While the image of lawyers in popular culture is of lawyers working in a firm, almost a quarter of New Zealand lawyers work as in-house counsel (providing advice to a business or entity as an employee of that entity). Even for lawyers working in firms, some will work in the sort of offices featured in television dramas (plush carpet, lots of support staff and junior lawyers), while others might work in much smaller firms in the suburbs or regional centres. Popular culture also often presents lawyers are luxury car driving, high wealth individuals, and while that is certainly true of some lawyers, there are also lawyers earning much more modest incomes. Some lawyers’ client base is primarily made up of large corporations and others work almost exclusively for low-income people in distress. These differences within lawyers’ work can create divisions within the profession about who should carry the burden of carrying out pro bono services and whether all lawyers have an obligation to do so. A comment by criminal barrister Len Andersen (now a QC) illustrates this division:

I’d be pretty disturbed if there was an expectation that criminal lawyers did pro bono. It is good marketing for the large law firms to do it and good on them for picking that up, but it’s not the same sacrifice as it would be for criminal lawyers. It suits those firms to do pro bono work because it is something they can trumpet about what good corporate citizens they are and they have the resources to do it.

These differences in the profession must be kept in mind when considering pro bono policy. However, we also need to answer some basic questions about pro bono services in New Zealand generally: how do lawyers define pro bono? How much do they do? For who? Do they see it as an obligation? We, therefore, designed a study to provide more information about the pro bono landscape in New Zealand, to help inform policy discussions on this issue.

**Method**

This study was conducted in two phases using a sequential-explanatory mixed methods design. Data were collected from September 2018 to February 2019 as part of a wider project titled ‘Lawyers and Access to Justice’. In the quantitative phase, New Zealand lawyers with a current practicing certificate were invited to participate in a short online survey. The invitation to participate was circulated among members through the (weekly issued) New Zealand Law Society newsletter. A total of 360 participants completed the survey to a degree suitable for analysis. The

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33 University of Otago Legal Issues Centre *Accessing Legal Services: The Price of Litigation Services* (September 2019) [https://ourarchive.otago.ac.nz/handle/10523/9524](https://ourarchive.otago.ac.nz/handle/10523/9524)

34 Stephen, above n 5.
demographic characteristics of the participants including the participant’s legal role, size of organisation, main areas of practice, their years post qualification experience (PQE), and geographical location were collected and are presented Table 3 (see Appendix). Participants were asked a variety of questions, including questions about what activities they perceived to constitute pro bono work, the number of hours spent on pro bono activities, barriers to providing pro bono services, and workplace support for providing such services.

Participants who completed the survey were invited to register their interest in a follow-up interview, for the qualitative phase. One hundred and twenty five lawyers were willing to be contacted about the possibility of a follow-up interview. A total of 23 in-depth telephone interviews were completed. The demographic characteristics of the interview participants are presented in Table 4 (see Appendix). Interviews were semi-structured and covered similar topics to the survey but were more conversational in nature to allow participants to elaborate on their responses. Half of the participants who participated in the telephone interviews were registered legal aid providers, while the remaining half were not. Participants practiced across a wide range of practice areas and were geographically dispersed.

Results

Pro bono defined and delivered

Participants were asked which of a list of free services they delivered (the list included both access pro bono and other types of free work excluded by the APBC definition of pro bono). Participants were also asked whether they considered each of the listed services to be “pro bono”. Of the 360 participants, 86.4 per cent (n=311) reported delivering at least one type of free service in the preceding year. Table 1 shows the results, listing the number of participants who delivered each type of free work and whether they considered it constituted “pro bono”.

1. Pro bono defined

Majority of participants considered categories 1-7 in Table 1 as pro bono work. The category most commonly considered “pro bono” work was ‘Giving legal assistance to individuals who cannot afford to access the legal system’, with 87.2 per cent of the participants agreeing on this (n=314), followed by ‘Giving legal assistance to charities or other non-profit organisations which work on behalf of disadvantaged members of the community’ (82.5 per cent, n=297), and ‘Giving assistance at advice clinics’ (80.8 per cent, n=291). The majority of participants did not think ‘Providing community legal education’ constituted pro bono work. This contrasts with APBC’s definition which does include this type of work. Less than half of all respondents (42.2 per cent; n = 152) thought that ‘Conducting law reform and policy work’ was pro bono work, work which is also pro bono in the APBC definition.

Nearly one in five participants (18.3 per cent; n = 66) responded that ‘Giving legal assistance provided under a grant of Legal Aid’ was pro bono work. This is despite this work being remunerated in accordance with legal aid scales. Legally aided work is also explicitly excluded from the APBC definition of pro bono.
Table 1. Pro bono defined and performed by participants

<table>
<thead>
<tr>
<th>Type of work (performed for free)</th>
<th>Participants who delivered this type of work in the preceding year % (n)</th>
<th>Participants who interpreted this as pro bono work % (n)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Giving legal assistance to individuals who cannot afford to access the legal system.</td>
<td>61.9 (223)</td>
<td>87.2 (314)</td>
</tr>
<tr>
<td>2. Appearing as an advocate in any Court, Tribunal or similar (not under a grant of Legal Aid).</td>
<td>27.5 (99)</td>
<td>66.4 (239)</td>
</tr>
<tr>
<td>3. Giving assistance at advice clinics (e.g. Community Law Centres, Citizen’s Advice Bureau or similar).</td>
<td>39.2 (141)</td>
<td>80.8 (291)</td>
</tr>
<tr>
<td>4. Giving legal assistance relating to issues of public interest</td>
<td>24.2 (87)</td>
<td>69.7 (251)</td>
</tr>
<tr>
<td>5. Giving legal assistance to charities or other non-profit organisations which work on behalf of disadvantaged members of the community.</td>
<td>36.9 (133)</td>
<td>82.5 (297)</td>
</tr>
<tr>
<td>6. Giving legal assistance to other types of charities or non-profit organisations (e.g. environmental, community or cultural entities).</td>
<td>37.8 (136)</td>
<td>79.2 (285)</td>
</tr>
<tr>
<td>7. Providing community legal education.</td>
<td>22.5 (81)</td>
<td>63.9 (230)</td>
</tr>
<tr>
<td>8. Conducting law reform and policy work.</td>
<td>16.9 (61)</td>
<td>42.2 (152)</td>
</tr>
<tr>
<td>9. Giving legal assistance provided under a grant of Legal Aid.</td>
<td>33.3 (120)</td>
<td>18.3 (66)</td>
</tr>
<tr>
<td>10. Workplace sponsorship of events and/or organisations (e.g. community, cultural and sporting).</td>
<td>30.8 (111)</td>
<td>21.4 (77)</td>
</tr>
<tr>
<td>11. Sitting on the board of a community organisation (including a school or charity).</td>
<td>32.2 (116)</td>
<td>41.9 (151)</td>
</tr>
<tr>
<td>12. Volunteering for a non-legal charity or community organisation.</td>
<td>36.1 (130)</td>
<td>38.6 (139)</td>
</tr>
</tbody>
</table>

A significant number of participants said non-legal voluntary work and sponsorship was “pro bono”. This included saying that pro bono included ‘Workplace sponsorship of events and/or organisations’ (21.4 per cent, n=77), ‘Sitting on the board of a community organisation’ (41.9 per cent, n=151), and ‘Volunteering for a non-legal charity or community organisation’ (38.6 per cent, n=139). These types of work are specifically excluded from the APBC definition of pro bono. In the interviews, participants cited examples of carrying out “pro bono” work that fell into this category:

I was on a school Board of Trustees for about six years [and] I was on [board of a national organisation] so there’s quite a lot of work where you inevitably end up providing effectively pro bono legal services.

I had a [music group, which was not for the public good or primarily for disadvantaged people] recently and I showed them how to form an incorporated society to protect themselves with limited liability.
This suggests around a quarter of the New Zealand legal profession have an expansive definition of pro bono work that includes work that does not facilitate access to justice and/or work that is not legal work.

In contrast, some participants had quite restrictive definitions of pro bono. A participant who provided assistance to prisoners said that all the volunteers were lawyers and that they were using “legal kind of skill to help them” but “it’s just more of a general help” and it’s “not pro bono legal work because … they’re not our clients and we don’t represent them”. A few participants even disclaimed work as “not pro bono” even though it clearly fell within the APBC and NZLS definitions of pro bono. One participant said “I wouldn’t consider community law centre work as pro bono work”. Another participant offered free legal advice to someone who could not afford the service and was paid with a home cooked meal, but specifically stated that “I don’t do pro bono”. This participant rejected the term pro bono because he thought that “the people who talk about doing pro bono work are the big firms … they do it to make themselves feel better and crow about it … but at the same time, they’re charging mega bucks”. He therefore considered it tainted and did not use it to describe work that would be pro bono under both the definitions we are discussing.

2. Amount delivered

Participants were asked if they recorded their pro bono hours and only 25 per cent reported that they did so (n=90). As with the 2015 Law Firm Study, the following results rely on approximations. A lack of consistent definition may make it difficult for lawyers to know what should and should not be recorded. Furthermore, without an aspirational (or mandatory) pro bono target, there may be little incentive for lawyers to record their hours.

With these caveats in mind, Figure 1 shows the results for the number of access pro bono hours worked in the preceding year (as calculated using categories 1-8, those forms of assistance that are included in the APBC’s definition of pro bono). As shown, majority (58.6 per cent) of participants reported completing less than 35 hours of access pro bono in the preceding year. What is clear from Figure 1 is that the distribution is very uneven across the profession with more than a quarter completing no pro bono access hours at all and 41 percent completing more than 35 hours in the preceding year.

The median hours of access pro bono hours was 20 hours in the preceding year. When all categories of work were included (access pro bono and other types of unpaid work), the median hours estimated was 27 hours.
Distribution of pro bono hours completed in the last 12 months

1. Roles of those delivering pro bono

The professional role of those who said they carried out any kind of pro bono work (self-defined) are reported in Table 2. The largest group of participants who said they carried out pro bono identified as employees in a law firm (38.3 percent, n=119). The next largest group identified as barristers in sole practice (20.0 percent, n= 72) and as partners or directors (19.0 percent, n=59).

Table 2. Roles of those delivering pro bono

<table>
<thead>
<tr>
<th>Current Role</th>
<th>All participants % (n)</th>
<th>Only participants who said they delivered pro bono services in the preceding year % (n)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee in a law firm</td>
<td>38.1 (137)</td>
<td>38.3 (119)</td>
</tr>
<tr>
<td>In-house lawyer</td>
<td>8.9 (32)</td>
<td>6.8 (21)</td>
</tr>
<tr>
<td>Partner/Director</td>
<td>17.2 (62)</td>
<td>19.0 (59)</td>
</tr>
<tr>
<td>Barrister in sole practice</td>
<td>20.0 (72)</td>
<td>21.5 (67)</td>
</tr>
<tr>
<td>Employed barrister</td>
<td>2.5 (9)</td>
<td>2.6 (8)</td>
</tr>
<tr>
<td>Sole Practitioner</td>
<td>7.2 (26)</td>
<td>7.7 (24)</td>
</tr>
<tr>
<td>Other</td>
<td>6.0 (22)</td>
<td>4.1 (13)</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 (360)</td>
<td>100.0 (311)</td>
</tr>
</tbody>
</table>

2. Connecting with pro bono clients

We asked interview participants who had carried out pro bono work how they had come into contact with the clients they worked for pro bono. Two participants said through referrals from Community Law. One participant received referrals direct from Community Law and the other...
worked for a firm that received referrals as it is known as a firm who do “a lot of free work for people”.

More commonly, clients came via personal connections. These examples are typical:

The number of times that as a lawyer, you’re asked by friends and family, “Oh, I’ve got this thing going on, I’m selling my house here or I’ve got this dispute with this person” or whatever.

It’s people who’ve come to me via other people that I know. So, you know a friend can say ‘Can you help this person out that I know?’ Or usually there’s some kind of um, personal connection with somebody else behind it … you know some would say ‘Look I know this poor bloke and he’s got this terrible situation, can you help out?’

Former clients of the firm or families who “have had ongoing connections with the firm” might also receive pro bono services. In addition to connecting with clients through these means, we also found that there was a significant amount of pro bono resource being provided to clients who were either legally aided or qualified for legal aid, as explained in the next section.

3. Relationship between pro bono services and the provision of legal aid

In interviews, participants described how they were working pro bono for clients who were also receiving legal aid. A participant explained:

Well [legal aid] is in a dreadful state, firstly because the amount you get on legal aid never matches. So even though a client is legally aided you are still doing more work than is exactly being paid. So invariably every case we do has a high element of pro bono. Free work in it.

Other participants agreed with this sentiment, describing the amount of pro bono work on legal aid cases as “large”, “substantial”, and “significant”. They explained that this was tied to the fixed fee model of legal aid and difficulties they encountered applying for amendments to legal aid grants. As one participant described:

What happens is that we get paid a fee [by legal aid] for the activities that we complete and it’s basically regardless of how long those activities may take us… Last week, for example, I had a file where…I’ve written to them [Legal Services Agency] and have said “hey look, can I have” – I think it was – “20 hours to spend at this stage, I’ve already spent seven and I’m gonna spend another 13 minimum”. And so they’ve come back to me saying “we need you to break down exactly what the time you’ve spent was on, exactly what the future time’s gonna be on”. And it took me literally, probably 40 minutes just to reply to the email and why I’d spend so much on this file.

The participant went on to talk about the emotional cost of this process:

It’s entirely defeating the purpose [of legal aid] and it’s undermining my professional judgement and insulting and really frustrating to base my life on stuff like this...they [Legal Services Agency] assume that you’re trying to fleece them and you have to prove your integrity every time and it costs time and it costs, you know, emotionally it’s draining and all of that sort of stuff but that’s my other comment.
Some participants chose to provide pro bono services, rather than legal aid services, as their means of assisting those on low incomes. They preferred to provide these services by way of pro bono (even though the clients might qualify for legal aid) on the grounds that pro bono was “easier”, with less bureaucracy, and fewer administrative demands. As one participant described:

The legal aid system drives them [lawyers] mad... And a lot of people would find, they’d rather do it pro bono than, than otherwise. It can take you know up to twenty, thirty percent of the time you spend on the case dealing with the legal aid authority. So, you know if you didn’t do that, you save twenty to thirty percent of your time already.

Other participants chose to undertake what they considered “low bono” instead of offering legal aid or pro bono services. This most often took the form of charging the client legal aid rates. This allowed them to provide what they considered a low-cost service without “having to worry about the bureaucracy of legal aid”. It did, however, mean that the client was meeting the cost of this service themselves, rather than the state.

4. Selection of cases

In addition to asking participants about how they connected with pro bono clients, we also asked about how they chose cases to take pro bono. Participants referred to cases that “pulled at their heart strings”, “David and Goliath” type cases, and instances when they wanted to “see people get a fair deal”. As one participant explained:

“Yeah, my criteria is if I feel like they’ve had a real injustice and I feel really sorry for them ... I usually take on cases where people are really stressed and have had a bad time … they can’t afford to take on a lawyer privately and don’t know what they’re going to do”.

One participant explained how while there are some situations “where everyone can see the, the sort of the, the justice of it”, in other instances:

It’s less clear and there are people who probably deserve assistance and certainly need assistance but don’t have the same sob story so they’re at a disadvantage. I mean the reality is you’re almost bidding with the unfortunateness of your circumstances as to whether a lawyer’s willing to take it on. Ah, and so you know if, if you’re in that middle zone of people who’ve been hard done by but perhaps not as hard done by as others, it can be very difficult”.

The majority of participants referred to selecting cases based on some version of altruistic criteria. Some participants also discussed commercial motivations, at least in theory, as one participant said:

It is theoretically possible that somebody would come to us with a high profile situation with it likely to get a media exposure. We might … – we don’t have a policy on this – but we might entertain the idea of working at a reduced rate on the understanding that we got some media exposure.

Notably, this participant made no reference to financial need of the client, the guiding concern (in the hypothetical) was the case being high profile.
**Perceptions of access pro bono**

In the second half of our survey, participants were given a definition of pro bono services that was limited to access pro bono, rather than participants continuing to self-define pro bono. This was to allow us to test and explore attitudes to access pro bono rather than self-defined pro bono. The definition we provided to participants was:

> Providing free legal services to low-income or otherwise disadvantaged individuals and/or to non-profit groups that serve the interests of low-income or otherwise disadvantaged individuals; and/or acting in a legal capacity in relation to public interest matters.

Using this definition, participants were asked to indicate their agreement or disagreement with a series of statements about attitudes to pro bono and workplace support for carrying out pro bono work. Figure 2 summarises their responses.

![Figure 2. Participant perceptions of pro bono support, delivery, and structure](image)

In interviews we also asked about motivations to carry out pro bono work and explored attitudes and perceptions of pro bono services.

1. **Personal desire and motivations to deliver access pro bono services**

The majority of participants (73.3 per cent; n = 263) agreed that providing access pro bono services was an important part of a lawyer’s role and 45.0 per cent (n = 162) wanted to provide more of these services. Interview participants referred to a range of motivations for providing pro bono services including compassion (either for clients’ inability to pay or for the consequences of not receiving legal assistance), giving back to the community, supporting social justice, commitment to access to justice, and helping people to “get a fair deal”. As one participant said: “we are in the
business of trying to help people”. These motivations were sometimes combined with seeing pro bono as an opportunity for intellectual or professional development. This included having the opportunity to work in a particular area of law of intellectual interest that did not form part of the lawyer’s paid practice, to “showcase[e] a skill set that I would not otherwise always get a chance to do”, or to “get in the [courtroom] door [as a barrister] … and show what you can do”.

There was a general consensus among interview participants that there was a need for pro bono services. Many participants were concerned about those on low incomes, who they realised struggled not only to pay legal fees but also in meeting their day-to-day expenses. Many participants expressed sadness or frustration with the justice gap and as one participant described it, the “colossal unmet need”. They discussed how it was financially unfeasible for some clients to continue with legal action, and their inability to pay forced them to abandon their claims. As one participant explained, “…they have a right but they don’t have a remedy”. Participants were concerned about the implications for this both for the individual but also for the system as a whole: “[this] has implications in terms of our broader democracy”.

2. Workplace recognition, support, and barriers

If a lawyer is employed, personal desire or motivation is, of course, only one factor in deciding to carry out pro bono work. We, therefore, also explored workplace support and barriers. Over half of participants (53.1 per cent; n = 191) agreed that their workplace supports them to provide these types of pro bono services. However, only one in five participants (20.8 per cent; n = 75) agreed that their workplace recognises and/or rewards those who provide such services.

In the interviews, some participants explained how their workplaces fostered a culture that encouraged them to undertake pro bono work. One participant described their firm as a “social work firm” in which lawyers were hired “for their compassion and intelligence and they go the extra mile for people.” Another participant gave examples of pro bono work they had undertaken and explained:

And [the firm] were happy for me to do that because they could see that that, you know, it was about trying to get some fairness for people who couldn’t afford it.

Some participants working in smaller firms or in sole practice suggested larger firms did not do the work for altruistic reasons but were primarily motivated by marketing opportunities: “it’s the sexy work that brings in good publicity”. A former employee of a large firm said that lawyers were “actively encouraged to pursue it as a career development opportunity” because “being cynical…you could market yourself on the basis that you offer this great pro bono service … and it offered [junior lawyers] good training”.

Other participants, however, discussed how workplace expectations limited their ability to take on pro bono work. As one participant pithily summed up, “I mean at the end of the day we’re judged primarily on fees rendered and fees recovered.” Meeting budget expectations was described as having implications for the firm itself, the participants’ standing in the firm, as well as personal financial implications: “my salary is tied to what I bring in”. Another participant remarked: “At the end of the day you’ve got to put food on your table and that means paying clients have to be
the, you know the focus of your work rather than pro bono.” Being a legal aid provider was described as adding another limitation in this regard:

I guess the key thing is my budget requirements, I have a really high budget that I struggle to make so it makes it hard for me to justify doing work for less than a full fee, particularly when I’m one of the only lawyers who’s predominantly doing legal aid work. Hence, I already have to work like three times as many hours as one of my same level experienced colleagues to make the fee so I feel they’re not – I don’t expect them to be that excited about me doing free work in those circumstances.

Results suggest it is unusual for firms to formally take pro bono work into account with nearly three-quarters (74.2 per cent; n = 267) of participants responding that their workplace did not build pro bono into staff budgets or key performance indicators.

Participants operating in smaller firms discussed the financial implications of carrying out pro bono work: “Small businesses, they just don’t have the resources to be able to absorb that sort of stuff” and another participant described how “the costs of running a law business are prohibitive factors as well, the overheads are very high.” For smaller firms, there was also the issue of fewer staff available to cover a pro bono matter. One participant explained how they struggled to take on as much pro bono work as they would like to as if they had a clash of hearing times for example, the firm would need to pay an agent to attend one which would be an out-of-pocket expense for the participant or firm. As with those working in larger firms, pro bono work in smaller firms resulted in personal financial implications: “The reality of being in commerce, you’ve got to make a buck…”.

In regard to civil litigation, participants expressed particular concerns about the unpredictability of matters and the costs in addition to legal fees. If a lawyer took on a pro bono case that ran for a long time, the lawyer might not be able to absorb that cost:

[Civil litigation is] long term … if you take on one client, then they could be with you for like two or three years plus and so that could be quite a big commitment…if something happens in their case that requires like a, say a week-long trial of something, then that’s a whole week where you don’t have your expenses paid for.

The participant explained that it could work provided “that you you’ve got a good enough practice that’s got enough income to offset costs with that”. Even if the firm could absorb the cost of not charging the client fees, participants expressed concerns that the client would still not be able to meet other expenses: “if the person can’t pay for your legal fees, then they probably can’t pay for an expert”.

3. **Attitude to mandatory pro bono**

While the majority of participants believed providing access pro bono was an important part of a lawyer’s role, the question about making pro bono mandatory was more polarising. Only 125 (34.8 per cent) participants agreed that providing access pro bono “should be a condition of maintaining a practising certificate”. In interviews, some participants expressed very strong disagreement with this:
Well I mean, I can understand, you know, [doing pro bono work for] professional development and all of that sort of thing but you wouldn’t ask a plumber to do a job for a customer for nothing, just because the customer had no money. Nobody else is ever expected to give their time for nothing. You don’t go to a supermarket and say I can’t afford to pay for this packet of potatoes today, Mr Supermarket-man, can you give it to me for nothing?

When the interviewer asked another participant about carrying out pro bono work as a criteria for selecting Queen’s Counsel (a condition that has subsequently been added to the appointment criteria), the participant said:

I think that’s disgusting … It just is mind boggling to me that anyone would even contemplate telling somebody that they have to do something for nothing.

Other participants were more cautious in their opposition, supporting the idea of pro bono work generally but questioning “whether enforcing that as part of the practice certificate is the right way to achieve that”.

Some of the reasons given for resisting compulsory pro bono related to financial constraints. Participants were concerned that compulsory pro bono could make it commercially difficult for firms. They were also concerned this could have flow on effects for lawyers’ working conditions, making employers reluctant to offer flexible arrangements and therefore, parents may “find it difficult to re-enter the workplace”. Another participant commented that “the economic world that we’re living in isn’t really conducive to making that kind of requirement of people”.

Other participants resisted the idea of mandatory pro bono because of the effect it might have on the substance of the work. As one participant described, “it can sort of turn off the appetite for taking it on more as a personal passion”. Others thought that the quality of the work done by the lawyers may suffer, either because the lawyer did not have the skills to carry out the work, or because “if people are forced to do it, they won’t have the right attitude” or, put differently, “if it’s not voluntary, what incentive or enthusiasm is there going to be a decent job?”. One participant appeared to share this concern, explaining:

I would hate to think I was being forced to do work for nothing… I couldn’t be enthusiastic and I probably wouldn’t do a very good job either. You know, I think that clients would be badly served by lawyers being forced to work for them for nothing. I think you’d get really second-rate service.

One participant linked concerns about mandatory pro bono back to the definitional issues of what counts as pro bono:

It would depend on what the definition of that pro bono work was. I know for example, a lot of lawyers who offer their services, what they consider to be pro bono to various organisations around here, be it of a board or an incorporated society or something like that. My worry is the fact that if you were to define it quite broadly, which is the only

35 The application for appointment as Queen’s Counsel now includes a section on the lawyer’s commitment to improving access to justice and specifically refers to pro bono as an example. New Zealand Bar Association “Queen’s Counsel Appointment Process” <https://www.nzbar.org.nz/queens-counsel-appointment-process>
way I can imagine it being done, is that you would have people sort of, people still miss out… (emphasis added).

Several participants who were interviewed, however, thought making pro bono mandatory was a good idea. They provided various reasons including that lawyers “are an incredibly privileged part of society to have [their] education and we need to use it for the greater good” or that there needed to be more than “lip service” given “that it’s actually part of what requires us to be a profession. It’s an important step and yeah, it shares the load”. Another participant thought that making pro bono mandatory would be “really, really good” because “it would keep people kind of quite honest and sort of help keep people grounded and a bit of sense of reality, not just being completely unaware of you know, people who are struggling financially”. Some cited lawyers’ professional obligations: “what sets us apart when you call us a profession”.

**Discussion**

**Shared definitions of pro bono**

The survey and interviews, as well as a review of NZLS publications, suggest there is little shared understanding of what constitutes pro bono legal services. This is a significant impediment to any discussion about pro bono legal services, the amount of provision, who is providing the services, and the design of policy to encourage the provision of more pro bono services.

The shifting and expansive use of pro bono suggests a limited understanding and/or loyalty to the idea that lawyers’ duty to carry out pro bono work is tied to their professional obligations and their rights to continued protection of various areas of practice. Conversely, some practitioners reject the label “pro bono” for work that would clearly meet the APBC’s definition of pro bono. At least part of the reason for this is that the term is understood with cynicism in some parts of the profession, who see it as the province of large firms who use an elastic definition of pro bono for reputational and/or commercial benefit. This again points to a lack of common ground about the definition but also the need to rehabilitate the term in the eyes of some practitioners.

The APBC’s definition of pro bono is intentionally very specific and one reason for this is to “provide leadership on ‘definitional fringe’ issues”. A very specific definition can also serve to ensure that practitioners who are doing pro bono work regard it as such. The current NZLS definition is too general and inconsistently applied; leadership is needed to redraft the definition and then champion it. This leadership should come from within the profession, from the major legal profession associations including the NZLS, the New Zealand Bar Association, the Criminal Bar Association and the In-House Lawyers Association of New Zealand.

Leadership on defining pro bono also needs to be coupled with leadership on articulating the reasons for lawyers providing pro bono. The message can be communicated simply as part of what is sometimes called the “grand bargain”. That is, lawyers’ work is given special regulatory

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36 Australian Pro Bono Centre, above n 9.

protection but in return there is an obligation to meet the justice needs of the community. Failure of lawyers to maintain their side of the bargain will inevitably lead to the withdrawal by the government of their side of the bargain. Articulating this reason should help support understanding of the definition, that pro bono services relate to access to justice, rather than the provision of general voluntary work.

The results also suggest there are a subset of practitioners who strongly believe that legal aid, with its lower than market rates, is a form of pro bono. The interviews suggest that lawyers might be interpreting legal aid as pro bono for two reasons. First, that the rates are so low that they constitute a form of pro bono under the NZLS definition (which includes low bono). Second, the experience of legal aid is that not all the work is remunerated and therefore any legal aid case also includes a pro bono element. This is problematic on a number of levels. It is further evidence of the already documented problems with the legal aid system. Furthermore, pro bono resources are being drawn to the same people who qualify for legal aid. This means there are fewer resources for those who do not qualify for legal aid but who cannot afford private legal services, a group who constitute the majority of the population. It also poses a risk to legal aid funding as the more pro bono resource that is drawn into servicing legal aid qualified litigants, the less need the government may see for increasing legal aid funding.

Recommendations 1, 2, and 4 are relevant to the challenge of creating a shared definition of pro bono.

Amount of pro bono and the lawyers doing pro bono work

1. Amount of pro bono

Were the NZLS to implement an aspirational target of 35 hours per annum, this study demonstrates that presently, most lawyers would fall short of this target. While 41 percent of lawyers are exceeding the target, the results suggest more than a quarter are doing no access pro bono work at all and the remaining quarter are doing some pro bono, but less than the aspirational target.

The study results, therefore, highlight the need to incentivise those practitioners currently underdelivering pro bono to do more. The majority of participants were personally motivated for a range of reasons including for altruistic and social justice reasons, professional development opportunities, and business benefits. This suggests the constraints are more structural with the need to investigate ways to encourage firm or employer support. As observed by the ACLC in their report on their pro bono pilot:

The second most important factor to successful pro bono partnerships is the pro bono culture within the donor organisation (e.g. the firm, company, government department etc). A culture that supports pro bono is more important than the size of the donor organisation or its capacity. Culture affects the volume of services provided, the relationship with gateway organisations, and the timeliness and quality of the legal

38 “Legal aid: the problems and issues” LawTalk 923 (New Zealand, 9 November 2018).
39 Auckland Community Law Centre Pro Bono: Unlocking potential through the Litigant-in-Person challenge (Auckland, 2019) at 11.
services provided. Ensuring pro bono work is prioritised and valued within a firm must come from the leadership down. Time should be spent to cultivate and support the firm’s leadership, and to develop programs that fit with the firm’s culture and interests.

We consider this culture can best be built through “carrots not sticks”, which the academic literature suggests are more effective than sanctions. We do not suggest pursuing mandatory pro bono targets; the results show significant resistance to this idea. It would be more productive, as Rhode has stressed, to build a legal culture that regards pro bono as “integral and inherently satisfying” because through doing so, the quality of pro bono contributions by lawyers are ultimately enhanced. One way of doing this is through the introduction of an aspirational target, already mooted by the NZLS. There is evidence to suggest this is an effective means of increasing the number of pro bono hours provided.

Part of building firm culture – as well as encouraging individuals – to deliver more pro bono can come from publicising and rewarding access pro bono. Advertising the variety in which lawyers could make up their pro bono target could also increase the amount of pro bono delivered. As the Auckland Community Law Centre observed:

The motivations and interests of the profession will determine the amount of pro bono and the type of pro bono that occurs in the future. Having a range of different options for providers creates more opportunities and increases the number of providers likely to put their hand up.

Approaching the delivery of pro bono services with many, rather than a single solution in mind, can therefore serve the goal of increasing the amount of pro bono delivered.

2. Distribution of pro bono work across the profession

The burden of carrying out pro bono work is not evenly distributed across the profession. As already discussed, some are doing more than others but this is not linked to the role they are working in. Our results found that while employed lawyers were the largest group of pro bono providers, those lawyers were not all from large firms. Some small and medium firms are doing large amounts of pro bono. Furthermore, in our survey, nearly 25 per cent of the pro bono work was being done by barristers.

The uneven distribution of work is also not necessarily due to varying enthusiasm for carrying out access pro bono work, although that will account for some of the distribution. In general, the survey found strong support for the idea that access pro bono is an important part of a lawyer’s role and 45 percent of lawyers said they wanted to do more. To understand how to smooth the distribution of access pro bono work among the legal community, we therefore need to consider

40 Scott Cummings and Deborah Rhode “Managing pro bono: Doing well by doing better” (2010) 78 Fordham L Rev 2357 at 2368.
42 Rowena Maguire, Gail Shearer and Rachel Field “Reconsidering pro bono: a comparative analysis of protocols in Australia, the United States, the United Kingdom and Singapore” (2014) 37 UNSWLJ 1164 at 1171.
43 Auckland Community Law Centre, above n 39 at 17.
a range of factors including employment conditions, business models, and links between lawyers and potential clients.

Firms building in formal recognition of pro bono work is one way to ensure employment conditions are conducive to individual lawyers undertaking pro bono. Firms, particularly smaller firms, also need to be relieved of the transaction costs involved in vetting cases. Participants talked about the costs associated with screening, intake and management. These costs have been exacerbated by the introduction of anti-money laundering legislation, which requires lawyers to carefully check the identity of prospective clients. A clearinghouse model would address this problem as it would manage case screenings; lawyers would only need to deal with the work itself. This model would also assist with creating links between lawyers and potential clients, an issue discussed further in the next section.

A further consideration is the amount of pro bono being performed by in-house lawyers. In-house lawyers make up 25 per cent of the New Zealand legal profession.44 However, in-house lawyers are not currently permitted to provide legal services, including pro bono, outside of their employment. A Members’ Bill has been lodged that proposes an amendment to the Lawyers and Conveyances Act 2006 that would permit in-house lawyers to undertake pro bono work, in accordance with rules established by the NZLS. Mary Ollivier, while the acting NZLS Executive Director, said that the NZLS “would need to consider the content of practice rules and how these will protect the consumer while assisting with access to justice issues”.45 In-house lawyers can, however, perform other access pro bono work without any need for legislative change including volunteering at CLCs and CABs and engaging in law reform activities. Depending on the structure of the clearinghouse, and if it was tied to community law centres (as has been proposed),46 it could also provide a mechanism for in-house lawyers to carry out pro bono work without the need for legislative change. Mobilising this very significant part of the legal profession to perform more pro bono is therefore also an important consideration.

Recommendations 2, 4, 5, 6, 7, and 8 are relevant to increasing the amount of pro bono being delivered and more fairly distributing it within the profession.

**Who gets pro bono**

The results showed that the distribution of existing pro bono resources to the public is inequitable. Some referrals to pro bono services were through CLC and other advice services. However, a large amount of pro bono is being offered via personal connections that rely on an individual’s social connections. This privileges access for those with existing connections to lawyers.

We therefore consider it is important to introduce a structure that more equitably distributes pro bono services. Close to half of the participants surveyed agreed that they would support the establishment of a formal structure to administer pro bono services. The most obvious way of

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44 Geoff Adlam “Snapshot of the Profession” LawTalk 926 (New Zealand, 7 March 2019) at 37-38.
carrying this out is via a national pro bono clearinghouse. As discussed, this model provides vetting of cases and matching them with available services.

In addition to smoothing the path for lawyers to offer more pro bono services, the clearinghouse model offers benefits to the public. A clearinghouse would provide an identifiable point of contact with pro bono services and ensure that all members of the public have the opportunity to access pro bono assistance. Importantly too, it would publicly signal the legal profession’s commitment to access to justice.

Recommendation 5 is relevant to ensuring equitable distribution of pro bono services to the public.

**How pro bono is provided**

One of the reasons put forward for reluctance to accept pro bono work, particularly in litigious matters, was a concern that the matter could drag on for an unknown period of time and the lawyer was therefore making a commitment of unknown quantity and duration. Similarly, the Auckland Community Law Centre reported similar concerns in their report on their pro bono pilot service: “…a barrier to providing pro bono is a concern about the open ended nature of legal disputes. Some lawyers are anxious about taking on pro bono work because they are worried about being unable to back out if the dispute drags on”. This suggests limited understanding of the ability of lawyers to limit the retainer for any work, including for pro bono work.

There are various ways of enabling lawyers to provide some assistance while not creating an obligation to take on the full responsibility for the case. First, increasing community run programmes where lawyers provide clinics or limited time advice or drafting services. For example, partnerships between Community Law and the profession are a means of lawyers providing assistance without the risks and ongoing commitment of taking on cases themselves. The Auckland Community Law Centre pro bono project for bankruptcy and employment matters is an example of an additional service of this nature. The implementation of a pro bono clearinghouse (depending on its design) may also allow this type of delivery of service. Second, the greater use of limited retainers (unbundling) for pro bono litigation assistance allows lawyers to limit their responsibility for a case but still provide some assistance. We have written elsewhere about the need for greater regulatory support of limited retainer (unbundled) legal services so that the benefits of providing some legal assistance to otherwise self-represented litigants can be delivered, but without taking on carriage of the whole matter. While this discussion has taken place in the context of privately funded legal services, there is no reason it cannot apply to pro bono legal services.

Recommendations 5, 9, and 10 are relevant to increasing pro bono services for litigious matters.

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47 Auckland Community Law Centre, above n 39, at 16.
48 Bridgette Toy-Cronin “Just an hour of your time? Providing limited (unbundled) assistance to litigants in person” *LawTalk* 884 (New Zealand, 24 March 2016) at 20.
Recommendations

1. NZLS (in collaboration with other legal profession associations) provide leadership on the definition of pro bono by amending the current practice briefing definition of pro bono. The amended definition needs to stress access to justice and specifically state what type of work is included and excluded in this definition. The APBC definition can serve as a model.

2. Legal professional associations recognising lawyers for pro bono work, for example through awards or new stories, use the amended definition (see recommendation 1) in deciding which work to champion as pro bono.

3. Practitioners and their associations continue to campaign for better legal aid funding to avoid the situation where pro bono resource is supplementing services to people who qualify for legal aid.

4. Introduce a national aspirational pro bono target with signatories, modelled off the APBC programme, which also uses the amended definition (see recommendation 1).

5. Provide support to the CLC bid to have the pro bono clearinghouse funded in the 2020 budget and/or other initiatives to fund a clearinghouse model.

6. Pursue legislative reform to allow in-house lawyers to deliver pro bono legal services.

7. Include, as part of the amended definition (see recommendation 1), law reform work. This ensures law reform work is recognised and gives lawyers who might not otherwise be able to provide legal services to individuals, an opportunity to participate in pro bono work.

8. Pursue policies that encourage employers (firms and other employers of lawyers) to recognise and reward pro bono work that meets the amended definition (see recommendation 1).

9. Support regulatory change (amendments to the court rules and/or client care rules) to increase the uptake of limited retainers for all litigation matters, including pro bono work.

10. NZLS promote the use of limited retainers to the profession for pro bono matters.

Conclusion

Access to justice is firmly on the policy agenda, with renewed attention on trying to solve the puzzle of providing services to all New Zealanders. Pro bono services are an important piece of the puzzle. Pro bono offers benefits to both the public and the profession. For the public it is a way of bridging the access to justice gap; for the profession it offers a range of benefits including enhancing the profession's reputation and the lawyer's professional skills. It is, however, just one piece of a much larger puzzle, and the importance of pro bono should not be overstated. The justice gap is large – so large that those who do not qualify for legal aid and who cannot afford private legal services are the great majority of the population. This is a gap that cannot be filled with asking lawyers to provide more free services, we must look for other solutions as well.
Pro bono however can be increased and distributed more fairly. This fairer distribution needs to occur at two levels – within the profession as service providers, and across the public, as service recipients. Once these things are achieved – overall increase and fairer distribution – along with a shared definition of access pro bono, pro bono services can be an effective part of solving the access to justice problem.
## Appendix

### Table 3: Demographic characteristics of all participants and those participants who delivered “pro bono”

<table>
<thead>
<tr>
<th></th>
<th>All participants % (n)</th>
<th>Only participants who delivered pro bono services in the preceding year % (n)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Current Role</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee in a law firm</td>
<td>38.1 (137)</td>
<td>38.3 (119)</td>
</tr>
<tr>
<td>In-house lawyer</td>
<td>8.9 (32)</td>
<td>6.8 (21)</td>
</tr>
<tr>
<td>Partner/Director</td>
<td>17.2 (62)</td>
<td>19.0 (59)</td>
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<td>Barrister in sole practice</td>
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<tr>
<td>Employed barrister</td>
<td>2.5 (9)</td>
<td>2.6 (8)</td>
</tr>
<tr>
<td>Sole Practitioner</td>
<td>7.2 (26)</td>
<td>7.7 (24)</td>
</tr>
<tr>
<td>Other</td>
<td>4.2 (15)</td>
<td>4.2 (13)</td>
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<tr>
<td><strong>Main Area of practice</strong></td>
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<td></td>
</tr>
<tr>
<td>Administrative/Public</td>
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<td>10.0 (31)</td>
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<tr>
<td>Banking and Finance</td>
<td>3.4 (12)</td>
<td>3.9 (12)</td>
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<td>Civil Litigation</td>
<td>26.4 (93)</td>
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<tr>
<td>Company/Commercial</td>
<td>19.6 (69)</td>
<td>18.6 (58)</td>
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<tr>
<td>Employment</td>
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<td>Family</td>
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<td>Immigration</td>
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<td>Resource Management</td>
<td>3.4 (12)</td>
<td>3.2 (10)</td>
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<td>Criminal</td>
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<tr>
<td>Other</td>
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<td><strong>Post Qualification Experience</strong></td>
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<td>0 to 1 year</td>
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<td>6 to 9 years</td>
<td>11.7 (42)</td>
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<td>10 years and over</td>
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<td>58.2 (181)</td>
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<td><strong>Region</strong></td>
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<td>Waikato, Bay of Plenty</td>
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<td>Nelson</td>
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<td>20.8 (75)</td>
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<td>1-3</td>
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<td>4-9</td>
<td>15.3 (55)</td>
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<td>5.5 (17)</td>
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<td>$351 - $450</td>
<td>14.2 (51)</td>
<td>16.4 (51)</td>
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<td>Do not have an hourly charge-out rate</td>
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<td>5.8 (18)</td>
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<td><strong>Did you record time spent on pro bono work?</strong></td>
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<td>Yes</td>
<td>24.7 (89)</td>
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<td>No</td>
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<tr>
<td>Unsure</td>
<td>3.3 (23)</td>
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<tr>
<td><strong>Does your workplace build pro bono into staff budgets or KPIs?</strong></td>
<td></td>
<td></td>
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<tr>
<td>Yes</td>
<td>9.4 (34)</td>
<td>10.3 (32)</td>
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<tr>
<td>No</td>
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<td>79.1 (246)</td>
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<tr>
<td>Unsure</td>
<td>7.5 (27)</td>
<td>8.0 (25)</td>
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*Percentages may not add to 100% due to rounding and non-response. Based on information provided by n= lawyers who participated in the Lawyers and Access to Justice Survey. ** Percentages may not add up to 100% as participants were allowed to select more than one response.
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<td>10 years and over</td>
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</table>

*Total number of participants n = 23

* Total participants add to 23 but participants were allowed to select more than one response.
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