

Centre for Innovative Justice, RMIT University

**Final Report for Fair Work Commission –
Evaluation of Pro Bono Program**

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Centre for Innovative Justice

The Centre for Innovative Justice was established by RMIT University in 2012 and formally opened in March 2013 by former Prime Minister, Julia Gillard. The CIJ was established to research, advocate, teach and translate into practice innovative approaches to justice. The CIJ is about designing and driving better ways to do justice – ways that better fit the diverse needs of the people who use the system.

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Executive Summary

Australia's national workplace relations tribunal, the Fair Work Commission ('the Commission'), is responsible for resolving disputes under the unfair dismissal provisions of the *Fair Work Act 2009*. These provisions allow employees who feel they have been unfairly dismissed from their workplace to apply to the Commission for a remedy, which may include reinstatement or compensation.

The unfair dismissal provisions only apply in certain circumstances, and an application for a remedy under these provisions must currently be made within 21 days of the dismissal occurring, unless the Commission considers that exceptional circumstances apply and therefore grants an extension. If an application potentially falls outside of these circumstances, respondents may raise objections on the grounds that the application does not fall within jurisdiction. These objections are generally dealt with in separate hearings and can raise complex legal questions.

Given that one of the objects of the unfair dismissal provisions is to provide processes that are quick, flexible and informal, the Act presumes that parties will represent themselves, unless they have the Commission's permission to be represented by a lawyer or paid agent. This means that many of the applicants in unfair dismissal and general protections matters, as well as respondent employers, are self-represented.

The Commission is keenly aware, however, that self-represented parties can be at a disadvantage when attempting to argue more complex matters, such as jurisdictional objections, or when trying to understand the distinction between jurisdictional and substantive issues. Consequently, in 2013, it initiated a pilot program to facilitate the provision of pro bono legal advice and representation to unrepresented parties in hearings concerning jurisdictional objections. This pilot ran from May to December 2013 and involved 14 law firms in the provision of pro bono assistance to both applicants and respondents.

The Centre for Innovative Justice (CIJ) was asked by the Commission to review this pilot program. The subsequent report identified the significant benefits of the program and highlighted some key areas for refinement. In line with a number of recommendations from this review the program was refined to improve program efficiencies whilst continuing to ensure access to justice.

The most substantial change implemented was to reduce the workload for participating lawyers and to limit client expectations around the program by confining the parameters of the initial legal advice on offer. Other changes related to improving communication with Commission Members about pro bono matters; and other administrative refinements.

Following this 2013 evaluation, the Commission established the program on an ongoing basis, incorporating the recommendations by the CIJ. The Commission then subjected this ongoing program to an internal review in the 2014 – 2015 year and undertook some further small refinements as a result. In 2016, the Commission again asked the CIJ to provide an evaluation of the program. This included examining data and substantial feedback from program participants. The CIJ also had the opportunity to consult extensively with Commission staff and members, as well as lawyers from participating law firms, giving this evaluation substantial depth in terms of its capacity to reflect the experience of all users.

Feedback from both applicants and respondents was positive, with benefits recognised by many participants regardless of whether the matter was ultimately decided in their favour. Comments included that advice from lawyers was clear and pragmatic and often went 'above and beyond' the original brief.

Participating law firms described multiple benefits to clients as well as to their practitioners who have gained valuable experience through the program; while Commission Members observed a significant difference in the capacity of parties to argue their case when they had received the pro bono assistance on offer. Commission staff, too, indicated that the program was generally straightforward to administer, while those who had been involved in the program at its inception universally acknowledged the improvements now that the changes previously recommended were in place.

Unsurprisingly, participants, law firms and Commission staff also had welcome suggestions for further improvements. For example, some participants had concerns about the way in which information about the program was provided; the point at which the program was delivered, or its scope in terms of the matters it could address. Participating law firms, meanwhile, felt that the flow of information from the Commission to firms could improve, including information about how eligibility was determined for the program. Commission staff also felt that the flow of information *within* the Commission and to parties could improve. Commission members reflected on the capacity of the program to expand.

Overall, however, the CIJ commends the Commission for developing the program and for continuing to strive for it to work more efficiently, effectively and fairly for parties, lawyers and the Commission alike. Many of the improvements already adopted have contributed to the sustainability of the program. The CIJ has made additional recommendations here to ensure that it remains a significant feature of the Commission's public value into the future.

Background

Context and legislative framework

The Fair Work Commission is Australia's national workplace relations tribunal. The Commission is independent from government and has a range of responsibilities relating to wages and employment conditions, industrial actions and other workplace matters. Amongst these functions, Part 3-2 of the *Fair Work Act* enables the Commission to deal with applications for unfair dismissal.

Some years ago the Commission began to observe that claims brought by individual employees, being applications for unfair dismissal remedies ('unfair dismissals') and applications to deal with contraventions involving dismissal ('general protections') were an increasing feature of its work;¹ these applications continue to make up a significant part of its workload in 2015-2016.²

The number of applications for general protections has continued to rise over the last five years³ and, while the number of applications for unfair dismissal has remained constant,⁴ these continue to represent the largest number of applications made to the Commission, comprising 42.95% of all applications lodged in 2015-16.⁵ At nearly three times the next highest number of applications,⁶ unfair dismissal applications are clearly going to remain a core part of the Commission's work.

Against this backdrop, section 285 of the *Fair Work Act* provides that a person has been unfairly dismissed if the Commission is satisfied that (a) the person has been dismissed; (b) the dismissal was harmful, unjust or unreasonable; (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and (d) the dismissal was not a case of genuine redundancy. Only certain employees or workers are covered by these provisions.

Meanwhile, an application for a remedy under these provisions must be made within 21 days of the dismissal occurring, unless the Commission considers that exceptional circumstances apply (as per Section 394(3)) and grants an extension. A fee of \$69.60 applies, unless the Commission determines that a case involves particular hardship. Section 725 of the Act dictates that parties may only make an application under one section of the legislation at a time, with the general protections, unlawful termination and unfair dismissal provisions all addressing slightly different circumstances.

Once an application has been made, the Commission sends the parties a notice of listing and arranges a telephone conciliation conference. This is a voluntary process and the parties may elect not to participate, although the Commission advises that it conciliated 79% of these matters for the period July 2015 – June 2016, suggesting that the majority of parties do choose to attempt conciliation. Remedies provided for unfair dismissal include reinstatement and compensation.

¹ In 2011-12, these applications numbered 16, 191 out of a total 37,442 lodged with the Commission. *Fair Work Commission Annual Report, 2011 – 2012*.

² 17,964 such applications were lodged in 2015-2016 out of a total of 34,215 applications overall. (Interim figures provided by the Commission at the time of writing).

³ 3,270 of general protections applications were made in 2015-16, up from 2,164 in 2011-12. *Ibid*.

⁴ 14,694 unfair dismissal applications were made in 2015-16, up from 14,027 in 2011-12. *Ibid*.

⁵ Interim figures provided by the Commission, up from 37% in 2011-2012. *Ibid*.

⁶ This being applications for approval of a single enterprise agreement, with 5,238 applications in 2015-16.

Jurisdictional matters

Upon receipt of the application, the employer is required to provide a written response. Where an employer believes that the application does not fall within the scope of the relevant provisions, that employer may lodge an objection to the application, either in their Employer's Response to Application for Unfair Dismissal Remedy (Form F3, Part 5, Rule 19, *Fair Work Commission Rules 2013*) or, if raised later in the process, in a separate Objection to Application for Unfair Dismissal Remedy (Form F4, Part 5, Rule 20, *Fair Work Commission Rules 2013*). Particularly relevant to this evaluation, Section 396 of the legislation provides that these matters must be dealt with prior to consideration of the substantive application, unless they turn on the circumstances of the case. This usually makes these matters the subject of discrete determinations.

Interim figures provided by the Commission indicate that, for the period 1 July 2015 to 30 June 2016, a total of 1,034 jurisdiction objections were raised. Of these objections, 769 were upheld and 265 were dismissed, meaning that the applications were found to be within jurisdiction. If a jurisdictional objection is unsuccessful, the matter proceeds through the remaining Commission processes to arbitration by a Commission Member, although an applicant may elect to discontinue and settle their claim in the intervening period. If a jurisdictional objection is upheld, the matter is dismissed and the applicant can take their claim no further. In the 2015 – 2016 period, objections were upheld on a variety of grounds, including that:

- no extension of time should be granted;
- the applicant had not been dismissed;
- the minimum period of employment had not been served;
- the applicant had no reasonable prospect of success;
- it was a genuine redundancy;
- there was no employment relationship;
- there was no award, agreement, or that the employee was a high income employee;
- the termination was consistent with the Small Business Fair Dismissal Code;
- the employer was not a national system employer.

The need for assistance

Parties who may be experiencing the Commission processes for the first time must navigate this challenging legislative terrain. Not surprisingly, many applicants are distressed to discover that they may not have lodged their application under the correct provisions, or that they have done so out of time and must therefore make a further argument as to why their claim should be entertained at all.

Despite this legislative complexity, Commission processes are intended to function without parties having the need for legal representation. In fact, section 596 of the *Fair Work Act* provides that a person may be represented by a lawyer or paid agent *only* with the Commission's permission, with the Commission able to grant permission only if doing so would enable the matter to be dealt with more efficiently; if it would be unfair not to allow parties to be represented because they are unable to represent themselves effectively; or to otherwise ensure fairness between the parties.

This means that parties in unfair dismissal and general protections matters – including respondent employers, some of whom are small business owners – usually proceed with their matters self-represented. While many are able to conduct their matters capably, inexperience on the part of ‘first time’ users can mean that a self-represented applicant does not seek redress from the most appropriate avenue, or that an application or response has not been framed to capture the real issues in dispute. This in turn can hamper the parties’ access to justice, as well as the efficiency of the Commission’s processes. What’s more, even where the Commission does give permission for a party to be legally represented, this is something that many are unable to afford, particularly given that applicants are before the Commission as a result of losing their job.

Pro Bono Program

Recognising this need, the Commission was eager to facilitate access to legal assistance in matters of a more complex nature. To this extent, the discrete and technical area of jurisdictional objections seemed to be the most appropriate area to which this assistance could be directed.

Accordingly, in 2013, it initiated a pilot project offering pro bono legal services provided by external law firms to parties in unfair dismissal disputes where a jurisdiction objection had been raised. This pilot program ran from May to December 2013 in the Melbourne registry of the Commission, with over 40 parties ultimately being provided with a service of some kind from participating law firms. The CIJ was asked to conduct an evaluation of this program and, at the conclusion of the pilot, recommended that it continue on an ongoing basis, albeit with a number of improvements.

These included that the expectations imposed on law firms be more effectively communicated and that the scope of the program be more clearly defined; as well as that certain administrative processes be adjusted, such as the creation of specific fields in the Unfair Dismissal Case Management System (CMS) to track pro bono matters more easily; and that additional resources be allocated to support the ongoing operation of the program. It also included improved communication between the program manager and Chambers.

These recommendations were adopted by the Commission and the pro bono program commenced operation on an ongoing basis from July 2014. A further internal review of this program was conducted by the Commission during the 2014-2015 period and further small adjustments implemented before the end of that period. These included changes to the communication of the program which provide parties with a checklist concerning relevant documentation to prepare beforehand and bring to their appointment.

Having been in operation for an additional twelve months with these extra refinements – and having benefited from greater familiarity on the part of staff and participating law firms – the Commission then asked the CIJ to conduct a further evaluation of the program in 2016. This was to ensure that the program was sufficiently well established; that previous recommendations had been successfully adopted; and that its operation was likely to be of ongoing benefit to parties and the Commission alike.

Evaluation Process

In conducting this evaluation, the CIJ examined data provided by the Commission and gathered comprehensive feedback about the program's operation. This included consultations with Commission staff and Members, lawyers from participating law firms and, crucially, participants in the program. The CIJ also drew on its previous evaluations of three Commission programs conducted in 2013 (including the evaluation of the pro bono pilot).

Data provided by the Commission indicated that, for the period 1 July 2015 to 30 June 2016, 327 unfair dismissal applications were listed in the Melbourne roster as the subject of jurisdictional objections. Of these applications, 238 (72.7%) were identified as having at least one party eligible for pro bono assistance, indicating a substantial need in this regard.

Of the eligible applications, 116 applications (49%) resulted in at least one party receiving pro bono assistance, including 15 matters (11% of pro bono applications) in which pro bono assistance was provided to both parties. In total, this equated to 131 people receiving pro bono assistance, with 106 applicants and 25 respondents. This means that, of the 327 unfair dismissal applications listed in the Melbourne jurisdictional objections roster, just under a third went through the pro bono program over the 2015-2016 period, indicating that the program has substantial reach within this targeted area.

Consultations

Program participants

On the application form that parties were required to complete in order to access pro bono assistance for the period July 2015 to June 2016, the Commission asked participants to indicate whether they gave their consent to being contacted for the purposes of evaluation by external consultants. Of the 131 parties who used the program, 81 participants gave their consent to being contacted.

These parties were contacted over the period from May to August 2016 and asked if they were willing to participate in an interview on the basis of this consent. Where parties indicated their interest in participating, they were then provided with written information about the evaluation process; advised that their responses would be de-identified and that they had the opportunity to withdraw their consent at any stage. Interview times were then scheduled and the parties consulted over the phone.

Participants were asked a series of questions, some concerning their demographic information; some requiring yes or no answers about the program and some inviting open ended responses and suggestions. Ultimately, 41 people provided responses to the survey – including 36 applicants (out of a possible 72 applicants in the sample provided) and five respondents (out of a possible nine).

Quantifiable responses to the questions revealed that:

Demographic information

Applicants

- Of the 36 applicants interviewed, 13 were women and 23 were men.
- Ten applicants identified as having a language other than English as their first language (Hindi, 4; Chinese, 2; Arabic, Mongolian, Russian, 2; Farsi, 1).
- Two of these required the assistance of an interpreter (one family member; one paid interpreter) when speaking with the Commission and providing feedback for the evaluation (family member only).

Respondents

- Of the five respondents, all were male.
- One respondent identified as having a language other than English as his first language (Mandarin).

A slightly higher proportion of respondents participated in the consultations (five out of a possible nine) as compared with the proportion of applicants (36 out of a possible 72), which the CIJ suggests is unsurprising, given that respondents are doing so in the context of their ongoing role as employers, while applicants may be grappling with a range of changing circumstances in their lives.

Nonetheless, feedback from over half of potential participants is a significant number and provides in-depth and credible information for the purposes of this report. Of note is the fact that the more recent their participation in the program, the more willing participants were to provide feedback.

Feedback from participating law firms

In order to glean the views of participating law firms, the CIJ was provided with the contact details of the relevant co-ordinator at the eight firms engaged in the program during the 2015-2016 period. This included one regional firm that had recently started to participate. These consultations were conducted by phone where a smaller number of lawyers in each firm were participating in the discussion, or via roundtable discussions at the relevant law firm premises where larger numbers had been involved. A total of 18 individual lawyers participated in these consultations, some providing views on behalf of a wider number of practitioners from their firms who had participated in the programs.

Feedback from Commission staff and Commission Members

Consultations with Commission staff were conducted by telephone, and consultations with Members were conducted in person at the Commission premises. Four Commission staff (three pro bono program staff and one case manager) and four Commission Members, including the President and Deputy President who oversees the pro bono program, participated in the consultations.

Themes emerging from the consultations

In order to reflect the experiences and observations of nearly 70 people, the CIJ considered it a more useful approach to group the observations in themes. This was particularly the case given the relative consistency of feedback across participants, law firms, Commission staff and Members alike. Where contrasting perceptions emerged this was obviously seen as especially important to highlight, but overall, the vast majority of those consulted viewed the pro bono program as extremely valuable. This was both in terms of its benefits to participants as the primary targets of the assistance, but also to the law firms involved and to the Commission in terms of the efficiencies it delivered and its broader contribution to the Commission's public value.

Especially striking was the fact that the majority of participants considered the program helpful regardless of the outcome of their respective cases. This was clearer in this evaluation than in the pilot evaluation, in which it was more difficult to conclude whether outcomes had affected participants' views of the targeted assistance.

Meanwhile, law firms all recognised the benefits of the program to participants, lawyers, and the Commission alike. In particular, those who had been involved in the program since its inception considered the current program to be a vast improvement on the pilot and thought that it generally worked well, both in terms of it serving its own objectives, and as a complement to any broader pro bono program that may be operating within the firm. Firms also commented on the opportunities it gave their staff, including junior staff, to gain valuable experience. In the case of firms who usually worked with corporate clients, the program gave lawyers the chance to work outside their usual client base.

Commission staff were also very supportive of the program and agreed that it was much more manageable and streamlined than it had been at pilot stage, with key improvements including the introduction of the one hour consultation. That said, they were also keen to find ways to continue to improve and refine it. Commission Members, meanwhile, were extremely supportive of the program and saw it as an integral part of the Commission's service. All noted the difference when self-represented clients had accessed the program, commenting that cases are 'much more structured, more efficient and ultimately much more fair' when parties have been given the 'tools to proceed'.

Despite this overwhelmingly positive feedback, some participants, staff, law firms and Members had suggestions for further improvements. Identifying the potential for these improvements was, of course, the objective of the Commission's request for a subsequent evaluation.

The CIJ has therefore identified the themes captured within the feedback of all parties, made some broad findings about what the feedback indicates and then drawn on parties' suggestions for additional refinement in the recommendations which follow. The views of program participants have been given priority as users of the system, and where parallels or distinctions exist with the feedback from either law firms, staff, members or all consulted, this has also been highlighted. Issues that were only specific to staff and law firm involvement have obviously also been noted.

Awareness and ease of access to the program

Participants

Part of the value of the program will inevitably lie in participants' awareness that it exists and how useful they find the opportunity to take advantage of it. To this end, it is useful to note that the majority of participants surveyed (20 applicants and four respondents) had not sought legal or other assistance before they lodged their application. Fifteen applicants had sought legal advice from a wide range of sources, with variable degrees of success. One respondent arranged for private legal representation following the pro bono consultation.

Having not sought legal assistance or secured it in an affordable way, the availability of the program came as welcome news to participants. Only one participant of the 41 surveyed had heard of the program prior to contacting the Commission and, of the 40 who had not, 27 were informed about the program by the Commission either through the paperwork sent to them, or when they contacted the Commission by phone. Nine others saw it on the website, while four were informed about it at different stages in their application process, including one by the relevant Commissioner.

Most applicants (25) and respondents (four) said that they found the information about the program before applying sufficiently easy to understand, with some commenting that it was:

...[the information was] straightforward, no jargon. When my brain is going 100 miles an hour, for me to make sense of that, it's really good.

However, seven applicants were not entirely clear about what assistance was being provided, and said that the information should have been more explicit about the fact that the service only involved an hour's advice. In contrast to the comment featured above, several applicants commented that they could not understand the 'jargon', or 'gibberish' in reference to the term 'pro bono' and other terms that they did not view as accessible to the 'normal average person'.

Others said that they were uncertain about what kind of service they would get until they had spoken with the lawyer, while one respondent suggested that the initial information about 'the pro bono stuff was in amongst all the other stuff'.

Commission staff

This theme was echoed in the reflections of Commission staff and, to a lesser extent, participating firms. Staff noted that uptake of the program could be improved, particularly with respondents, suggesting that not all parties were aware of it as they went through the Commission process. Certainly, one Commission Member commented that he did not feel he had seen as many people coming through the program as he used to, although one staff member who had started at the Commission twelve months before being consulted specifically commented that he had observed an increase in pro bono applications over that time.

Nevertheless, staff queried whether program information sent to parties was getting lost amidst other information and, accordingly, suggested that information on the Commission website be improved or that information be featured more prominently on the Notice of Listing.

Staff also suggested that a more proactive approach be taken with people who contact the Commission as the process for informing parties about the program was currently a bit ad hoc, with staff more likely to respond to questions as opposed to offering information unprompted. Staff therefore suggested that follow up calls after the notice of listing might be useful, to check whether parties had received the necessary information.

Here pro bono program managers noted that case managers (who are the primary contact for parties throughout their matter) may be the most appropriate avenue for this, but suspected that this addition to their roles may too onerous. As an alternative, they suggested more regular communication and meetings between case managers and pro bono program managers, including so that case managers would be more aware of the program and promote it to parties.

Staff also noted that staff turnover can affect staff awareness about the program, as well as the efficiency of its administration. At the same time, staff moving through the program to other parts of the Commission meant that knowledge of the program's operation and requirements was gradually spreading to other work areas.

Ultimately, all staff agreed that more should be done to check whether parties were receiving the information about the pro bono program but at the same time all acknowledged that they did not currently have the resources to cope with an increase in applications.

Clarity of program information and efficiency of processes

Participants

Once aware of the program, of course, the experience of participants and law firms alike are affected by the clarity and efficiency of processes. The majority of participants, including all respondents, found the information at this stage to be concise and clear. However, nine applicants said that the information could have been clearer about what was on offer, with one frustrated to discover that they could not receive advice about their substantive matter from the program.

Meanwhile, several were confused about whether the participants should contact the law firms, or the other way around, with one explaining that 'it was a mystery as to who would contact me, and when, and how long I should wait'. Again, the suggestion that the offer and program 'came too late in the process' or was 'switched on at the 11th hour' was a consistent concern from one applicant who seemed very frustrated by their overall experience with the experience.

Most participants found the application process for the program easy to navigate, although one was frustrated that the Commission had not received the application and two others suggested that it may not be that easy for someone without English as a first language.

The majority of applicants and all respondents found the pro bono consultation easy to arrange, with one commenting that 'each step was clarified, no stone left unturned'. Most were contacted by the law firm within the timeframe specified by the Commission (five days), with some especially enthusiastic about how promptly this had occurred:

...The lawyers contacted me and said for me to come down at 4pm in the city. The guys from pro bono were such nice guys, I was feeling really quite anxious and they really put me at ease...

...Yes the law firm did call straight away, the person I spoke to was professional, prepared, gave proper legal advice. They were very sympathetic, I was quite amazed by the whole process though I wish it had gone a different way...

However, one applicant indicated that they had to initiate the contact and four said that it came too late to be of any use, with one receiving contact after they had tried to resolve the matter themselves:

...I just basically had to accept what [my employer] came up with...[the pro bono lawyer] rang up but I'd already come to an arrangement.

Instructions from the Commission urged participants in the program to prepare for their appointment by gathering all the relevant documentation. The majority of applicants felt that they had prepared adequately for the appointment, indicating that these instructions had not only helped the consultation go more smoothly and efficiently, but that:

...when you're not thinking straight it helps to clarify what you want to know. It stops the emotional bubble...

Law firms

The majority of participating law firms, meanwhile, expressed a preference for receiving material slightly earlier in the process – even if only by a day or two. This was particularly the case for firms who must wait 48 hours for the completion of their conflict search. Given that time is of the essence in jurisdiction matters, most lawyers felt that the sooner they can have the information the better they are able to meet the client's needs.

On 4-5 different referrals, the client's deadline for materials [was] that same day or tomorrow... We're left in an invidious position to do it within 24 hours or seek an extension... It's not preventing us from participating in the scheme effectively, but the quality of experience could be improved just by being able to allocate work in a reasonable way and to give the client some breathing space...

Firms suggested that the Commission could overcome the tight timeframe by making sure clients are referred in advance of the deadline. A possible timeframe suggested by one firm is to allow 48 hours for a conflict search, one day to look at materials, and a four day window to have the meeting.

However, one firm stressed that they see significant benefits in the shorter timeframes, in that lawyers' expectations of themselves cannot be too much:

...[tight timeframes] are part of the learning experience. Even the short period actually has a benefit, in terms of juniors having to step up and throw themselves in... you have limited time, do the best you can, ask for help if you need it.

Seven out of the eight firms consulted mentioned that they had received inadequate or incomplete materials from the Commission in relation to client matters, or even information about the respondent when their client was the applicant. Lawyers said that they often had to follow up with the Commission for additional information after receiving a request for consultation, although acknowledged that, when they do, they usually receive it very promptly.

To assist lawyers in providing the best possible advice, some lawyers suggested that the Commission could provide a short brief on the application when notified of the matter, including a brief outline of directions and critical issues.

In an ideal world, we'd get a brief – e.g. this has happened, this needs to happen; by the way, you need an interpreter. Or 'the date has passed, so here were the directions, and the application did not comply with directions'. We are landing in the middle of a matter, so it would be helpful to have relevant parts of the bench book (not a briefing on the law).

The short briefs provided by Justice Connect to participating lawyers were suggested as a good example.

Lawyers also stressed that the Commission should be very clear about the date as to when the application was actually filed, and for any information to be forwarded to the lawyer from the moment

that the firm was listed as the consulting firm until the firm notifies the Commission that the matter is finalised.

Commission staff

Commission staff similarly questioned whether five days allowed sufficient time for parties to submit consent forms and receive legal advice. They noted that additional resources might enable them to provide information in a more timely way, as despite being acutely aware of the urgency of pro bono applications, it was sometimes hard to find the time to prioritise them. They were concerned about the potential consequences that even a small gap in timing and resourcing can have on participants' access to justice through the program.

Again, staff turnover was noted as having a potential impact on the efficient provision of adequate information.

Scope and delivery of pro bono consultation

Participants

Particularly important in the context of this evaluation were observations about the scope of the advice provided by the participating law firms and whether it met the participants' expectations. Also important were reflections about the extent of the advice – for example, whether it was limited to advice about the jurisdictional matter or whether it also included help with written documents or advice on the merits of the broader claim. This is because the previous evaluation indicated that law firms found a more 'open-ended' scope to be fairly onerous and difficult to manage. As a result, participants are now told that the assistance is for one hour, and to prepare carefully beforehand, so as to make the consultation count.

Mode of consultation

Participants reported receiving their consultation through a range of processes, with ten applicants receiving a mix of telephone call (for example, an initial basic discussion) as well as face to face consultation, plus email exchanges prior to or afterwards. Many applicants received their consultation by telephone only (22) or by a combination of phone calls, texts and emails (3).

Three of these applicants would have preferred face to face consultations, and said the form was unclear about what was on offer. One told the lawyer that face to face would work better for them, but the lawyer indicated that telephone consultation was the only option available. Importantly, one of these applicants was from a CALD background and thought that consultation was not *allowed* to be in person. This applicant suggested that, for people with limited English, face to face conversations were more effective than struggling through a conversation over the phone.

Pro bono lawyers need to be supportive to people who don't speak the language and who are intimidated...it would be great to have support for people in their own language.

It is interesting to note here that one Commission Member also highlighted a concern in this area:

I think we underestimate the proportion of people who are not literate in English or have poorer education – we underestimate the proportion of people who just get by, when they put materials and appear, they look like they understand but often they don't and there's evidence that doesn't come to light... Sometimes we think it's a hopeless case but if we get better access to information, then we would actually see that it's not so hopeless after all. I still don't think we're dealing adequately with those people, and often they understand much better face to face.

Length of consultation

The time that participants spent in consultation with their pro bono lawyers varied considerably. Some had ongoing contact after initial consultation, some only had a few minutes. Most applicants said that they had between 30 minutes to an hour (16) or between 15 – 30 minutes (8) while respondents indicated that they had received between 30 minutes to an hour.

For most applicants, the amount of time spent did not equate to disappointment if they felt that they were receiving sound advice. In fact, the expectation of one hour meant that most were very happy with what they received and were grateful if it exceeded that:

...I was on the phone for 15 minutes, but it had to come to the crunch. If I needed more, I would have got it. She was very prepared and that spoke volumes to me.

...I got what I needed...without the [advice] we probably would have gone in the wrong direction.

...[The advice was] short, sweet and succinct.

Ten applicants had considerably more time with a lawyer than the allocated hour, including two being represented at their hearing. For these applicants, the lawyers going 'above and beyond' was a consistent theme, given that they had gone in with limited expectations and got 'more and then some'.

...Having spoken with about 15 lawyers, I was impressed because she'd read materials and was prepared.

...It far exceeded my expectations – they've taken it a step further to negotiate a settlement.

... [the lawyer was] very generous – spent way over an hour. I called them again several times, and they were happy that I followed up – easily spent 2 hours over 3-4 days.

However, one applicant for whom English was not their first language was disappointed that the meeting was 'very brief' (about 15 minutes) and did not provide the opportunity for advice about additional issues, such as the calculation of wages. Two applicants, meanwhile, reported that they had 'only a few minutes' and that the consultation had not helped at all. One respondent ended up employing a private firm to take carriage of his matter because he had hoped that the pro bono program involved full representation and, upon discovering that it did not, decided that a 'basic 30 minute consultation can't do anything'.

More broadly, nine applicants said that the consultation did not meet their expectations. This seemed to relate to their understanding of the information provided by the Commission, with some indicating that they were disappointed with just a phone call or had expected full representation:

I wouldn't have gone through all the hoo ha without thinking it was representation.

I thought I could ask anything...but [the firm's] focus was on the first jurisdictional objection.

They gave me a few cases that may have set precedents but the employer countered it with other precedents...it would have been helpful, but they had representation, I didn't.

Assistance with documents

Fifteen applicants received some assistance with written documents, with one indicating that the lawyer had 'pretty much helped with everything'. Respondents did not see help with documentation as particularly relevant to their experience, although one indicated that their pro bono lawyer had gone 'above and beyond generally'. Nineteen applicants received no assistance with documentation or had prepared it themselves, some indicating that they would have liked more assistance with this.

Advice on the merits

Seventeen applicants were advised that their matter had merit. Of these, two withdrew because they were advised that nevertheless they were out of time and had no chance of success:

...what I loved was the lawyer said I'll have to let it go. If my family had said the same... I probably would have continued...it was going to be nasty and although disappointing, I had to move on....

Seven applicants were advised that their matter had no merit, with three withdrawing and four continuing to hearing. Four of these seven applicants were happy with the advice regardless of how they had proceeded because they felt that they had avoided a painful fight or, alternatively, had been prepared for the process. Three, however, were unhappy with the advice, despite one being similarly advised by their relevant union. Another felt upset by the lawyer's apparent disinterest in their case:

...I continued anyway, [they were] just not interested in my case. I was a pimple on a rock to [them].

Although three of the respondents could not recall whether they had received advice on the merits, they had won their case and were pleased with the advice they received, saying that the advice was 'very good and sensible' and 'raised some very valid points I hadn't considered that were all in our favour'. Another was advised that their case had no merit and successfully negotiated subsequently.

Nine applicants reported that they did not receive advice on merit one way or another. Of these, three subsequently withdrew, with one receiving additional help from the pro bono lawyer to resolve the matter externally with the employer. The other six applicants continued with their applications to hearing, with one saying that they were frustrated by the lawyer not being willing to provide advice on merits and eventually negotiating a positive outcome for themselves.

Law firms

All firms indicated that they try to manage client expectations by outlining what they are able to offer and the purpose of the consultation prior to the meeting. Some communicate via email or phone initially to introduce themselves, arrange a meeting and set expectations. Others set expectations as an introduction at the start of the consultation. While lawyers were not necessarily sure how the Commission explains the one hour consultation to clients, they assumed that the Commission communicates it with sufficient clarity because most clients seem to come to the consultation with similar understanding. If clients do have a different expectation all firms have their own procedures for setting limits and expectations at the outset. That said, the one hour limit did not mean that lawyers only

provided the one hour consultation in every instance. All firms offered additional advice and assistance where they determined a particular case had merit.

Meanwhile, all firms found the workload – both in terms of the numbers of clients accessing the service through their firm and the work involved in providing the consultation itself – to be manageable. On average, lawyers consistently reported that a consultation takes between 3-5 hours of a firm's time, with additional commitment taking up to as much as 30 hours. Even in cases where lawyers only provide the straightforward consultation, all acknowledged that the one hour consultation requires preparation time, so that at the very least firms will spend 2-3 hours on each matter.

Though firms reported the workload as manageable, some did have some issues around planning. For example, one firm noted that planning for the roster could be challenging if matters arrived on different days throughout the week and suggested that the Commission give notice of the number of matters arriving at the beginning of the week. Another expressed preference for one application every three weeks as opposed to two at once every six weeks. Given that lawyers generally find the client flow manageable, however, these comments were made in the context of offering suggested refinements, as opposed to being highlighted as significant problems.

Some lawyers noted that clients seem to be coming to the consultation more organised, which helped to ensure efficient provision of advice. However, lawyers also commented that, when clients are not aware of what is occurring with their applications or why they are there, this takes up more of lawyers' time:

...[The Commission] needs to make sure everyone is on the same page – this entails values, expectations, the common goal, understanding what their role is – everybody should understand these about the program... For example, we had a respondent recommended to the service, but they really didn't understand why, didn't really need it.

Irrespective of the limits of the program, all lawyers emphasised that they will always have professional obligations to provide good quality advice. This meant that there would always be a tension between the program's scope and the reality of lawyers' professional duties. For example, echoing the views of some of the participants above, some indicated that they would have liked the opportunity to help with the preparation of written documents, as this would have assisted with the client's case more broadly.

Others indicated that, although there was not a lot of time to reflect on the merits of the cases, they still felt obliged to spend time on what appeared to be 'merit-less' matters:

...even if it's just so we can say 'go out and tell everyone about it and never get in this position again!

As one lawyer, who has been involved with the program since inception, remarked:

The issue...is how to limit the commitment but to do so with respect to our professional obligations. So unless it is a drop-in service, we are going to give clients the advice they need.

Nevertheless, most lawyers remarked that the flexibility of the program is largely seen as a positive:

Our formal commitment is so limited, so it's funny that it acts as an incentive and serves our capacity to look at each case, we can take cases that are important.

Despite this, some noted that it would be helpful to have some clarity from the Commission around the expected scope of the program. This feedback came from firms who were relatively new (1-2 years) as well as firms who had worked with the program since inception.

In particular, lawyers wanted to know more about the practical management of the program such as:

- the scope of the Commission's expectations
- the extent to which they were expected to provide additional services or 'chase' clients
- information that firms should expect from the Commission and that clients should have
- what they should do when clients needed additional help beyond the remit of the program.

This last issue was seen as particularly important by many lawyers. Lawyers suggested that a list or one-page referral guide on where clients can go for additional support would be helpful, for example on matters relating to areas such as anti-discrimination or adverse action claims. As one observed:

...Reasonably complex things can arise from the consultation, so having someone who can refer in the right way, or an intermediary who can answer questions would be very helpful. A link to answer questions and to help clients get on with rest of their life.

Consequences of the advice

Participants

Of the 36 applicants surveyed, 22 continued with their matter to jurisdictional hearing. Most who did so said that their lawyer had said that they had a reasonable case, or did not say either way. Of these:

- thirteen went to hearing and lost (though in one case the pro bono lawyers went on to secure a settlement for applicant in lieu of appealing);
- three were successful with the jurisdiction hearing and subsequently negotiated settlements prior to hearing on the substantive matter;
- one proceeded to hearing, was successful but then lost the subsequent hearing; and
- five proceeded to hearing and were successful overall.

One of these successful applicants commented that the advice received at the jurisdictional stage had helped them in running their substantive matter:

...he said it had merit and I won, but it was the way I had to conduct myself, had to be respectful...stick to facts, be clear

...[The successful outcome] wouldn't have happened without them...I've recommended [the law firm] to three of my friends since...

...I'm a big advocate... the advice was invaluable. I sent [the lawyer] a bunch of flowers and sent her the outcome of the case. And she called me after that...to chat about what happened and what would happen next. She didn't have to do that but she just did. I ...thought it would be useless but I was so pleasantly surprised. I was so happy I just wanted to give this positive feedback.

Of those who lost at the jurisdiction hearing, most perceived the lawyer's advice to be sound and the outcome unjust. Only a small number seemed to perceive their loss as a result of the pro bono lawyers:

...[the] only advice I had...was from the lawyers...but [they] weren't going to invest any time.

Three respondents continued to hearing, with one negotiating a positive outcome at hearing; one seeking their own legal representation and one taking the legal advice and approaching the matter in a different way with a successful outcome.

...We benefited greatly from their suggestions about what to raise and when to shut up.

A further two did not continue to hearing and negotiated settlements based on the lawyer's advice.

Other issues

All those consulted were asked if they had any other concerns or suggestions beyond their immediate scope of their experience of the program. These included:

Broader communication by the Commission

Many participants expressed frustration that the 21 day limit for lodging applications was not, in their view, advertised sufficiently on the Commission's website or in Commission information, with some saying that they did not realise that the limitation existed.

...[The Commission] really needs to highlight the 21 day limit and that if you apply outside that then you have limited chance of getting through...

...Lots of people don't even know that they have a complaint to pursue until after some time. In that timeframe it's too short.

Some also felt that concerned about the broader flow of information and follow up by the Commission during the course of their matter.

...The lawyer and the service were great. If anything, the [Commission] were more difficult to get information out of – I understand that we were one of many but they need to improve their communication processes a LOT.

Participants also would have appreciated follow up from Commission staff to see how their matter was progressing. This idea of follow up or a 'feedback loop' was echoed in comments from some lawyers, who noted that, while some firms hear back from clients, many do not know what the result is from their consultation matters.

...It'd be interesting to know the outcome, to get some sort of formality or sign off from the Commission – for example, just a proforma email or form...

More broadly, a wish for more contact with Commission staff was a theme throughout consultations with law firms, many noting that they appreciated the opportunity to meet with staff at Christmas events each year and that staff always recognised that firms have make a valuable contribution to the program.

Firms noted that it would be useful, however, to have a key contact person and contact details for a Commission staff member in relation to the program, as opposed to the unfair dismissal register email address.

Eligibility for the program

Another theme to emerge was unease about the provision of pro bono representation to respondents. This included a strong sense of injustice felt by some applicants who were aware of the provisions in the legislation regarding legal representation and did not understand why respondents were allowed to have representation in circumstances where applicants were not:

...They should be doing a survey about representation at the FWC. It's SO UNFAIR about representation inequality, self-representation is set out in the Fair Work Act, the FWC went against the Act, why are they doing that? Why are companies allowed to pay money for a barrister/solicitor, when parties are meant to be self-represented?

Some participants felt the lack of representation at hearing keenly and suggested that, even if their pro bono lawyer could not follow the matter through, the Commission could facilitate a duty lawyer service.

Similarly, though all firms who were involved with the pilot program see the current program as more in tune with firms' internal pro bono programs, some still noted tension between the objectives of the two.

For three firms, the Commission's program either fits into or actually forms their own pro bono practice, but for the other five, it generally falls outside their own practice because it not means tested.

...the only eligibility is the jurisdictional objection and that they are not represented, there is no eligibility on income, or size of business...the result is that it is not within our program, so it's even more important to make sure we keep check of resources.

The issue of providing pro bono to employers as respondents was a common theme among law firms:

...In this program, most employees would fit our criteria; respondents mostly would not... there is just no way to shoehorn them in to our pro bono.

...If they came already means tested that would be a better fit. I do question us providing pro bono to employers, it's not really the way it works usually.

None of the lawyers interviewed seemed to understand whether/what kind of triaging the Commission carries out before clients are referred to them and recognised that means testing would require additional resourcing. Some law firms noted that they carry out their own assessments anyway during the course of the consultation, and all firms are comfortable in determining what level of support they are prepared to offer based on the a merits assessment. Nevertheless, Justice Connect was suggested as an example of a program that carries out an element of triaging before referring clients and six out of the eight law firms noted that some level of means assessment would be beneficial for their management of the scheme.

Irrespective of the triage and means testing issues, however, all firms noted that the pro bono program added to the firm's broader pro bono program and certainly did not detract from it.

Training

Lawyers from firms who had been with the program since inception had attended previous training and found it very useful. Firms who were newer to the program and hadn't yet had the benefit of attending a training session agreed that some training around the program itself would be beneficial.

Law firms with lawyers who had attended training in the past identified the following as positives:

- Having a senior member of the Commission running the training program and offering valuable insights into the Commission's processes. This was seen as a real drawcard.
- Advocacy training, particularly for junior lawyers, was seen as a highlight, even though advocacy was acknowledged as not a core part of the current program.
- Advice or training around how to approach a consultation when the jurisdictional outcome is not likely to be positive for the client.
- Information on how the Commission triages clients for the pro bono program.
- Some understanding as to how other firms manage the program.
- Training on procedural matters relevant to the program, such as a clearer understanding of the level of assistance firms are expected to offer, as well as issues regarding their day to day involvement, such as what lawyers should do when they can't make contact with a client; the level of information that clients will have; clients' expectations and an idea as to the point at which lawyers are able to bring the scope of the service to a close.

The Justice Connect training model was again suggested as a good example of a training program that offers relevant procedural training for participating lawyers.

Overall value of the pro bono legal advice

Participants

The majority of applicants (27) and all respondents were generally appreciative of the advice they received, even when they were not happy with the outcome. This was in part because they felt that someone had listened, while some said that it gave them confirmation that they were on the right track and were happy when advice was flexible and met their needs.

Others said that they had adopted pragmatic advice about getting certain information or sending certain emails; and had gained confidence about what to expect and were better able to deal with the outcome, regardless of whether it was positive.

...I was looking for strategy more than process...and they did help me with that. It met my needs...

...It helped me to understand that I potentially didn't have as clear cut case as I thought and I had to get my stuff together

...the lawyer told me what the set up would be, I was expecting informal processes but it was very formal, very intimidating.

...[The advice was] 100% on the money, all the way through.

...At least the lawyer gave me the information beforehand, I have no regrets about going through with it even though there was no extension of time.

...We got a wonderful result because of the lawyer's advice.

...Having pro bono is like having your hand held, it's a good process.

...[The lawyer] was great, easy to talk to, switched on, everything at [their] finger tips, very capable.

...Even if we didn't get the result we wanted, we got as far as we could have. I would have been happy with them either way, I love the program and I'm very grateful, would recommend it to anyone.

...What I really like is that they were impartial, as opposed to a paid lawyer who are trying to make money and charging for all of it....If you really listen to the advice you get, you save yourself a lot of grief.

...[this program] needs to be there, regular people just can't do this all on their own...

Of note was the one applicant mentioned previously who said that, while the advice was very useful, they really needed assistance at the hearing in order to make the necessary arguments.

This said, eight applicants felt that the advice had simply come too late, was not relevant or was generally not helpful, with one feeling particularly aggrieved, as previously mentioned, that advice on matters other than the first jurisdictional issue was not provided; and another feeling that:

...[the lawyer] wouldn't listen, just didn't hear what I was saying.

Here it is important for the Commission to note that participants' perceptions of the program were significantly affected by the extent to which they felt that their lawyer cared about their case and had tried their best to help them, regardless of the outcome.

This was also the case when clients felt heard by the Commission, despite not being successful:

...I went to hearing, it was decided against me but the Commissioner listened to me, to my entire case [and] the lawyers probably didn't expect that. I got a chance to explain, she did not allow the extension but I was happy she let me talk. I had these things heard and I have a transcript as a handy record if anyone ever questioned me about it all.

Law firms

The reflections of the majority of participants correspond with observations of lawyers and Commission members that the provision of the advice usually gives parties more confidence and capacity to navigate the hearing, and also prepares them for what may occur. Lawyers highlighted the following aspects of the program as key benefits for clients:

- The program gives clients the opportunity to be heard and hopefully to 'move on'. Even when clients have no chance of success, understanding the issues enables them to decide whether to pursue the application and accept the eventual outcome.
- Clients get very succinct advice because of the one hour limit, it sets expectations and enables lawyers to crystallise the issues.
- Some lawyers focus on building capacity of clients, for example helping small businesses to write their own documents and to learn some relevant skills.
- Clients experience significant disappointment when the extension of time affects their entire case. Lawyers noted that their advice can give clients a sense of direction and therefore noticeably reduces their level of anxiety.

Unprompted, all firms identified substantial benefits to the Commission of the scheme – helping to improve efficiency by helping meritorious claims to be more efficient and eliminating unmeritorious ones and by providing good quality advice, which means that matters take up less time for everyone when they get to the Commission.

Expanding the program to other areas

During consultations with law firms, Commission staff and Members were asked about whether they saw value in expanding the program to other areas of the Commission's work. Law firms and Commission staff suggested that the scope of the program was 'about right', with staff noting that they did not currently have the resources to expand its reach, as much as they would like to in theory.

Commission members had mixed views about expanding the program, though all were enthusiastic about increasing the Commission's capacity to facilitate access to justice, noting the value of legal advice in terms of increasing parties' readiness to settle or to run their cases more effectively:

...when they've had help the cases are invariably more fluent, arguments are put in a more cogent way. It's relatively easy to identify whether a person has had some form of assistance.

Certainly, all agreed that jurisdictional objections were an appropriate place to target limited resources:

It is more common in jurisdiction matters to have applicants who have difficulty accessing the justice system – they may have language difficulties; have put in their application late; or not understood the process. Given there's a higher proportion of those in the jurisdiction basket, it's appropriate to have pro bono there.

Jurisdiction matters are the low hanging fruit, they can be mind-bogglingly complicated for regular people...

In terms of extending the program...the balance is about right as it's not too onerous on firms...

Nevertheless, some Members were keen to expand the program to applicants more generally, one noting the value of another program that the Commission had piloted in Western Australia in which firms had provided advice on the merits in general protections matters. The CIJ evaluated this program and found it to be of value, but understands that the program did not proceed on an ongoing basis.

Suggestions for extending pro bono assistance also included meritorious but difficult 'test cases' that would be 'mission impossible' for applicants without legal representation. Another was the anti-bullying jurisdiction:

People need help to repair relationships in bullying matters – there could be facilitated mediation assistance and perhaps some form of representation on a pro bono basis.

That said, Members said that the Commission had a responsibility to design user friendly processes that did not require legal assistance, but to facilitate support when parties most need it. To this extent the Commission has facilitated a pilot Workplace Advice Clinic for applicants in unfair dismissal and general protections matters in which parties can attend the Commission's Melbourne premises and receive an hour's free legal assistance from two community legal centres which service the program.

...Access to justice is a bottomless pit and we're trying to approach it in a series of targeted ways.

Discussion and findings

Awareness and access – communication of the program

Since the pilot program was developed, important refinements have been made to the information sent out to parties about the program to improve how it is communicated and to help parties understand its purpose. Indeed, lawyers commented that parties now come to the consultation better prepared and with a clearer understanding of what they can expect from the consultation. Participant feedback corresponded with lawyer observations, with almost all applicants and respondents noting that they prepared for their consultation in accordance with the Commission's instructions. The majority of participants generally understood the level of commitment from lawyers prior to the consultation.

However, participant feedback also suggests that a level of inconsistency exists in terms of *how* parties are informed about the program and at what point. Some discovered information within written materials; some were advised of it by phone; some saw it on the Commission website and others heard about it in other conversations during the course of making their application. Several participants also suggested that the information about the program provided in written form had 'gotten lost amongst all the other stuff', while mention of the program is, in the CIJ's view, not especially evident on the Commission website.

This may suggest a lack of consistent process by the Commission, although obviously parties to a legal proceeding – particularly first time users of the legal system who are highly stressed and unfamiliar with legal terms and processes – are not always able to absorb all the information given to them whether verbally or in written form. This makes it possible that some participants who believed that they had not received information over the phone had simply not absorbed mention of it at the time.

That said, parties from a culturally and linguistically diverse background or who are unfamiliar with legal terminology could find some of the wording used difficult to understand. For example, one applicant presumed that he could *only* have a telephone consultation despite the fact that it would have been more effective face-to-face.

Others commented that the term 'pro bono' is not widely understood, with one applicant stating that the information is written 'by a lawyer, for a lawyer'. One respondent suggested that the words 'pro bono legal advice' should be replaced with more specific wording that clarifies that the program involves a free legal consultation to establish whether parties wish to pursue their application.

In light of this feedback, the Commission should review the information it provides about the program – including on the Commission website – to ensure that it is written in **plain English**; and that legal terms such as 'pro bono' and 'exceptional circumstances' are either clarified or replaced with simple and clear wording. Given the difficulties faced by parties from culturally and linguistically diverse backgrounds, the Commission could also provide some information to law firms as to the additional issues faced by – and some direction as to how best to proceed with – parties who are not fluent in English.

In the CIJ's view – and as reflected in the observations of Commission staff – this feedback also indicates a need for the Commission to ensure that parties are informed of the availability of the program through *several* means. To ensure consistency, the CIJ suggests that this multi-pronged approach be adopted as a **standard checklist** to be used by Commission staff. This may be particularly useful when staff turnover may be impacting on staff's awareness of the program, although ironically this turnover can contribute to broader awareness of the program across the Commission's other work areas.

Finally, the CIJ suggests that it may be useful for the Commission to consider alerting people to the availability of the program **earlier in their application process** – by highlighting both the 21 day limit on applications and the availability of the pro bono program better on the Commission's website.

Clarity and efficiency of processes

Participants were generally satisfied with the process of arranging their consultation with the lawyers but frustration was expressed by some in relation to Commission administration processes. Commission staff, lawyers and participants all highlighted administrative issues as having the potential to impact negatively on parties' access to justice, including where law firms themselves were not contacting clients in a timely fashion because of the delay that their conflict checks created.

Participants' overall sense of justice in the feedback provided was aligned not just with their experience with a lawyer but also with their experience of the process, including the Commission's administration of the program. Where the Commission's process had been efficient, participants considered the administration unremarkable. However where the administration was viewed by participants as having some gaps, it negatively impacted on their broader experience. Even where participants were happy with the legal advice provided, some pinpointed failings in the administration of the program or in the management of their applications that they perceived as having a negative effect on the outcome.

Echoing this feedback, most participating law firms noted that materials are sometimes provided by the Commission quite late in the process, and that often materials forwarded by the Commission may not be complete or may be lacking important details. Some firms therefore expressed a preference for the Commission to provide them with a **mini-brief** when allocating matters and to forward all information relevant to the matter – including the date on which the application was filed - as soon as the client has been allocated to that firm. They also suggested that the **timeframe be extended** to allow for clients to receive effective advice, as well as that the Commission provide **advance notice** at the beginning of the relevant week as to how many matters may be likely to be referred to allow for workload planning. In the CIJ's view, these are valuable and common sense suggestions.

In addition, some lawyers and participants expressed a preference for the consultation to be offered at an earlier stage in the process. Lawyers commented that they were often providing the advice too late in the process, with some noting that they would like to be of more assistance in the consultation as opposed to just 'delivering the bad news'. Again, the CIJ considers there to be considerable value in the Commission revisiting the point at which discrete pro bono assistance is offered to parties.

Program scope

The majority of applicants were happy with the scope of consultation they received, even when the outcome was not positive. Interestingly, less time spent with a lawyer did not equate to dissatisfaction if the participant felt they had received sound advice. In fact, participants identified many other key aspects of the service that contributed to their overall satisfaction with the service or outcome, being quality advice that clarified their issues for them; feeling listened to and heard; having advice provided at a timely stage in the process; and being provided with advice that was relevant to their issue by a lawyer who had no financial interest in the case.

While the majority of applicants were grateful for relevant advice, a small number expressed frustration with the consultation due to the inflexibility of the advice provided. Two were already well prepared, but hoped that the consultation would be able to provide them with advice on issues beyond the first jurisdiction issue; one in particular sought assistance with – but struggled to determine – calculations of wages and found this particularly difficult because the applicant was non-English speaking.

Meanwhile, participating law firms were generally happy with their level of involvement with the program, and find the current model much more manageable than the earlier program. Some observed that the workload has reduced significantly, and that changes in the program have meant that they are better able to continue supporting the program. As one lawyer noted, by confining client expectations to the one hour consultation, clients arrive expecting less. Yet lawyers are more inclined to provide additional assistance where a matter appears to have merit. By setting expectations at the outset, participants are better able to identify the value of the service they receive.

Nonetheless, even with the confined one hour format, lawyers felt it important to acknowledge that firms spend an average of three to five hours per matter and sometimes choose to spend more where cases are deemed to have merit. To this extent, many lawyers observed that some further guidance as to the program's scope would be helpful; such guidance could clearly set out program goals and objectives, provide information on how to provide referrals for unrelated issues, and clarify expectations for lawyers and participants to make sure clients and lawyers are 'on the same page'. This was also suggested as a possible area to cover in training.

Many firms have established their own frameworks for managing the program, but some would still appreciate confirmation that they are operating in accordance with program objectives and would like **clarity about scope** from the Commission in this regard. They also indicated that they would appreciate being provided with a **referral guide** which they could use when clients had matters which the pro bono consultation was not designed to address.

Given that two firms mentioned the issue of **clarity of scope** in the context of looking at their ongoing involvement with the program, it would also likely assist in ensuring firms' continuing involvement in the program, or make it easier for new firms to be involved with some clarity around those issues.

Outcomes

Feedback from participants indicated that, while some applicants withdrew their application upon receipt of legal advice that they would not be successful – including a number who were very grateful to be saved the distress of a formal hearing – others proceeded nonetheless.

Of these participants, a minority were unhappy with the advice, but most indicated that they at least proceeded better prepared for what was to come and were more able to accept the outcome. Just as importantly, a number of participants were advised about a more effective course of argument, or a more pragmatic path in which they could negotiate and settle successfully prior to hearing.

Rather than contribute to a predictable course of action, therefore, the pro bono advice contributed to participants' overall experience of justice, feeling that they had been heard and understood; and that they in turn understood the legislation and Commission processes better.

That said, participants and law firms alike indicated that they would like to provide and receive feedback about outcomes as their matter proceeded. Participants would like to be contacted by Commission staff to ascertain what had happened to them, and law firms would like to hear what the results of their advice may have been.

Consequently the CIJ suggests that the Commission develop a process for gaining and providing this feedback, potentially by including this requirement on the **checklist** suggested earlier. It also encourages the Commission to develop an **ongoing review process** where it seeks and maintains data from participants about their experience of the program and broader Commission processes.

Other issues

At present, all firms are happy to continue with the program. However seven of the eight firms interviewed mentioned the complexities involved in advising respondents through the pro bono program. Almost all lawyers acknowledged the fact that respondents would generally not meet their firm's pro bono requirements. Most asked for clarity around how the Commission triages clients and almost all raised the issue as to whether the Commission is able to conduct means testing of parties. Whilst firms recognise the resource issues that limit the Commission's ability to means test clients, some level of triage adopted by the Commission would be welcomed by almost all firms consulted.

Two lawyers from different firms highlighted these issues as leading them to consider whether they may add more value by working with a means tested program like Justice Connect. This is important feedback to note for future relationships with law firms and for sustainability of the program. The Commission should be aware that law firms are generally happy to continue with the program, but that they are generally involved despite the fact that it does not sit within their pro bono program. It should also be acknowledged that firms are being flexible in order to fit the program into their firm structures.

Similarly, a significant issue for a small number of applicants was their sense of injustice stemming from the Commission allowing respondents to be represented at hearing. Given that these applicants were aware that the *Fair Work* legislation discourages legal representation, they were unable to understand why the respondents were entitled to legal representation at the hearing when the applicants could not afford it.

In this context, one applicant made the suggestion that the Commission could consider having an advocate available for applicants and respondents to assist on the day of the hearing. This particular applicant had been advised that they had a strong case, and the lawyer had provided additional assistance to support the applicant's arguments at the hearing. However the applicant felt that because she couldn't argue these arguments confidently and was intimidated by the Commissioner and the hearing process, she needed additional support on the day.

Conclusion

The CIJ commends the Commission for seeking to continually refine and improve their processes to ensure that people have access to justice, and in particular for its commitment to improving the pro bono program to facilitate the provision of legal advice in complex jurisdiction matters. The Commission's ongoing efforts have resulted in a program that is overwhelmingly viewed as providing a positive experience for applicants, respondents and participating law firms, and as providing essential legal support for many parties who would otherwise be unable to access it.

This evaluation indicates that recommendations for improvement from previous evaluations have been successfully adopted, as have internal efforts for ongoing refinement of the program. The proactive approach that the Commission has taken in both developing and adapting the program since inception is quite distinct and indicates that the Commission is not only committed to assisting the increasing number of self-represented parties who appear before it, but to ensuring that this assistance is as effective as it can possibly be.

Consequently, the CIJ makes the following recommendations for the program's continued place as an established fixture in the Commission's processes.

Recommendations

1. That information about the pro bono program is redeveloped on the website so as to be more prominent and user friendly as a plain English introduction for potential participants in the program.
2. That information about the program be included on the Notice of Listing.
3. That information about the program be redrafted in plain English and should indicate, in addition to the current checklist provided to parties about the documentation which should be prepared and brought to the appointment, that the appointment involves:
 - A free one hour consultation is available to help eligible parties decide how to proceed
 - That lawyers will contact parties within a certain timeframe (to be determined by the Commission pursuant to recommendations below)
 - That, if the lawyer does not contact the party within that time frame, they should advise the Commission
 - That the consultation may be via phone or in person, depending on the situation.
 - That parties should advise the Commission if they need to have the consultation in person because, for example, they are not fluent in English. Parties should also advise the Commission if they need an interpreter.
4. That a standard checklist be developed for use by Commission staff to ensure that parties are informed of the pro bono program's availability by several means – including via written information and by phone.
5. That case managers and pro bono managers meet regularly to increase efficiency and awareness of the program processes.
6. That the Commission consider providing advice at an earlier stage in the process so that the advice is able to serve both the access to justice needs of the clients as well as the Commission's efficiency needs.
7. That information be provided by the Commission to law firms clarifying the scope of their involvement in the program, including expectations in relation to time allocated to clients; the extent to which they should remain involved with clients; the information that clients should have and that the Commission should provide.
8. That a mini-brief be developed for inclusion documents forwarded to law firms which includes the date of the application and other relevant information. Justice Connect is a possible model to investigate for replication. Additional information from the Commission could also include procedures to adopt for clients with English as a second language, so that lawyers and Commission staff follow specific procedures for these parties to ensure they are provided with advice in a way that best suits their needs.
9. That the period in which lawyers must schedule consultations with clients is extended by one or two days.

10. That a brief guide or referral list is developed outlining where clients can go for support or advice about issues that arise in connection with employment law matters but do not fall within employment law, such as discrimination, so that lawyers are able to refer clients on if needed.
11. That the Commission establish a process for the receipt of feedback about the outcome of matters from program participants, as well as the provision of this information to relevant law firms.
12. That the Commission provide information to lawyers which explains the rationale behind providing advice for respondents in order to gain their support for providing pro bono advice to all parties and develops brief guidelines around how the Commission triages clients before referring them to law firms.
13. As an alternative to recommendation 12, that a simple means test for parties (e.g. simple declaration of assets and salary/wages) is introduced to identify eligibility or that the Commission establish a way of triaging clients before referring them to the law firm.
14. That annual training is provided to lawyers to encourage ties between law firms and the Commission, as well as to clarify the program scope, goals and expectations of the program. The Commission could also consider the introduction of twice-yearly Q&A sessions between lawyers and Commission staff. This training should consider the fact that firms have different experiences of working with individuals clients.
15. That the Commission make regular connections with external service providers such as Justice Connect, Jobwatch, unions, and other referring bodies to promote the program to eligible parties.
16. That the Commission:
 - a. review the numbers of respondents versus applicants who are represented at hearing to establish the effectiveness of self-representation as opposed to allowing for representation in more matters.
 - b. clarify for parties the circumstances where representation is allowed.
 - c. consider making advocacy support available at the Commission for hearings (for example, immediately prior to the hearing) where one party is represented but the other is unable to afford representation.
17. That a cost benefit analysis be conducted of parties withdrawing post-advice, compared with the cost to the Commission of parties proceeding to hearing and not succeeding. This would be conducted with a view to ensuring that additional resources are allocated to pro bono program management.
18. That, following this analysis, the Commission consider facilitating pro bono assistance in other areas, such as the anti-bullying jurisdiction or other matters which have a public interest element.

19. That internal evaluation measures are embedded in the program, including by developing a survey that all participants can be asked to complete prior to and following their consultation.