



NATIONAL PRO BONO RESOURCE CENTRE

Submission to the Law Council of Australia

**Legal Profession Uniform Law:
Continuing Professional Development Rules**

6 March 2015

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ABOUT THE NATIONAL PRO BONO RESOURCE CENTRE

The **National Pro Bono Resource Centre** is an independent centre of expertise that aims to grow the capacity of the Australian legal profession to provide pro bono legal services that are focused on increasing access to justice for socially disadvantaged and/or marginalised persons, and furthering the public interest.

While the **Centre** does not provide legal advice, its policy and research work supports the provision of free legal services and informs government of the role that it can play to encourage the growth of pro bono legal services. The **Centre's** work is guided by a board and advisory council that include representatives of community legal organisations, pro bono clearing houses, the private legal profession, universities and government.

Established in 2002 as an independent, not-for-profit organisation at the University of New South Wales, it was envisaged that the **Centre** would:

*“Stimulate and encourage the development, expansion and co-ordination of pro bono services, as well as offering practical assistance for pro bono service providers (and potential providers). The **Centre** would play the key roles of facilitating pro bono practice and enabling the collection and exchange of information.”*

The strategies that the **Centre** employs to grow pro bono capacity include:

Strengthening the place of pro bono legal work within the Australian legal profession as an integral part of legal practice by

- being a leading advocate for pro bono legal work;
- promoting the pro bono ethos and increasing the visibility of pro bono legal work;
- developing policies and advocating for measures to encourage an increase in the quality and amount of pro bono legal work; and
- producing resources and sharing information in Australia, regionally and internationally that builds pro bono culture in the Australian legal profession and participation by Australian lawyers in pro bono legal work.

Providing practical assistance to facilitate, and remove barriers to, the provision of pro bono legal services by

- undertaking research on how pro bono legal assistance can best respond to unmet legal need, including the identification of best practice in its provision;
- engaging in policy development, advocacy and law reform on issues that have an impact on pro bono legal services;
- providing practical advice to lawyers and law firms to support their efforts to increase the quantity, quality and impact of their pro bono work;
- informing community organisations about the way pro bono operates in Australia; and
- leading in the development of new and innovative pro bono project and partnership models.

Promoting the pro bono legal work of the Australian legal profession to the general public by

- informing members of the public through the media and presentations about the pro bono legal work undertaken by members of the Australian legal profession.

The **National Pro Bono Resource Centre** operates with the financial assistance it receives from the Commonwealth and State and Territories Attorney-General Departments, and support from the Faculty of Law at the University of New South Wales.

SUMMARY

One CPD point for a day's pro bono work

The Centre thanks the Law Council of Australia (**LCA**) for its invitation to provide comments and submissions on the proposed Continuing Professional Development Rules (Solicitors) 2014 (**CPD Rules**) to be made pursuant to the Legal Profession Uniform Law.

The Centre submits that the LCA should amend the proposed CPD Rules to permit a lawyer who undertakes at least a day's (7.5 hours) legal work on a pro bono basis to claim one (1) CPD unit towards the required minimum 10 units of CPD Activity, with the following parameters in place:

- a) the definition of pro bono basis¹ should be the one set out in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014 (Vic)*;
- b) a solicitor may claim only one CPD unit per CPD year for the pro bono legal work undertaken during that year;
- c) a solicitor must undertake at least seven and a half hours of the pro bono legal work to claim one CPD unit per CPD year; and
- d) there should be no compulsion to undertake any pro bono legal work that counts towards the required minimum 10 units of CPD activity.

This change would:

- a) formally recognise that legal work undertaken on a pro bono basis contributes to a lawyer's professional development;
- b) encourage lawyers of all levels of experience to participate in pro bono legal work; and
- c) enshrine in a key document of the Australian legal profession a formal recognition of an important ethical value of the profession.

If Australian jurisdictions adopted this suggestion, they would not be alone. There are nine jurisdictions in the USA who similarly permit their attorneys who take on pro bono cases to earn credit toward mandatory CLE requirements.

Details are available through the American Bar Association website at <http://apps.americanbar.org/legalservices/probono/clerules.html>

¹ The definition is found in Clause 8 of Schedule 1 and is based on the definition of pro bono legal work promulgated by the Law Council of Australia in 1992.

1. PRO BONO LEGAL WORK TO BE PART OF CPD RULES

1.1 PRO BONO AS PROFESSIONAL DEVELOPMENT

Pro bono publico or pro bono (a Latin phrase for “for the public good”) refers to professional work undertaken voluntarily and without payment (or at a significantly reduced fee), as a public service.

Clause 8 of Schedule 1 of the *Legal Profession Uniform Law Application Act 2014 (Vic)* defines ‘pro bono basis’ as follows:

8 Meaning of *pro bono basis*

For the purposes of this Law, an Australian legal practitioner provides legal services on a pro bono basis where—

- (a) the practitioner, without fee, gain or reward or at a reduced fee, advises or represents a client in cases where—
 - (i) the client would not otherwise have access to legal services; or
 - (ii) the client's case raises a wider issue of public interest; or
- (b) the practitioner is involved in free community legal education or law reform; or
- (c) the practitioner is involved in the giving of free legal advice or representation to charitable and community organisations.

Unlike other volunteerism, pro bono work involves use of specific professional skills to service those who are not able to afford them. In order to provide professional service to a client, this work often requires a lawyer to develop a knowledge and understanding of areas of law and practice in which they don’t ordinarily work. It is often challenging work.

For example, this may occur in a clinic situation where training and supervision from a practitioner experienced in that area of practice is available², or it may require a practitioner to develop that skill and knowledge themselves. In either case the lawyer involved, by providing the legal service, undertakes professional development by reason of their involvement in the pro bono work. They learn new skills, new areas of law and practice, and are better lawyers for the experience.

The Centre submits that the Legal Profession Uniform Law represents a timely opportunity for the LCA and the Australian Bar Association (**ABA**) to formally recognise this aspect of professional development within its CPD Rules. Creation of these CPD Rules is an important step towards having a national profession and the pro bono legal work of its members has become increasingly prevalent and visible (see Growth of Pro Bono below).

The promotion and formal recognition of the legal work undertaken by Australian lawyers sits squarely with the vision of the LCA - to have a strong and respected Australian legal profession³. The

² E.g. Expert training in dealing with vulnerable clients, and how to address the most common legal problems of the homeless that arise, and legal supervision is provided to volunteer lawyers at Homeless Persons Legal Clinics in most States and Territories of Australia. E.G. Expert supervision and training is provided by Justice Connect lawyers in Victoria and Public Interest Advocacy Service (PIAC) lawyers in NSW.

³ Law Council of Australia Strategic Plan 2015-2020, Our Vision.

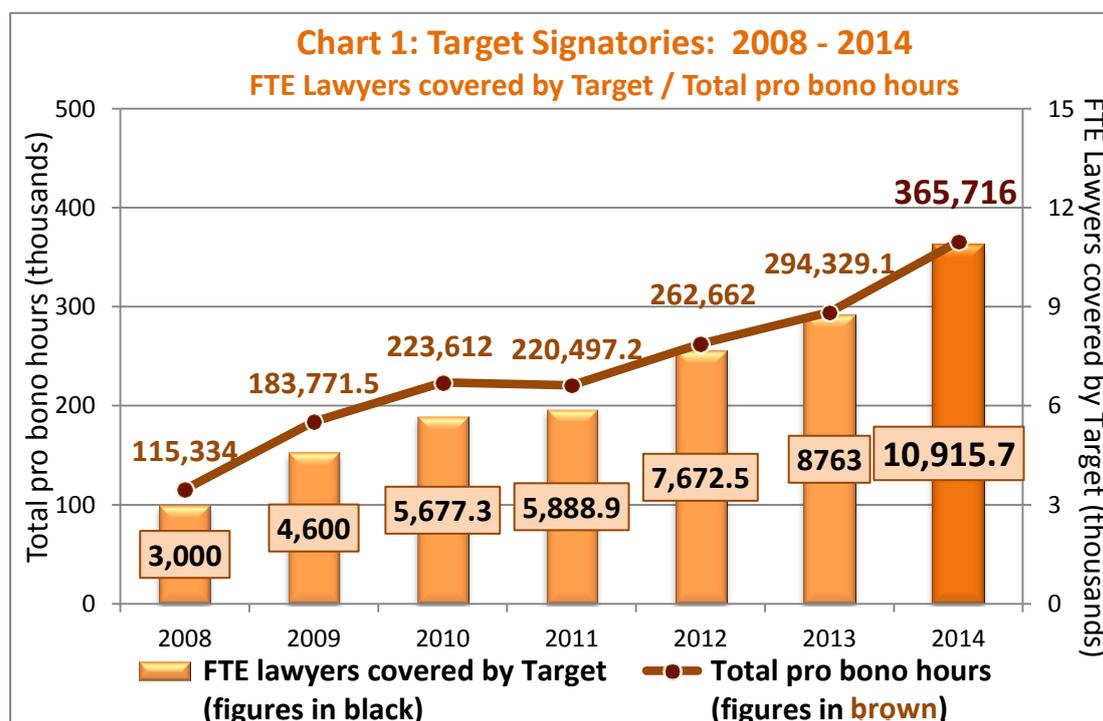
profession is stronger by its members developing a broader range of skills and experience, and reaching out to help, and seek justice for disadvantaged communities in Australia. Also pro bono legal work adds considerably to the respect in which the community holds the legal profession because it demonstrates that members of the profession do care about the communities in which they live and work.

It also supports one of the LCA’s principal responsibilities, that is to promote access to justice and its effective delivery⁴. One of the key accepted reasons why lawyers undertake pro bono work is because every lawyer has an ethical duty to facilitate better access to justice. Pro bono legal work is provided to those persons who wouldn’t otherwise be able to obtain access to legal help and thus its provision promotes better access to justice.

Formal recognition in the CPD rules in the way suggested will raise its visibility in a measured way within the profession and we thereby suggest, it will encourage more lawyers, particularly new lawyers to make pro bono work part of their ordinary professional activities.

Growth of Pro Bono

A significant growth in the amount of pro bono legal work undertaken by members of the Australian legal profession, is an indicator of how lawyers themselves see the increasing importance of pro bono legal work in their ongoing professional development, as can be seen from the graph below that illustrates the uptake of lawyers signing up to and meeting the National Pro Bono Aspirational Target of at least 35 hours per lawyer per year for the period from 2008 to 2014.



⁴ Ibid. See Principal Responsibilities in the LCA Strategic Plan

The surveys undertaken by the Centre of all Australian firms with more than 50 lawyers confirm this trend and show a growth from an average of 21 to 31.7 pro bono hours per lawyer over the same period⁵.

This is a growth that the legal profession can and should be proud of. As we move towards a national system of regulation, this new edition of the CPD Rules provides an appropriate opportunity to formally acknowledge that this is an increasingly widespread way in which lawyers undergo professional development.

1.2 NATURE OF PRO BONO LEGAL WORK

The Centre submits that any legal work that falls within the definition of work done on a “pro bono basis” should qualify for the purposes of the CPD Rules. This definition was developed by the Law Council of Australia in 1992 and is now found in the *Legal Profession Uniform Law Application Act 2014*⁶.

It is also submitted that all work done on a “pro bono basis” would fall within the terms of Rule 4 - CPD Content and thus there is no need to exempt pro bono work from those requirements:

4 Each CPD activity undertaken by a solicitor must be an activity:

- 4.1.1 of significant intellectual or practical content and must deal primarily with matters related to the solicitor’s practice of law; and
- 4.1.2 conducted by persons who are qualified by practical or academic experience in the subject covered; and
- 4.1.3 which seeks to extend the solicitor’s knowledge and skills in areas that are relevant to the solicitor’s practice needs or professional development.

Pro bono work is often undertaken in a context where supervision by a lawyer experienced in the relevant area of law and practice is responsible for any legal advice provided. In this way this is an activity conducted by persons who are qualified by practical or academic experience in the subject covered. To the extent that there is doubt or concern about this matter, the words ‘or supervised’ could be inserted after the word ‘conducted’.

The Centre submits that pro bono legal work can potentially fall within any of the sub-categories identified in proposed Rule 3.1, as outlined below.

- a) Ethics and professional responsibility
- b) Practice management and business skills
- c) Professional skills
- d) Substantive law

⁵ National Law Firm Pro Bono Surveys: 2008, 2010, 2012, 2014 available at <http://www.nationalprobono.org.au/page.asp?from=4&id=31>

⁶ Clause 8 of Schedule 1.

Typical pro bono legal work is likely to fall within either category (c) or (d), although it is possible that some pro bono legal work could contribute towards a solicitor's professional development in ethics and professional responsibility and even practice management and business skills.

However, because of the difficulty of classifying different types of pro bono legal work in this way, it is suggested that pro bono legal work should NOT be able to be counted towards any of the 'sub-quota' requirements in Rule 3.1. It is submitted that this would be understood from the overall context of the Rules without the need for any specific words to be added to the Rules. If clarification was required it could be done by regulation made by the designated local regulatory authority.

The Centre also notes that currently (and in the proposed CPD Rules⁷) a CPD activity may consist of the membership of a committee, taskforce or practice section of a professional association, designated local regulatory authority or the LCA or of other committees, provided that the solicitor regularly attends its meetings, if the work performed on the committee, taskforce or practice section is of substantial significance to the practice of law and is reasonably likely to assist the solicitor's professional development.

The Centre fully acknowledges the importance of such activities and their potential to assist in the professional development of a solicitor involved, though activities that may not be in the form of traditional educational settings.

Similarly, the Centre submits that pro bono legal work can contribute to the professional development of solicitors of all levels of experience, in particular for the younger generation of solicitors without it being in the form of traditional educational settings.

1.3 ONLY ONE CPD UNIT PER CPD YEAR

The Centre acknowledges that it is appropriate that there is a limit on the amount of CPD units that can be claimed for undertaking pro bono legal work, similar to the limits placed on other categories referred to section 1.2 above.⁸

In this regard, the Centre recommends that only one CPD unit may be claimed for any pro bono legal work undertaken per CPD year.

Note: Please see the suggested drafting changes to Rule 6.2 of the proposed CPD Rules below (by way of guidance only).

1.4 7.5 HOURS OF PRO BONO LEGAL WORK FOR ONE CPD UNIT

The Centre recommends that one CPD unit can be claimed for seven and a half hours of pro bono legal work unlike other CPD activities where one hour's activity provides one hour's credit.

This approach encourages lawyers to undertake pro bono legal work, and reinforces the 'service to the community' ideal of the profession. These arguments are consistent with and support the LCA's

⁷ Rule 5.1.4 of the proposed CPD Rules.

⁸ Rule 6.2 of the proposed CPD Rules.

Vision of a strong and respected profession. Whilst a single hour of pro bono legal work may be quite valuable, 20% of the Australian legal profession has already acknowledged that 35 hours of pro bono legal work per year is a reasonable amount to aspire to provide⁹. Therefore 7.5 hours is a modest and a minimum amount of pro bono legal work to undertake, in order to be able to claim one CPD unit.

The increased ratio from 1:1 to 7.5:1 can also be used as an argument in reply to those who may say that some pro bono legal work does not produce the same level of professional development benefits to a solicitor, in comparison to other CPD activities of more traditional educational form.

Note: Please see the suggested drafting changes to Rule 6.1 of the proposed CPD Rules below (by way of guidance only).

1.5 NO COMPULSION TO UNDERTAKE PRO BONO LEGAL WORK

The Centre has always held the policy position that pro bono legal work should be voluntary and therefore the Centre does not support any form of compulsion for solicitors to undertake pro bono legal work acknowledging that in certain jurisdictions¹⁰, compulsion through professional regulation does exist.

Therefore it is suggested that this proposed new CPD activity is not added to Rule 3, CPD obligations.

1.6 OTHER CONSIDERATIONS

The Centre believes that minimal changes are required to the proposed CPD Rules, in order to recognise and reward pro bono legal work in the proposed CPD Rules.

In particular, the Centre believes that record keeping and verification rules in the proposed CPD Rules¹¹ will be sufficient to deal with these issues in relation to pro bono legal work.

Suggested changes to the proposed CPD Rules

The Centre suggests, by way of guidance only, the following drafting changes to the proposed CPD Rules (by inserting the underlined parts).

2.1 In these Rules:

“pro bono basis” has the same meaning as it does in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014 (Vic)*

5.1 A CPD activity may consist of:

5.1.6 legal work undertaken on a pro bono basis.

⁹ As at 1 July 2014, the National Pro Bono Aspirational Target covered approximately 10,915.7 FTE legal professionals or approximately 20% of Australian lawyers. See Seventh Annual Performance Report, October 2014, p. 5.

¹⁰ Such as South Korea and South Africa.

¹¹ Rules 9 and 11 of the proposed CPD Rules.

6.1 CPD unit means:

6.1.4 in relation to a CPD activity referred to in Rule 5.1.6, seven and a half hours of the activity.

6.2 In calculating the relevant CPD units of CPD activity in a CPD year, the total must not include:

6.1.5 more than 1 CPD unit of CPD activity referred to in Rule 5.1.5

Suggested changes to the Proposed Continuing Professional Development Rules: Barristers 24 November 2014

The Centre notes that Rule 3 proposes that each designated local regulatory authority has the power to make policies pertaining to the CPD rules including the power to impose a cap on the points that may be gained in any one CPD activity, and the format of CPD activity. Therefore under these proposed rules, any credit for work undertaken on a pro bono basis would be a matter for each designated local regulatory authority.

The only Rule that appears to be inconsistent with the Centre's submission is Rule 4 which states:

4. One CPD point is earned for each completed hour of engagement in a CPD activity.

It is suggested that the words "except where a designated local regulatory authority decides otherwise in relation to a CPD activity of a particular format" be added after the words "CPD activity". This would then provide flexibility to a designated local regulatory authority to vary the hour to CPD unit ratio for activities of differing formats.

The Centre notes that this amendment (or similar) would be necessary for the **Proposed Continuing Professional Development Rules: Barristers** to be consistent with the **Proposed Continuing Professional Development Rules (Solicitors) 2014** as the latter already include (Rule 6.1.3) **two** hours of activity equaling one CPD unit in relation to the CPD credit that can be claimed by being a member of a committee taskforce or practice section of a professional association, designated local regulatory authority or the Law Council of Australia or of other committees..., as detailed in Rule 5.1.4.

6 March 2015
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