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Public consultation – proposed CPD Rules 2008
Legal Services Board
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**Submission to the Legal Service Board,
Notice of Proposed Legal Profession Rules**

1 Executive summary

Pro bono legal work deepens the knowledge and experience of legal practitioners, and requires them to develop client management skills which for many would not ordinarily be obtained through their general practice. It is thus legitimately a continuing professional development activity.

The Centre considers that the proposed definition of ‘CPD activity’ contained in the CPD rules proposed by the Law Institute of Victoria and Victorian Bar should be broadened to include pro bono legal work and consequential amendments made to those rules.

It further submits that any legal practitioner who undertakes at least two hours of pro bono legal work per year should be able to claim one CPD unit or point for this activity.

2 Introduction

This submission is provided by the National Pro Bono Resource Centre (**Centre**) in response to the *Notice of the Proposed Legal Profession Rules*, the purpose of which was to invite comments and submissions on proposed legal profession rules concerning Continuing Professional Development in Victoria (**CPD**).

3 National Pro Bono Resource Centre

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendation by the National Pro Bono Task Force to the Commonwealth Attorney-General. The Centre exists to support and promote the provision of pro bono services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

The Centre is an independent, non-profit organisation that aims to:

- Promote pro bono work throughout the legal profession;
- Undertake research and projects to inform the provision of pro bono legal services;
- Provide practical assistance to pro bono providers (including information and other resources);
- Develop strategies to address legal need; and
- Promote pro bono law to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth and States' Attorney-General's Departments, and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, community sector and other relevant people and produces resources of immediate benefit to the legal profession and community sector.

The Centre's key publications include:

- *Australian Pro Bono Manual, a practice Guide and resource kit for law firms – 2nd ed. 2005;*
- *Mapping Pro Bono In Australia – May 2007;*
- *Pro Bono Practices – A guide to the pro bono practices of NSW's largest law firms – December 2007; and*
- *National Pro Bono News, - a free monthly e-Newsletter,*

which are available on its website at www.nationalprobono.org.au. In August 2006, the Centre co-hosted the Inaugural National Access to Justice Pro Bono Conference in Melbourne with the Law Council of Australia. A second such conference is planned to be held in Sydney in November 2008.

The Centre also attended the Victorian Law Foundation Pro Bono Workshop in October 2007, where amendments to the CPD rules were discussed. The Outcomes Report for the Pro Bono Workshop is available at

http://www.victorialaw.org.au/pdfebook/2007_OUTCOMES_REPORT.PDF.

4 The Centre's Submission

This submission addresses the legal professional rules made under Division 3 of Part 3.2 of the *Legal Profession Act 2004* (VIC) proposed by the Law Institute of Victoria, the Victorian Bar and the Legal Services Board. The Centre submits that the rules should explicitly recognise the pro bono work undertaken by practitioners as a legitimate form of CPD and permit it to count for limited CPD points.

In October 2007, the Victoria Law Foundation held a Pro Bono Workshop (**Workshop**) to consider the current and future challenges to the provision of pro bono services. The Workshop was attended by 12 law firms, as well as representatives from the Victorian Bar Legal Assistance Scheme, Victorian Law Foundation, Law Institute of Victoria Legal Assistance Scheme, Public Interest Law Clearing House, Pro Bono Australia and the Centre.

Relevantly, the Outcomes Report for the Workshop stated:

Participants considered that as a means of raising awareness of pro bono in the legal sector, the Law Institute of Victoria and the Victorian Bar Association consider amending their CPD rules to mandate that one CPD point per year be undertaken on access to justice issues.

A number of issues emerged from the Workshop that are of relevance to the proposed CPD Rules:

- Legal practitioners are generally regarded as having a moral and professional responsibility to undertake work for the public good by assisting those in the community who would otherwise be unable to obtain access to justice.
- There is generally a mismatch between the expertise of legal practitioners and the most common areas of legal need. In order to provide pro bono assistance, legal practitioners are often required to develop professional skills or knowledge in areas outside their expertise.

- They are also required to develop an ability to deal with, and an understanding of the legal issues affecting, disadvantaged and marginalised clients and the organisations who undertake work on behalf of such persons.
- There is a need to raise awareness of, and support for, the provision of pro bono services to disadvantaged and marginalised people.
- The current CPD framework does not recognise the utility in, or encourage legal practitioners to undertake, pro bono work.

The Centre supports the above recommendation subject to two notable exceptions. Firstly, the rules should credit practitioners with one CPD point for undertaking two hours of pro bono legal work rather than access to justice work in the previous year, as the concept of access to justice is too wide for the rules.

Secondly, the Centre submits that legal professional rules should not impose any obligations on practitioners to undertake pro bono legal work. Pro bono legal work should remain voluntary. The Centre considers that the introduction of one CPD credit for practitioners who undertake pro bono work would provide an appropriate way of supporting the important ethical value of pro bono, and acknowledging that practitioners develop valuable professional skills when delivering pro bono.

If the Legal Services Board, Law Institute of Victoria and Victorian Bar accept the above, it follows that the definition of 'CPD activity' contained in the CPD rules proposed by the Law Institute of Victoria and Victorian Bar should be broadened to encompass pro bono legal work and consequential amendments to clause 4.6 of the Law Institute of Victoria Rules (which states that engaging in legal practice does not constitute LPD activity) would need to be made.

5 'Access to Justice' or 'pro bono'

The Centre considers that it would be appropriate to issue a CPD credit to practitioners who undertake pro bono legal work rather than work on access to justice issues. 'Access to justice' is a broad term that is difficult to define and would arguably encompass a range of work which may not necessarily be relevant to a legal practitioner's professional development. By contrast, the definition of pro bono legal work is widely adopted within the legal profession and in most cases, involves work which is highly relevant to a legal practitioner's professional development.

The Law Council of Australia in 1992 defined pro bono work as situations where:

1. A lawyer, without fee or without expectation of a fee or at a reduced fee, advises and/or represents a client in cases where:
 - (i) a client has no other access to the courts and the legal system; and/or
 - (ii) the client's case raises a wider issue of public interest; or
2. The lawyer is involved in free community legal education and/ or law reform; or
3. The lawyer is involved in the giving or free legal advice and/or representation to charitable and community organisations.

This definition is used by many firms.¹ It covers not only legal advice and representation but also law reform and community education – but it is limited to work done by lawyers and does not cover some kinds of assistance that firms may wish to include in their pro bono programs, such as secondments of non-legal staff and/ or the provision of financial or in-kind assistance to community organisations (such as community legal centres and Public Interest Law Clearing Houses) which undertake activities that enhance access to justice.

¹ In the 1999 Victoria Law Foundation/ Voluntas survey of Victorian practitioners, 80 per cent of respondents reported that they used the Law Council definition: N Gratton, Voluntas, *Pro bono survey report*, June 1999, Victoria Law Foundation, p6, as cited in the *Report of the National Pro Bono Task Force to the Commonwealth Attorney-General*, 14 June 2001, p5

6 CPD obligations

The Centre notes that Rule 5.2 of the Law Institute of Victoria CPD Rules 2008 and Rule 9 of the Victorian Bar Rules 2008 provide that each year a practitioner must complete as part of his or her CPD obligations at least one CPD unit in each of the following fields:

- Ethics and professional responsibility;
- Professional skills;
- Substantive law; and
- Practice management.

The Centre considers that pro bono legal work, though not currently recognised as a ‘CPD activity’ under the Law Institute of Victoria or Victorian Bar Rules, should be recognised by allowing a legal practitioner to obtain a CPD credit under one of three fields: ethics and professional responsibility, professional skills or substantive law.

The Centre considers that it is neither helpful nor appropriate to introduce mandatory CPD points for pro bono legal work. Rather, it is preferable that legal practitioners and their professional bodies engender an expectation that all legal practitioners should consider it a professional duty and be willing to facilitate access to justice. Undertaking pro bono work is a charitable activity – it involves foregoing income in order to assist another person. It should be voluntary. Mandatory or compulsory volunteering is an oxymoron.

7 CPD

The Centre considers that while the definitions of ‘CPD’ and ‘CPD activity’ under Rule 4 of the Legal Services Board’s proposed Continuing Professional Development Rules 2008 are sufficiently broad to encompass pro bono legal work, the definitions under the proposed professional association rules are not.

Rule 4 of the Law Institute of Victoria CPD Rules 2008 sets out the requirements for ‘CPD activity’. Rule 4.2 sets out the activities that qualify as CPD activity. The defined activities do not include work that is generally undertaken when performing pro bono legal work. In fact, rule 4.6 provides that ‘engaging in legal practice does not constitute CPD activity’.

Similarly, ‘CPD activity’ under rule 3(d) of the Victorian Bar CPD Rules 2008 does not include work that is ordinarily done when undertaking pro bono legal work, although it does not specifically exclude legal practice from the definition of CPD activity.

The Centre considers that pro bono work contributes to a legal practitioner’s professional development in additional ways to those presently included in ‘CPD activities’. The defined activities recognise that legal professionals are required to spend time keeping up with new legislation, technology, improving personal performance skills and understanding changing market environments.

However, the definition does not acknowledge that the provision of pro bono assistance contributes to a legal practitioner’s ethics and professional responsibility, and develops their professional skills, client management skills and substantive law skills.² This is illustrated by, for example, the broad range of skills developed by corporate lawyers through participating in the Homeless Persons Legal Service (**HPLS**). Although many legal practitioners would not have the expertise to provide legal assistance in areas relevant to homeless people, such as fines, social security, discrimination, consumer credit, guardianship and administration issues, by undertaking pro bono work for the HPLS they develop their legal knowledge through training and client management skills through practice.

² See Victorian Bar Inc Legal Profession Rules - Continuing Professional Development Rules 2008, rule 9, and Law Institute of Victoria Continuing Professional Development Rules, rule 5.2

The Centre acknowledges that not all legal practitioners will be required to undertake work outside their areas of expertise in order to deliver pro bono assistance. However, the Centre considers that even where legal practitioners undertake pro bono work within their area of expertise, they still develop skills that are relevant to their professional development and practice. This is because the main recipients of pro bono (being asylum seekers, homeless people, Aboriginal people and people from lower socio-economic backgrounds, community organisations such as non-profit organisations, community legal centres and charities) often require a more delicate approach to client management, requiring legal practitioners to develop skills which would not ordinarily be required.

A past President of the Law Institute of Victoria recognised the value of pro bono work to the professional development of a legal practitioner, when he said:

The benefit of engaging in pro bono is like the quality of mercy: it blesses those who provide it, and those who receive it. For my part, some of the most challenging work I have engaged in has been pro bono. Practitioners can enjoy similar benefits and pursue outcomes without the constraints of clients' resources. It also provides uplifting work, which can become a welcome relief to the normal areas of one's practice. All this deepens one's knowledge and experience. Finally, it provides a balance to the debate about the image of the profession.³

This comment indicates the professional development that is gained in undertaking pro bono legal work and supports the introduction of CPD credit for pro bono legal work.

8 Conclusion

Pro bono work deepens the knowledge and experience of legal practitioners, and requires them to develop client management skills which for many would not ordinarily be obtained through their general practice. It is thus legitimately a continuing professional development activity.

The Law Institute of Victoria and Victorian Bar already support the pro bono activity of practitioners in many ways, including through the Law Institute of Victoria Legal Assistance Scheme and the Victorian Bar Legal Assistance Scheme. The Centre understands that an objective of the conduct of these schemes is to encourage as many practitioners as possible to participate and recognise their ethical duty to enhance access to justice by providing some level of pro bono legal support in appropriate matters. The introduction of limited CPD credit for undertaking pro bono legal work is a useful and appropriate way to further pursue that objective.

The Centre considers that the proposed definition of 'CPD activity' contained in the CPD rules proposed by the Law Institute of Victoria and Victorian Bar should be broadened to include pro bono legal work and consequential amendments made.

It further submits that the introduction of one CPD credit for legal practitioners who undertake two hours of pro bono legal work per year would be another important way in which the profession can recognise the ethical value of pro bono in facilitating access to justice, and its contribution to both the integrity of the legal profession and the professional development of legal practitioners.

John Corker
Director

³ Chris Dale, *Law Institute Journal* April 2004, p4