

National Pro Bono Resource Centre

Submission to the Law Institute of Victoria, Discussion Paper, February 2004

Government lawyers

April 2004

1 Introduction

This submission is provided by the National Pro Bono Resource Centre (the Centre) in response to the *Government Lawyers Discussion Paper* (February 2004), the purpose of which was to examine, facilitate discussion and invite comments on issues of interest to government legal professionals.

2 National Pro Bono Resource Centre

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

- encourage pro bono legal services,
- support lawyers and law firms to make it easier for them to provide high quality pro bono legal services, and
- work with the profession and the community sector to match services with the clients and groups most in need of assistance.

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

Since its inception in 2002, the Centre has focused on consultations, building networks and partnerships and producing resources of immediate benefit to the legal profession and community sector.

The Centre has produced and distributes information to promote and support pro bono including the first *Australian Pro Bono Manual* and a free bimonthly eNewsletter *Pro Bono News* available on its website at www.nationalprobono.org.au. It has also co-hosted with the Public Interest Law Clearing Houses in NSW, Victoria and Queensland the 2nd National Pro Bono Conference in Sydney in October 2003 at which the issue of aspirational targets for pro bono lawyers was addressed.

2.1 Government lawyers project

The Centre is currently preparing an information paper for the benefit of government lawyers with the goal of enhancing and supporting their increased involvement in pro bono. The paper will include information about extent of current pro bono work done by government lawyers, address barriers to pro bono work and report on models from other countries. Our preliminary research indicates that while some government lawyers undertake pro bono work in a personal capacity, involvement overall by this sector of the legal profession in pro bono is currently quite limited.

The Australian Government Solicitor (AGS) has conducted an internal survey of the amount of pro bono that its lawyers undertake and is in the process of reviewing its existing pro bono policy with a view to expanding its pro bono contribution. We are not aware of significant pro bono activity in other Government departments or agencies although we have not yet completed our inquiries.

The information paper will report on overseas experience and include information on the kinds of projects and initiatives that government lawyers and officers have undertaken in other jurisdictions. For example, the US Attorney General and Department of Justice have adopted and published a policy¹ on pro bono legal and volunteer services. The policy encourages Department employees to set a personal goal of 50 hours per year of pro bono legal and volunteer services, provides an approvals procedure, and deals with issues such as use of agency resources. The policy generally urges employees to seek pro bono work outside their scheduled working hours but permits pro bono activities during work hours, where approved, generally on an unpaid leave basis. In limited circumstances 'administrative leave' may be granted, for example, where the service is officially sponsored or sanctioned by the Attorney-General or where it will enhance the professional development or skills of the employee in his or her current position.

The policy of the Office of the Attorney General of the State of Washington provides that where performance of pro bono work is required during regular work hours, attorneys should be allowed to take advantage of flexible work schedule arrangements rather than being required to take leave.

The Centre will forward a copy of the government lawyers information paper when it is completed later in 2004.

3 LIV Discussion Paper: key issues

The Centre commends the initiative of the Law Institute of Victoria to more fully include government lawyers in its activities. Of particular relevance to the work of NPBRC is the issue in the Discussion Paper that addresses the role and functions of a government lawyers committee.

3.1 Role and functions of a government lawyers committee

This Centre suggests that encouraging, developing and supporting **pro bono** work by government lawyers and government agencies should be part of the role and functions of the Committee.

Pro bono falls within the professional responsibility of every lawyer and has commonly been a part of the every day practice of many private practitioners in Australia. It has also been addressed and encouraged, to varying degrees, by legal professional associations, and particularly by the LIV. Pro bono work has less commonly been part of the professional life of government lawyers nor (with some exceptions) has it been addressed by government departments or agencies at an institutional level as it has been by many of their law firm counterparts. This, together with the fact that there are particular issues and concerns that can arise in relation to government lawyers undertaking pro bono, warrant this issue being on the agenda of a government lawyers committee.

Specific functions or activities of the Committee in relation to pro bono could include:

¹ See http://www.usdoj.gov/jmd/ethics/docs/probonopol_pol.htm

- Sharing and gathering information about pro bono activities currently performed by government lawyers;
- Ascertaining areas of work and/or the kinds of pro bono activities that might be of interest to government lawyers;
- Discussing amongst members relevant issues and any concerns or barriers identified;
- Developing a policy on pro bono;
- Liaising with relevant individuals and groups in the community and legal aid sectors (such as the Centre, the Victorian Public Interest Law Clearing House (PILCH), legal aid and community legal centres) to explore pro bono needs and possible projects and activities;
- Developing projects to enable pro bono participation by government lawyers;
- Advocating the adoption of pro bono policies and practices by key government officers and agencies;
- Organising and/or encouraging relevant training to facilitate participation in pro bono activities by government lawyers (which could perhaps form part of the Committee's work to 'establish and facilitate ongoing legal education for government lawyers': p 11 Discussion paper)

We also suggest that encouraging, developing and supporting pro bono work by government lawyers fits well with the objectives identified on page 5 of the Discussion Paper, including those of sharing knowledge between Departments and Agencies, facilitating discussion of ethical issues and values, developing standards, publishing policies and guidelines for government lawyers and promoting the professional development of government lawyers.

4 Why pro bono?

Lawyers 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. This responsibility arises because of lawyers' role and privileges as professionals and has been widely recognised.² Pro bono legal services operate to supplement publicly funded legal services in an effort to address the needs of disadvantaged individuals and organisations.

The reasons or motivations for undertaking pro bono extend beyond moral and professional responsibility, however, and may include:

- Personal satisfaction experienced through assisting those who would not otherwise have access to the legal system, or from undertaking work (such as community legal education or law reform and policy work) that promotes access to justice for disadvantaged or marginalised people;
- Enhancing professional skills, confidence and morale;
- Developing new contacts in the legal community;
- Becoming involved with the non-law community;

² See, for example, F McLeay 'Pro Bono Lawyering in the 21st Century' and S Parker, 'Why lawyers should do pro bono work' in C Arup and K Laster, *For the public good: pro bono and the legal profession in Australia*, The Federation Press, Sydney 2001.

- Improving the public image and reputation of the organisation and of the legal profession generally;
- For the organisation, pro bono assists in recruitment because new graduates and others perceive pro bono as offering interesting work, professional development and the opportunity to contribute something worthwhile to the community.

Specifically in relation to government lawyers, there is very neat fit between the public service/interest rationale and objective of pro bono and the principle of promoting the public interest identified in the Discussion Paper³ as a responsibility of government lawyers.

5 Pro bono by government lawyers and agencies

Two kinds of initiatives might be considered. First are those where the government lawyer provides pro bono services in their own time, for example, volunteering at an evening advice session of a community legal centre. In this regard, attention could be given to how government agencies could facilitate such work, for example by paying for practising certificates and allowing leave or flexible work arrangements. The second kind of initiative could involve the government lawyer participating in pro bono as part of the agency's own pro bono program. Such a program would involve the agency itself allocating resources to pro bono, for example, in the form of lawyer-hours, funding and other agency resources. Thus an agency might second legal staff to a community organisation or participate in a community clinic. These matters will be discussed further in the Centre's information paper.

6 Support for government lawyers' pro bono

Former Attorney-General Darryl Williams in 2001 referred to the scope that exists to get more public sector lawyers involved in pro bono work. In 2002, when launching the Centre, he again referred to this issue, noting AGS guidelines about pro bono and the desirability of the Centre, the AGS and other government legal service providers working to address obstacles that can arise and finding ways 'to enhance contributions of government lawyers and their employing agencies'.

In Victoria, the Law Institute resolved in 1998 that its members should dedicate a minimum of one hour per week to pro bono. Recently the President of the Law Institute suggested that Victoria should go further and consider incorporating aspirational pro bono targets in its professional conduct rules.⁴ He also stated:

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 legal knowledge and experience. Finally, it provides a balance to the debate about the image of the profession.

The Victorian Attorney General has shown a particular interest in pro bono and has taken specific initiatives to encourage it, most particularly:

³ Page 10.

⁴ Chris Dale, Law Institute Journal, April 2004, p 4.

- the Government's tender scheme and government legal services contract arrangements under which panel firms agree to provide pro bono services equivalent in value to a nominated percentage of the fees they derive from the panel arrangements;
- initiation of and involvement by the Attorney-General and Department of Justice in the Pro Bono Secondments Scheme, together with the Law Institute of Victoria, the Federation of Community Legal Centres (Vic), Victoria Legal Aid and others.⁵

The State of Victoria is very fortunate to have an active pro bono community that includes the Public Interest Law Clearing House (PILCH), the Law Institute's Legal Assistance Scheme, the Victorian Bar Legal Assistance Scheme, the Victoria Law Foundation and pro bono coordinators and others individuals from law firms and the bar. These agencies and individuals have links to and relationships with community legal organisations and legal aid.

PILCH refers public interest matters to member law firms and other members to be dealt with on a pro bono basis. PILCH also operates the Homeless Person's Legal Clinic in 9 different locations around Melbourne and also organises training for its pro bono lawyers, community lawyers and volunteers. A recent initiative taken by practitioners in Victoria is Spare Lawyers for Refugees (SLFR), a network of lawyers providing free representation and advice to refugees. SPARE, has recently launched the Spare Lawyers for Refugees Online Advocacy Centre www.sparelawyers.com.

There may well be scope for government lawyers in Victoria to become involved in activities undertaken by these organisations and/or individuals and for government agencies themselves to form partnerships with them to provide services. We note, for example, that the Brisbane office of the Australian Competition and Consumer Commission is a member of QPILCH.

7 Conclusion

The Centre is of the view that there is scope for leadership in the area of pro bono by government lawyer groups, at a state or national level, as well as by governments themselves.

While there are issues to be addressed (ranging from a definition of pro bono, perceptions of conflicts of interest, practising certificates, insurance and appropriate training) there are also precedents for the effective delivery of pro bono services by government lawyers – and evidence that this is of benefit both to the lawyers and the clients who are assisted.

There is also evidence of support for pro bono by governments within Australia and increasingly, by members of the profession.

The Centre submits that it would be both appropriate and timely for the Government Lawyers Committee to include in its roles and functions, encouraging, developing and supporting pro bono work by government lawyers and agencies. The Centre would welcome the opportunity to work with the Committee on this endeavour.

The Centre encourages the Committee to distribute copies of this submission to government lawyers in Victoria.

⁵ See Pro Bono Secondments Steering Committee, *Pro Bono Secondment Scheme: Report on the 2002-2003 Pilot scheme*, April 2004, available at www.justice.vic.gov.au