NATIONAL PRO BONO RESOURCE CENTRE

Submission to the Review of the Legal Services Directions: Issues Paper

April 2004

The National Pro Bono Resource Centre (‘**the Centre’**) is an independent, non-profit organization that supports and promotes pro bono legal services across Australia. The Centre receives financial assistance from the federal Attorney-General’s Department and accommodation and other support from the University of New South Wales.

Issue 7

The Centre has a strong interest in Issue 7. As noted in the Issues Paper, the Centre developed a Protocol that it requested the Attorney-General adopt and implement in the Legal Services Directions (‘**the Directions**’). The Protocol was developed following consultation and the publication of a Consultation Paper for this purpose.[1] The Centre has in April 2004 written to State and Territory Attorneys-General advocating adoption of the Protocol by State and Territory Governments.

The need for amendment of the Directions

Private lawyers and firms are reluctant to act pro bono in matters against government because of a perception that this would or might prejudice them in securing or retaining government legal work. An article appeared on page 3 of the *Australian Financial Review*[2] on 11 March 2004 discussing this issue. The article is consistent with reports made to the Centre and others about the difficulty of securing pro bono assistance for matters involving government parties. In most cases, there is no legal conflict of interest that would prevent the practitioner from taking on the pro bono matter. Rather, there is a perceived or ‘commercial’ conflict of interest – where the firm or practitioner perceives that the particular government agency, or government agencies generally, would question the firm’s allegiances and the firm will thereby be commercially disadvantaged in obtaining or retaining government work.

Some firms feel they have been punished for acting against government in pro bono matters in the past. There is also anecdotal evidence that some government agencies have suggested to particular firms that they should not act in matters against government including in cases where there is no direct legal conflict. For example, an agency may mistakenly or otherwise inappropriately take the view that a firm who has provided it with assistance in relation to leasing should not act in a discrimination case against the agency. One firm suggested that if they were approached to act pro bono in such a matter, they would likely refuse because of a perception of disadvantage, however if Government put in place a clear protocol addressing the issue, the firm expressed the view that this outcome was likely to be different.

---

[1] See Consultation Paper and Protocol at http://www.nationalprobono.org.au/publications/index.html

[2] “Law firms wary about pro-bono work”, AFR 11 March 2003, p. 3.

Whether or not the perception of disadvantage is well-founded, it continues and is widespread amongst practitioners, notwithstanding the Attorney-General's public comments referred to at paragraph 31 of the Issues paper. Consultations carried out by Attorney-Generals Department officers in the course of preparing the Federal Civil Justice Strategy noted the continuing concern by practitioners and the need to take steps to deal with it. The recent comments of Peter Stapleton, a partner of Blake Dawson Waldron, one of the largest government law practices in Australia, in the above *Financial Review* article also evidence the problem.

Addressing the problems of prejudice and perceptions

An effective solution will be one that deals with the perception by practitioners that they will or may be disadvantaged in their dealings with government. Addressing the problem requires not only dealing with agency behaviour but doing so in a way that alleviates the concerns of the profession. Therefore the measures taken must adequately address these perceptions and make the profession feel comfortable that, in acting pro bono against Government, they will not be prejudiced or penalised, and if they are (or perceive that they are), they have an accessible avenue of complaint and redress. So in addressing the problem, amendment to the Directions is only one part of the solution. Below we set out elements of an implementation strategy that we suggest should be adopted in order to provide the necessary leadership and cultural change within Government and the profession to properly address the problem.

Amending the Legal Service Directions

Paragraph 29 of the Issues Paper suggests amending Paragraph 11 of the Directions:

> 'to include a statement that affirms the Commonwealth's position that lawyers who act pro bono for clients against the Commonwealth are not disadvantaged as a result when seeking to provide legal services to the Commonwealth'.

The Centre suggests that this alone will be an insufficient response to the issue. We refer you to paragraphs 1-4 of the Protocol for the elements that we submit should be contained in an appropriate paragraph of the Directions.[3]

Paragraphs 1 and 2 of the Protocol set the policy framework. We note that paragraph 2 of Appendix D of the existing Directions similarly sets the policy framework on the issue of engagement of counsel when it says "Commonwealth agencies and legal service providers are encouraged to brief a broad range of counsel and, in particular, women".

---

[3] The prohibition in para 3 of the Protocol has been drafted so as to preclude a legal service provider's pro bono work being taking into account *to their detriment* but not so as to prevent it being taken into account *to their benefit* (cf para 32, Issues Paper). The wording in para 3 would leave open to Government the option of adopting an incentive scheme whereby lawyers' pro bono contributions would be an essential or desirable criterion of a retainer agreement with government. Such a scheme has been adopted by the Victorian Government and is referred to in the Centre's submission to the Attorney-General on the Federal Civil Justice System Strategy Paper (copy of relevant section attached). The Centre there recommends that following the evaluation of the Victorian scheme, and subject to the evaluation, the Commonwealth Government should consider implementing these kinds of measures at the Commonwealth level. Accordingly, we suggest that the Directions be amended, inter alia, to incorporate the prohibition as contained in para 3 of the Protocol, rather than in the form of requiring 'the same level of consideration…regardless of whether those lawyers have acted pro bono' as referred to at para 32 of the Issues Paper.

Similarly we suggest that paragraphs 1 and 2 of the Protocol should be contained in the amended Directions (or at least in notes to them or an appendix) as follows:

1. The Government encourages lawyers to provide legal services on a pro bono basis.

2. The Government recognises that it is appropriate for legal service providers to act against government and government agencies in pro bono matters where there is no direct legal conflict of interest.

Both these policy positions were stated by the Hon Philip Ruddock, Attorney-General of Australia on the occasion of the 2nd National Pro Bono Conference[4] and as we understand it are existing government policy.

Paragraphs 3 and 4 of the Protocol raise the following two important issues which should be addressed in the amended Directions:

1. The Directions should cover not only the engagement of practitioners but also their continuing retainer (including any decision to terminate services).

2. The Directions should require each agency to have an identified senior person whom a practitioner can contact to discuss issues arising from pro bono work against the agency or government, for example to clarify whether a direct conflict of interest arises or to raise a concern (in confidence) if they suspect that they have been prejudiced in some way for acting pro bono against Government.

   We note that matters not satisfactorily resolved in this way may be pursued with the Office of Legal Services Coordination ("**OLSC**") who has a function of receiving and investigating complaints about non-compliance with the Directions.

Both of the above issues should be specifically addressed as they are essential elements of the solution and without them the amended Directions will be incomplete. The first point may be a technical one (important nevertheless) but for this Direction to have credibility and effect, the accessibility of the government agency by a firm as outlined in 2 above is necessary for the Direction to work successfully. We submit that it is not sufficient to leave this issue to the responsibilities imposed by 11.1(b) of the Directions.

Whilst the drafting of the amendments to the Directions is a matter for Government we suggest that the matter of perceived government conflict should be addressed in a separate paragraph of the Directions rather than in paragraph 11. The above matters are substantive and warrant a separate paragraph. This will also give the issue greater visibility in the Directions which is likely to assist with its adoption and implementation.

Notes

Additionally, there are other matters raised in the Protocol that should be addressed. Some of these could perhaps be adequately dealt with by inserting notes to the

[4] 20 October 2003, see http://www.nationalprobono.org.au/conference/1_ruddock2.pdf

relevant paragraph of the Directions, a device that we observe is already commonly used in the Directions. These are as follows:

- The relevant paragraph should apply to all forms and aspects of engagement of legal service providers including but not limited to selecting panels of firms, making decisions to retain or to terminate the services of a particular lawyer or firm in particular cases and engagements for expert advisory committees.
- It will be important to give guidance to agencies on the meaning of 'pro bono' so as to provide an adequate level of certainty for government agencies who are bound by the Directions. The Centre suggests that an appropriate definition of 'pro bono' for this purpose is that adopted by the Law Council of Australia ("**LCA**") in 1992 that is as follows:

  > Pro bono work is defined to include 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.
  >
  > 2. or, the lawyer is involved in free community legal education and/or law reform;
  >
  > 3. or, the lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations.

  Pro Bono definitions can vary widely[5] and should be chosen to meet a particular purpose. The Centre suggests that the LCA definition is appropriate as the definition is a broad one which matches the overall policy objective of further encouraging firms to undertake a wide range of pro bono activities. It is also relevant that the definition was developed by the peak body representing the legal profession in Australia.

Other Matters

We note paragraph 15 of Appendix D to the Directions provides "… the choice of counsel is a matter for individual agencies, taking into account any advice from AGS and private lawyers". We suggest that it might be appropriate to include as a note to this paragraph the existence of the new 'perceived conflict' paragraph to make clear that it applies when agencies are choosing counsel.

Implementation measures

We suggest that the starting point for implementation is government leadership on the policy positions captured by paragraphs 1 and 2 of the Protocol.

- The Government encourages lawyers to provide legal services on a pro bono basis.

---

[5] As to why definitions of pro bono can vary widely see Defining and Quantifying Pro Bono: Targets and Definitions, Pros and Cons, Esther Lardent, at http://www.nationalprobono.org.au/conference/3a_lardent.pdf

- The Government recognises that it is appropriate for legal service providers to act against government and government agencies in pro bono matters where there is no direct legal conflict of interest.

Any communication to agencies or the profession about the amended Directions should state these policy positions. A number of respondents to the Consultation Paper stressed the importance of 'robust implementation' of the Protocol in order for it to have a practical effect in allaying the concerns and perceptions of private legal service providers – and consequently, increasing their willingness to take on pro bono cases involving government agencies. In addition to amending the Directions in the manner outlined above, we suggest the following implementation measures:

- The relevant amendments to the Directions should be publicised to agencies and the profession. In relation to the latter, a number of strategies could be pursued, including a public announcement by the Attorney-General, letters to practitioners and/or their professional associations, articles in professional journals. The Centre would of course be happy to assist in this regard and would see itself as having a promotional role. The recent initiatives implemented in relation to the policy of briefing women barristers may provide ideas for appropriate implementation.
- The OLSC should publicise the amendments to agencies[6] and provide detailed instructions about the measures agencies should take to implement it. We suggest these instructions would also cover advice on what is a direct legal conflict of interest so as to reduce the risk that agencies might inadvertently discriminate against legal service providers on the basis of their pro bono work. The Direction is most likely to be adhered to if agencies are made aware of the reasons for it and the kinds of activities it is directed at. This educational function will be particularly important in respect of the contact/complaint person nominated by each agency.
- Information about the relevant Direction could be included in the Commonwealth's Procurement Guidelines and in relevant papers produced by the OLSC, for example, documents concerning the purchasing of legal services.
- The OLSC would also play an important monitoring role, to see whether 'appropriate management strategies and practices are adopted so as to achieve compliance with' the Direction (para 11, Directions).

Issue 11: Model litigant obligations

The Centre would support inclusion of examples of model litigant behaviour and in particular in relation to avoiding 'taking advantage of a claimant who lacks resources'. In matters that are being done pro bono, by definition the claimant will lack resources. The financial pressure of running a case is often a factor as to whether a matter will be taken on pro bono, particularly for a smaller firm. It is suggested that the examples not only mention self represented litigants but also those represented on a pro bono basis.

[6] Including through its Bulletin.