



Proposed Model for the Reform of Commonwealth Legal Services Purchasing

A. Executive Summary

This Paper examines the proposed reforms of the Commonwealth Government Legal Services Purchasing arrangements and proposes a model for the Commonwealth tender scheme (**Commonwealth Scheme**) to encourage pro bono. The Centre invites the legal profession to comment on the Centre's proposed model and the issues raised in this paper by emailing the Centre's Senior Project Manager, Skye Rose, at skye@nationalprobono.org.au before 5pm on Friday 13 June 2008.

B. 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.

C. Background

In March 2008, the Centre contacted the 35 law firms who are on the Victorian Government Legal Services Panel (**Panel Members**) to gather information on the 'pro bono condition' in the panel arrangements (**Victorian Scheme**).

The Centre provided all Panel Members with a questionnaire which aimed to assess the support for and effectiveness of the Scheme, with a view to properly informing the Commonwealth Attorney-General of the pros and cons of introducing a similar Scheme. An analysis of the responses to the questionnaire can be found in the [Reports section](#) of the Centre's website.

D. Proposed Model

The Centre developed the following model for the Commonwealth Scheme based on consultations with the Centre's Board and Advisory Council, Panel Members of the Victorian Scheme, and the legal profession generally.

The model supports the voluntarist ethic of pro bono by encouraging and promoting pro bono work without creating a contractual obligation to provide it.

The key provisions relating to pro bono services for the proposed model are as follows:

1. The scheme would involve a whole-of-Government policy for the purchase of legal services that requires departments, agencies and authorities to ask certain questions about a firm's pro bono activities when seeking to provide legal services to the Commonwealth. If this is a whole-of-government policy it has a wider application than government panel firm contract conditions as it would apply across government and over time is more likely to build an appropriate culture through its constant reappearance in government tender documents.
2. The questions would be apportioned a specific weighting as part of a total tender score when considering appointment of a firm to a legal service panel, or engaging them to provide legal services, without making performance enforceable.
3. The form of the questions is important as they must be capable of clearly distinguishing between tenderers if they are to have any effect. Proposed questions (with commercial-in-confidence answers) would include:

Q.1 How many hours per lawyer (averaged across the number of full-time equivalent lawyers in the firm) of pro bono legal work have your firm's lawyers undertaken in the past financial year.

- 0 - 10 hours
- 11 - 20 hours
- 21 - 30 hours
- 31 - 40 hours
- > 41 hours

Q.2 What is the notional value of this work as a percentage of the firm's billable income?

- 0 - 0.5%
- 0.51% - 1.0%
- 1.01% - 1.5%
- 1.51% - 2.0%
- 2.01% - 2.5%
- more than 2.5%

Q.3 What targets has your firm set (if any) for pro bono work over the next 12/24 months?

In addition to these questions (or as an alternative to question 3) the Commonwealth raised the issue of including the following question:

Q. Has your firm signed up to the National Pro Bono Resource Centre's Aspirational Target?

Given that it may be difficult to quantify and apportion a weighting to question 3, it may be more appropriate ask a firm whether it is a signatory to the Aspirational Target as a way of assessing its ongoing commitment to pro bono. The Commonwealth raised this in its [Draft Deed of Standing Offer](#), which is discussed in more detail under '**Issues**' below.

By taking into account whether a firm has become a signatory to the Target, the Commonwealth would give justification and support to the firms who are already conducting pro bono work, and to the Aspirational Target without requiring a firm to meet any particular target.

4. The Scheme would include an annual reporting regime under which firms would be required to answer the questions above, allowing the Commonwealth to evaluate the performance of the scheme.
5. It is suggested that 'Pro bono legal work' be defined in accordance with the Aspirational Target.

E. Issues

Questions to be included

Community service work and non-legal assistance

The Centre acknowledges that these questions do not take into account a law firm's community investment or non-legal contributions (such as providing meeting rooms, catering, administrative assistance etc). While not wanting to diminish the value of non-legal assistance and community service work by law firms, the Centre has not included questions relating to a firm's non-legal contributions and community investment for the following reasons:

- It is more difficult to quantify a firm's non-legal contributions in monetary terms than the provision of legal services. This would create an administrative burden for law firms who may have to develop a costs regime to quantify non-legal services (such as meeting rooms, catering, and administrative assistance) for the purposes of reporting under the Commonwealth Scheme.
- A lawyer's time is best utilized by providing legal services, and
- The primary aim of the initiative is to encourage pro bono legal work.

Signatory to the National Aspirational Pro Bono Target

The Centre launched the Target on 26 April 2007. Over 3,000 lawyers across Australia are covered by the Target, which sets a voluntary target of 35 hours of pro bono legal work per lawyer per year, with no sanction or penalty for non-compliance.

The aspirational nature of the Target recognises that lawyers at different times and in different circumstances may only contribute what they are able to, and they do this out of goodwill and in recognition of their professional duty to help disadvantaged people otherwise unable to get assistance.

The figure of 35 hours per lawyer is based on consultations with members of the profession and the Centre's national survey findings, and reflects what many lawyers are already doing. It represents a minimum number of hours of pro bono legal work that all lawyers should aspire to undertake. The Target represents a benchmark by which the legal profession can judge itself and its performance in relation to its pro bono activities.

In the [Draft Deed of Standing Offer](#), the Commonwealth Government raises the issue of asking firms whether they are a signatory to the National Pro Bono Resource Centre's Aspirational Target when engaging them to provide legal services.

Weighting of responses to questions

In the Victorian Scheme, the answers to the pro bono questions are weighted at 10% of the total tender score. How this is managed by the Commonwealth is matter for them. It may be that each department and agency should have the power to set the weighting for each criteria as it sees fit within a minimum weighting for the pro bono questions set by Commonwealth policy.

Definition of ‘pro bono legal work’

The Centre takes the view that there is not one correct definition for pro bono and that it is appropriate to develop and use different definitions for different purposes. However if the Commonwealth government introduces a scheme similar to Victoria and work done under the Victorian scheme counts towards the Commonwealth scheme, the definitions should be the same or substantially similar or else firms will need to create separate records to meet any reporting obligations.

The Centre advocates the definition of ‘pro bono legal work’ contained in the National Pro Bono Aspirational Target Statement of Principles as follows:

1. Giving legal assistance for free or at a substantially reduced fee to:—
 - (a) individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or
 - (b) individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or
 - (c) charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;
2. Conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
3. Participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or
4. Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

The proposed definition of ‘pro bono legal work’ is consistent with the Law Council of Australia definition but is specific about certain activities that have been considered ‘grey areas’ in some definitional debates.

The following guidelines were created to provide guidance about ‘definitional fringe’ issues such as community service work by lawyers, sitting on boards, work for sporting organisations or work done without any reference to the capacity of a pro bono client to pay for pro bono services.

Under the proposed definition, the following would NOT be regarded as pro bono work:

- giving legal assistance to any person for free or at a reduced fee without reference to whether they can afford to pay;
- free first consultations with clients who are otherwise billed at a firm’s normal rates;
- legal assistance provided under a grant of legal assistance from Legal Aid;
- contingency fee arrangements or other speculative work which is undertaken with a commercial expectation of a fee;

- the sponsorship of cultural and sporting events, work undertaken for business development and other marketing opportunities; or
- time spent by lawyers sitting on the board of a community organisation (including a community legal organisation) or a charity.

The definition of 'pro bono legal work' differs to the Victorian Scheme's definition of 'approved cause' as it excludes the provision of:

- services by non-legal staff, and
- financial or in-kind assistance to community organisations (such as CLCs or PILCHs).

However it is broader in certain aspects as it includes the provision of legal assistance to individuals who have a need for legal assistance and but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship. Under the Victorian definition, an individual must have no other access to the courts or the legal system unless their case raises a wider issue of public interest. The definitions are otherwise substantially the same.

The Centre considers that the definition of 'pro bono legal work' is more appropriate for the Commonwealth Scheme because it looks specifically at a firm's total pro bono legal work. As the proposed model does not require law firms to undertake a minimum amount of pro bono work, it is not necessary to include services by non-legal staff or financial or in-kind assistance to community organizations in the definition as these were built into the definition to allow firms to meet their obligations if they were unlikely to meet their contractual obligations through pro bono legal services alone.

Reporting

The rationale behind the reporting regime is twofold – to allow the Commonwealth to monitor each firm's pro bono contributions, and to evaluate the effectiveness of the scheme. Reporting requirements would be simpler than those required under the Victorian Scheme because firms would not be required to demonstrate that compliance with their pro bono obligations. It is suggested that the reporting requirement would be consistent with the final form of the questions that are asked in the tender scheme so that if question 1 asks for the number of hours of pro bono work done in the past financial year, then for each financial year that the firm provides legal services to the Commonwealth, they would be required to report on the number of hours of pro bono work performed say within three months of the end of each financial year.

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Director

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