



NATIONAL PRO BONO RESOURCE CENTRE

Submission to the National Legal Profession Reform Taskforce:

**Legal Profession National Law
14 May 2010 Consultation Draft**

("Draft Law")

This submission is endorsed by:

**Australian Corporate Lawyers Association (ACLA)
Public Interest Law Clearing House (VIC)
Justice Net SA
Queensland Public Interest Law Clearing House QPILCH
National Association of Community Legal Centres
Cancer Council of Australia
Consumer Action
DLA Phillips Fox**

August 2010

**National Pro Bono Resource Centre
Law Building, UNSW 2052 NSW
www.nationalprobono.org.au**

National Pro Bono Resource Centre
Law Building, UNSW NSW 2052

T: +61 2 9385 7381
E: info@nationalprobono.org.au
W: www.nationalprobono.org.au

About the National Pro Bono Resource Centre ('the 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' and Territories' 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 Legal Centres (**CLCs**), pro bono referral schemes, Legal Aid, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and produces resources of immediate benefit to the legal profession and community sector.

1. Introduction

The Centre has made two previous submissions to the Taskforce which outline some of the structural barriers that exist in relation to facilitating Australian legal practitioners to undertake pro bono legal work.¹

The Draft Law has responded to these issues by providing that:

- all Australian lawyers engaged in legal practice must hold a practising certificate (excluding those engaged only in legal policy work). This provides a platform for authorising all certificate holders to undertake pro bono legal work;
- all Australian practising certificates will authorise the holder to provide legal services as a volunteer at a Community Legal Service (CLS); and
- a stand-alone Australian practising certificate will be available that authorises the holder to practice as a volunteer at a CLS to be issued free or at low-cost.

The Centre supports these provisions but submits that the Draft Law has missed the opportunity to provide a practising certificate regime that authorises in-house corporate and government lawyers to develop their own pro bono projects, and for retired and career-break lawyers to undertake pro bono legal work other than through a CLS. This is a significant missed opportunity and should be rectified in the final Law.

The broader opportunities to provide pro bono legal assistance sought in this submission are currently authorised under State law in NSW and Queensland. This has led to the creation of a number of pro bono projects by in-house corporate lawyers in NSW that would not be authorised if the Draft Law became law in its current form.

This submission should be read in conjunction with the PILCH (VIC) submission that provides more detail on some of these matters.

¹ See National Pro Bono Resource Centre et al, *Joint Submission to the Taskforce for the National Legal Profession Project*, October 2009, [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%288AB0BDE05570AAD0EF9C283AA8F533E3%29~National+Pro+Bono+Resource+Centre+%28&+others%29+-+Pro+Bono+Legal+Work.PDF/\\$file/National+Pro+Bono+Resource+Centre+%28&+others%29+-+Pro+Bono+Legal+Work.PDF](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%288AB0BDE05570AAD0EF9C283AA8F533E3%29~National+Pro+Bono+Resource+Centre+%28&+others%29+-+Pro+Bono+Legal+Work.PDF/$file/National+Pro+Bono+Resource+Centre+%28&+others%29+-+Pro+Bono+Legal+Work.PDF); and Supplementary Submission, available at [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29~National+Pro+Bono+Resource+Centre+-+Supplementary+Submission%28%29.PDF/\\$file/National+Pro+Bono+Resource+Centre+-+Supplementary+Submission%28%29.PDF](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29~National+Pro+Bono+Resource+Centre+-+Supplementary+Submission%28%29.PDF/$file/National+Pro+Bono+Resource+Centre+-+Supplementary+Submission%28%29.PDF)

2. Executive Summary

The Centre submits as follows:

1. **That the Draft Law should be amended to allow the holder of an Australian practising certificate to engage in defined general pro bono legal practice (provided the practitioner has complying professional indemnity (PI) insurance and appropriate experience or supervision).**
2. **That the Draft Law should be amended so that the stand-alone CLS practising certificates includes an authority to engage in general pro bono legal practice (provided the practitioner has complying PI insurance and appropriate experience or supervision).**
3. **In order to make these changes the Draft Law should define the term “pro bono basis” in accordance with the definition adopted by the Law Council of Australia in 1992.**

3. The Issue

Pro bono legal work is work done for the public good. This work makes legal services available to low-income and disadvantaged individuals who generally do not qualify for legal aid and organisations who work on behalf of low income or disadvantaged members of the community which would otherwise not have access to justice. Accordingly, greater pro bono participation should be encouraged and regulation should support and encourage all Australian legal practitioners to undertake pro bono legal work.

Corporate and government lawyers

Approximately 25 percent of Australian solicitors are in-house either in government or in a corporation. In increasing numbers these lawyers want to undertake pro bono legal work similar to their counterparts in the private legal profession.

The definitions of corporate and government lawyer in the Draft Law suggest that these classes of lawyer are limited to providing in-house legal advice only to their employer, or at the direction of their government authority, respectively.² Accordingly specific authorisation for them to undertake pro bono legal work must be contained in the law if they are to be duly authorised. The only specific authorisation found is as a volunteer at a CLS.³ There is no authority available within the Draft Law for them to undertake general pro bono legal work.

There is an increasing interest amongst corporate and government in-house lawyers in developing and being involved in pro bono projects. Statements from Group General Counsel at Telstra and the NAB contained in the PILCH (VIC) submission refer to a growing interest in and capacity to undertake pro bono in-house. The Centre has authorised six pro bono projects under its National Pro Bono PI Insurance Scheme since 1 July 2009, all involving in-house counsel (see part 5). The Centre has also been approached by another three large corporations whose in-house counsel want to commence pro bono programs but want to develop the program nationally and can't do that whilst the law in

² Draft National Law 1.2.1, definition of “corporate lawyer” and “government lawyer”, and Draft National Law 3.3.6 (b)(iv)

³ Draft National Law, section 3.3.6(3).

Victoria remains as it is, i.e. in-house lawyers cannot obtain a practising certificate that authorises pro bono legal work generally in Victoria.

Louisa Fitz-Gerald, Professional Services Coordinator at the Cancer Council in NSW provides reasons why in-house lawyers are important for the Cancer Council Legal Referral Service, and pro bono projects other than through a CLS:

- *Given the high cost of cancer (from treatment costs to transport and accommodation, childcare and complementary therapies, as well as lost income), mortgage hardship and consumer credit issues are critical for our clients. Often clients will have several creditors, including home lenders, credit card providers and more, making it very difficult to find a firm without conflicts that is willing to assist. **In-house legal teams have been critical in filling this gap.***
- *Most firms with large capacity and interest in pro bono have offices in the Sydney CBD, which limits their geographical coverage for matters like enduring powers of attorney and appointments of enduring guardian, which require face-to-face assistance. In-house legal teams are spread wider across Sydney and can therefore assist in western and south-western Sydney, which are crucial areas of need.*
- *The geographical spread is also important where matters are urgent. We occasionally have matters where a patient needs to make an enduring power of attorney before they are able to receive pain relief, because after they receive the treatment they will lose capacity. In-house legal teams that are close to the hospital can respond to these requests on an urgent basis.*
- *The volume of referrals in our service is so high after having rolled out to only a limited number of hospitals that we anticipate quickly exhausting the capacity of Sydney firms. **Since 1 March 2010 we have assisted over 250 clients with a range of matters.** It is therefore critically important for us to have the participation of in-house legal teams, in order to be able to meet increasing demand as we roll out the service to more hospitals.*
- *The opportunity to have their clients' in-house legal teams involved in pro bono projects deepens the commitment of law firms and strengthens our relationship with them, which has a positive impact on service delivery. Some firms which have another focus for their own pro bono programs and therefore cannot be a full-scale participant in our project are nonetheless 'sponsoring' the involvement of their clients' in-house lawyers, by providing templates and support as needed. This model allows us to leverage the pro bono expertise of firms with minimum impact on other programs, whilst servicing an ever-expanding client group.*

An alteration to practising certificate conditions that has the effect of preventing in-house legal teams from participating in the Cancer Council Legal Referral Service would have an immediate detrimental impact on service delivery, would threaten the ongoing viability of a state-wide service, and would deepen the gaps in access to justice for this client group.

Retired and career-break lawyers

The same limitation applies to retired and career-break lawyers if they wished to resume practice to undertake pro bono legal work⁴ (unless they pay for and obtain a practising certificate as the principal of a law practice).

The Centre undertook research about engaging retired and career-break lawyers in pro bono (funded by the Commonwealth Attorney-General's department) in 2009. The February 2010 report recommended:

Recommendation 1

The practising certificate regime in Australia should be amended so that free practising certificates are available for the sole purpose of engaging in pro bono legal work, provided that the practitioner is:

- (a) 'suitably qualified'; or
- (b) supervised by a lawyer who is 'suitably qualified'; and
- (c) covered by appropriate professional indemnity insurance.

Recommendation 2

Professional indemnity insurance requirements in relevant regulatory Acts or subordinate instruments should be amended where necessary to recognise that professional indemnity insurance is available without charge to lawyers wanting to undertake pro bono legal work

The report also noted that this practice had been facilitated in 30 of the 51 US States through the creation of Emeritus Rules that waive some of the normal licensing requirement for attorneys agreeing to limit their practice to volunteer service⁵.

The Draft Law should be amended to give effect to these Recommendations and better encourage retired and career-break lawyers to provide pro bono legal services to help meet legal need. Some lawyers nearing retirement for example may have a long history of providing pro bono legal assistance to a not-for-profit organisation, and may wish to continue doing so despite ceasing commercial practice.

4. Qualification and Supervision

As stated in the Statement of Principles for the National Pro Bono Aspirational Target⁶,

when a lawyer provides pro bono legal services, he or she owes the pro bono client the same professional and ethical obligations that are owed to any paying client and accordingly the lawyer must give that work the same priority, attention and care as would apply to paid work.

Accordingly it is vital that a lawyer providing pro bono legal services is adequately qualified, and supervised, if necessary. In the case of a volunteer at a CLS, it or its governing body must have at

⁴ Draft National Law, section 3.3.6(1)(b)(6).

⁵ Further information on the US models can be found at

<http://www.abanet.org/legalservices/probono/emeritus.html>.

⁶ See <http://www.nationalprobono.org.au/page.asp?from=8&id=169> for details

least one supervising practitioner who is the principal of the legal practice.⁷ In the case of an in-house legal team it is suggested that a suitably qualified lawyer should be identified that agrees to supervise the pro bono legal work of the team. This is how the current system in NSW operates for the purposes of the National Pro Bono PI insurance scheme (see below).

Also for lawyers who have not practised for some years but wish to return to practice to undertake pro bono legal work, issues may arise of legal education, training and supervised legal practice.

We note the condition making powers of the Board in Part 3.3 of the Draft Law and in particular Rule 4.2.3 (b) and (c) of the Draft Legal Profession National Rules that provide the Board with power to impose on an Australian practising certificate:

- (b) subject to sub rule (2), a condition that the holder undertake and complete one or more of the following:**
 - ...
 - (i) continuing legal education**
 - (ii) specific legal education or training**
 - (iii) a specified period of supervised legal practice**
- (c) a condition restricting the holder to particular arrangements concerning employment or supervision**

It is suggested that these powers could be used by the Board to impose conditions to address any concerns that may arise in relation to either qualification or supervision of lawyers undertaking pro bono legal services otherwise than at a CLS.

5. Professional Indemnity Insurance

Background

In July 2009 The Centre introduced a Professional Indemnity Insurance Scheme to encourage lawyers that work in corporations and government to undertake pro bono legal work. The insurance policy is held by the Centre and issued by Law Cover Insurance Pty Ltd (**the Scheme**).⁸ By addressing the need for PI insurance, the Scheme removes one of the key constraints to employee, government and in-house lawyers engaging in general pro bono legal practice.

The Scheme insures lawyers and paralegals who undertake work on pro bono legal projects approved by the Centre. For a project to be approved it must meet the LCA's definition of "pro bono legal work" and be provided without charge to the client. It can include work with a charity, a single case or a larger project involving a law firm pro bono program.

To be approved, projects must also be undertaken or supervised by a practitioner eligible to hold an unrestricted practising certificate.

In NSW, the Law Society regulation was amended to facilitate the Scheme, and the Law Cover PI policy, being consistent with the policy for the legal profession in NSW, was approved by the NSW Attorney-General. Accordingly, the Centre would expect that the National Pro Bono PI Insurance

⁷ Draft National Laws 1.2.1, definition of "principal of a law practice" & "supervising legal practitioner", and 3.7.4 and 3.8.2(1)

⁸ For more information see the National Pro Bono Resource Centre website:
<http://www.nationalprobono.org.au/page.asp?from=8&id=236>

Policy to be considered as a complying insurance policy under s. 4.4.3 of the Draft Law but recognises that this would be a matter for the Board.⁹

Approved projects under the Scheme have included projects where legal advice and assistance has been provided by private practitioners and in-house legal teams (e.g. Optus, Ramsay Health, Benevolent Society) to the Cancer Council Legal Referral Service, Karma Currency Foundation, Information and Cultural Exchange (which provide services to young people in the greater western suburbs of Sydney), the Touched by Olivia Foundation (which supports children with special needs), and the Strathfield Plaza Community Legal Advice Service (which provides legal assistance to the Korean community).

Draft Law

It is noted that a practitioner holding the stand-alone CLS practicing certificate under the Draft Law is exempt from the requirement to hold PI insurance.¹⁰ The CLS itself is required to have a complying policy of PI insurance that provides cover for its volunteers.¹¹

All other lawyers are required to have approved PI insurance to undertake pro bono legal work¹². A few corporate lawyers may have this insurance cover by reason their employer's insurance cover but most other lawyers will be required to obtain PI insurance.

If a lawyer or group of lawyers propose undertaking pro bono legal work within the Law Council definition and without charge to the client, the Scheme will be available to provide them with PI insurance cover free of charge.

The Centre does not consider there is any need for further amendment to the Draft Law or the Rules on account of PI insurance requirements for general pro bono legal services.

6. Suggested Amendments

Drafting is a matter for the Office of Parliamentary Counsel but with that disclaimer the following amendments to the Draft Law are suggested:

3.3.6 Conditions – trust money and categories of practice

- (1) An Australian practising certificate is subject to the following conditions, as determined by the Board:
 - (a) a condition that the holder is authorised or not authorised to receive trust money;
 - (b) a condition that the holder is authorised to engage in legal practice:
 - (i) as a principal of a law practice; or
 - (ii) as or in the manner of a barrister only; or
 - (iii) as an employee of a law practice only; or
 - (iv) as a corporate lawyer or government lawyer only; or

⁹ Draft National Rules rule 9.2.3

¹⁰ Draft National Law 4.4.5 & Draft National Rules 9.2.5

¹¹ Draft National Rules 9.2.6. and Draft National Law 4.4.2 (2)

¹² Government and corporate lawyers are exempt from having PI insurance if they only provide legal services as an employee to his or her employer: Draft National Rules, rule 9.2.5 (a)(i)

- (vi) as a volunteer at a community legal service **or otherwise on a pro bono basis.**
- (2) An Australian practising certificate authorising the holder to engage in legal practice as a principal also authorises the holder to engage in legal practice as an employee of a legal practice or as a corporate lawyer or government lawyer.
- (3) An Australian practising certificate authorises the holder to provide legal services as a volunteer at community legal services **or otherwise on a pro bono basis**, subject to any discretionary condition that may be imposed by the Board that specifically prohibits, restricts or regulates the provision of legal services at community legal services **or otherwise on a pro bono basis.**

Our reasoning for proposing a single practising certificate that authorises the holder to engage in legal practice as a volunteer at a CLS and otherwise on a pro bono basis is based on an understanding that a lawyer may only hold one practising certificate at a time¹³.

The Centre also suggests introduction of a definition of “pro bono basis” at 1.2.1 of the Draft Law as follows:

pro bono basis means providing legal services 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 of free legal advice and/or representation to charitable and community organisations.

**National Pro Bono Resource Centre
13 August 2010**

¹³ Draft National Law s. 3.3.3 - 3.3.6