



NATIONAL PRO BONO RESOURCE CENTRE

**Joint submission to the Task Force for the
National Legal Profession Project**

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About the 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 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.

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A. Executive Summary and Recommendations

1. Executive Summary

- 1.1 The National Pro Bono Resource Centre (**Centre**) together with the Australian Corporate Lawyers Association (**ACLA**), Queensland Public Interest Law Clearing House (**QPILCH**), Public Interest Law Clearing House (Vic) (**PILCH**), JusticeNet (SA) and DLA Phillips Fox (**Authors**) welcome the opportunity to contribute to the National Legal Profession Project through this submission to the Taskforce and Consultative Group.
- 1.2 It is the view of the Authors that the Federal and State governments have a responsibility to promote and support the professionalism of pro bono legal services by the legal profession through government policy designed to increase socially responsible outcomes.
- 1.3 The national review of the legal profession represents a significant opportunity to introduce a nationally consistent legislative framework for the regulation of the legal profession that facilitates access to justice by encouraging participation in pro bono legal work to the fullest extent possible. Presently there are a number of inconsistencies between jurisdictions.
- 1.4 The Authors submit that in harmonising the rules and procedures in relation to legal practice in Australia for this objective, it will be necessary to:
- (a) Identify the barriers faced by lawyers wanting to provide pro bono legal assistance, particularly in relation to practising certificates; and
 - (b) Identify ways to overcome these barriers.
- 1.5 Lawyer participation in pro bono activities should be encouraged where individuals have the skills and expertise to meet unmet legal need as part of their normal professional duties.
- 1.6 The Commonwealth and some State and Territory governments have taken a number of initiatives to encourage and support the legal profession to provide pro bono legal services.
- 1.7 The proposals below provide a framework for better supporting the legal profession's ethical obligation to enhance access to justice for disadvantaged persons or charitable and community organisations, and promoting the public interest by providing pro bono legal work.

2. Recommendations

- 2.1 The Authors submit that the Taskforce and Consultative Group should make the following recommendations to the Council of Australian Governments (**COAG**):

- (a) *Recommendation 1:* The practising certificate regime in Australia should be amended so that all lawyers can obtain a practising certificate which would permit them to undertake pro bono legal work, provided that the practitioner is:
 - (i) 'suitably qualified'; or
 - (ii) supervised by a lawyer who is 'suitably qualified'; and
 - (iii) covered by appropriate Professional Indemnity (**PI**) insurance.

- (b) *Recommendation 2:* 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:
 - (i) 'suitably qualified'; or
 - (ii) supervised by a lawyer who is 'suitably qualified'; and
 - (iii) covered by appropriate PI insurance.

- (c) *Recommendation 3:* Any requirements in relation to PI Insurance should be amended to reflect the availability of free PI insurance for lawyers wanting to undertake pro bono legal work.

B. Scope of submission

3. Scope of this submission

- 3.1 This submission does not intend to comment on all aspects of the COAG reform of the legal profession.
- 3.2 As discussed above, the Centre's primary aim is to promote and support pro bono through its independent role as advocate, broker, coordinator, researcher and resource provider. The Centre is therefore in a unique position to comment on the opportunities for the proposed reforms to encourage participation in pro bono legal work to the fullest extent possible and does so in conjunction with key stakeholders.
- 3.3 The purpose of this joint submission is to identify the key legislative and regulatory barriers faced by Australian legal practitioners wanting to undertake pro bono legal work, and identify the reforms needed to help to overcome these barriers.

C. Background

4. Barriers to pro bono

- 4.1 Although some States have taken a progressive approach to facilitating pro bono work by lawyers, no State or Territory has succeeded in removing *all* barriers to pro bono legal assistance. The resultant outcome is an inconsistent approach across jurisdictions.
- 4.2 The regulatory framework governing the legal profession in each State contains barriers to pro bono which, if removed, would significantly enhance the legal profession's ability to meet unmet legal need in our community. The key barriers can be summarised as follows:
- (a) Government and corporate lawyers may be prevented from undertaking pro bono legal work under conditions on their practising certificates;
 - (b) Government and corporate lawyers that are exempt from the requirement to hold a practising certificate may not be able to provide pro bono legal assistance;
 - (c) Practitioners who offer their services on a purely voluntary basis often have to pay for the cost of a practising certificate; and
 - (d) There is limited recognition by professional associations that free PI insurance coverage is available to corporate, government and retired lawyers wanting to provide pro bono assistance.

4.3 The ACLA estimates that there are approximately 14,000 lawyers working in corporations and government,¹ which equates to roughly 25% of the legal profession nationally.²

4.4 The opportunity cost of these barriers to legal practice is therefore a significant loss in the number of legal practitioners able to provide pro bono assistance to meet unmet legal need in the community.

5. The Government's role in access to justice

5.1 While the Authors strongly support the removal of the barriers to pro bono outlined below, these reforms should not be seen as an opportunity for the Government to shift the burden of providing publicly funded legal services for disadvantaged people to the private legal profession.

5.2 Increased reliance on pro bono must not become a replacement for properly funded legal services. Pro bono and government funded legal services are complementary; they are not alternative solutions to a single problem. Pro bono cannot function to its full capacity without effective legal aid and community legal services. The Senate Legal and Constitutional Affairs Committee recognised this, confirming that pro bono legal services, while being an important response to the need for legal assistance, are neither a substitute for an adequately funded legal aid system nor a panacea for overcoming gaps in publicly funded legal services.³

D. Practising Certificates

6. Overview

6.1 Before a lawyer can undertake pro bono legal work which involves the provision of legal advice or representation, they must hold a practising certificate.

6.2 The classes of practising certificates available to legal professionals and the conditions imposed thereon vary between jurisdictions. As a result of these differences it is significantly easier to provide pro bono legal assistance in some States than in others.

¹ See ACLA website, www.acla.com.au, 12 October 2009.

² According to the Law Council of Australia, there are approximately 56,000 lawyers in Australia: John Corcoran, 'National and International Trends for the Legal Profession' (Paper presented at the Law Society of WA Law Week Luncheon, Perth, 15 September 2009) 3.

³ The Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, Fourth Report, June 2004, http://www.aph.gov.au/Senate/committee/legcon_cte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf at 9.40 (accessed on 15 September 2009)

7. Restrictions

- 7.1 Most jurisdictions have traditionally imposed restrictions on government and corporate practising certificates, which authorise the holder to provide legal services for their employer, not for anyone else. These restrictions aim to ensure that advice is not provided in the absence of appropriate PI insurance.
- 7.2 In Tasmania and the Northern Territory, lawyers holding a Corporate Practising Certificate can only provide legal services to their employer.⁴ The position in Victoria is slightly less restrictive; holders of a Corporate Practising Certificate (typically corporate and government lawyers) can undertake legal work for their employer or as a volunteer at a CLC.⁵
- 7.3 No such limitations exist in Queensland, or in NSW following a resolution of the Council of the New South Wales Law Society dated 19 February 2009.⁶
- 7.4 In the ACT, there are no restrictions on practising certificates that prevent the holder from undertaking pro bono legal work, however many in-house and government lawyers do not hold a practising certificate because they are exempted under s16(4) of the *Legal Profession Act 2006* (ACT).

8. Exemptions

- 8.1 Not all government and corporate lawyers hold – or are required to hold – a practising certificate in order to undertake legal work for their employer. The position differs markedly between jurisdictions largely determined by the availability of PI Insurance and, in the case of government lawyers, the preparedness of government to pay for the practising certificates of its employees.
- 8.2 In South Australia, government lawyers must sign an undertaking that they will only practice on behalf of their employer, and in return become exempt from the requirement to take out PI insurance cover.
- 8.3 In Western Australia, government lawyers are not required to hold a practising certificate but often need approval from the head of department before they can engage in any work outside government or volunteer at a CLC.

⁴ See Law Society of Tasmania website, <<http://www.taslawsociety.asn.au/web/en/lawsociety/practice/ConditionsPC.html>> and *Legal Profession Regulations 2007* (NT), r7(4).

⁵ *Legal Profession Act 2004* (Vic) s 2.4.3(3), 2.4.3(6).

⁶ In NSW, government lawyers and corporate lawyers with practising certificates are now able to undertake pro bono legal work provided that they are covered by appropriate PI insurance.

- 8.4 In NSW and the ACT, government and corporate lawyers are exempt from the requirement to hold a current practising certificate where they only provide legal services as an employee to their employer (or a related entity of their employer) in the ordinary course of their employment and receive no fee, gain or reward other than their ordinary remuneration.⁷
- 8.5 In Victoria and Tasmania, government lawyers are not required to hold a practising certificate to provide legal services to their employer.⁸
- 8.6 Several submissions have considered in detail whether the practising certificate exemption for government and corporate lawyers in some jurisdictions should be removed.⁹ These submissions recommend that government and corporate lawyers should hold practising certificates for the following reasons:
- (a) Practising certificates facilitate involvement in pro bono legal work;
 - (b) Practising certificates provide:
 - (i) certainty and clarity in regulation;
 - (ii) greater access to continuing professional development;¹⁰
 - (iii) greater mobility for practitioners wanting to transition between the public and private legal sectors;¹¹
 - (iv) the holder with access to the protections of legal professional privilege;¹²
 - (c) A practising certificate acts as a legitimate identifier that a person is a legal practitioner and is entitled to practice law.¹³

⁷ See *Legal Profession Act 2004* (NSW), s14(3) and *Legal Profession Act 2006* (ACT) s16(4).

⁸ *Legal Profession Act 2007* (TAS), s41; Legal Services Board website
<<http://www.lsb.vic.gov.au/GovernmentPractitioners.htm>> 16 October 2009.

⁹ See for example, Susan Campbell and John Lynch, Department of Justice Victoria, *Regulation of Government Lawyers: Report to the Attorney-General* (2009) available at <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eba99f0a14fff51/4188%20DOJ%20RegGovLawyers%20V3.pdf> and Law Institute of Victoria, *National legal profession reform - issue of practising certificates and government lawyers: Submission to the Commonwealth Attorney General* (23 February 2009).

¹⁰ Steve Mark, 'Conflicts of Interest: Challenges for the Government Lawyer' (Paper delivered at the 5th Annual Public Sector Corporate Counsel Conference, Canberra, 27 August 2009), 9. See also Law Institute of Victoria, above n 9, 4.

¹¹ Law Institute of Victoria, above n9, 5.

¹² *Ibid*, 4.

¹³ *Ibid*, 5.

8.7 While this submission does not aim to examine whether all government and corporate lawyers should hold a practising certificate, the Authors acknowledge that there are benefits to government and corporate legal practitioners in holding practising certificates.

9. Ensuring best practice

9.1 Pro bono work should always be done to the same standards of attention, priority and professional performance as paid work. As such, pro bono work should only be undertaken where a lawyer is 'suitably qualified' (meaning that they have the appropriate skills and expertise), or supervised by a lawyer that is 'suitably qualified'. What constitutes 'suitably qualified' could be a minimum number of years of legal practice.

9.2 Notwithstanding this, the Authors submit that it is not practical nor desirable for the pro bono work undertaken by 'suitably qualified' corporate and government lawyers to be supervised by a lawyer with an unrestricted practising certificate (if such a class of certificate withstands the national reform). In practice, many government and in-house lawyers with considerable practical experience (and therefore 'suitably qualified') do not hold or are not supervised by a lawyer with an unrestricted practising certificate. These lawyers may not currently be required to hold a practising certificate as part of their employment, or may be the sole or most senior in-house lawyer in their organisation.

9.3 Working on the assumption that there will be a simplification of the existing practising certificate regime, the Authors submit that practising certificates should be available to all lawyers (including but not limited to government, corporate and retired lawyers) wanting to undertake 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 PI insurance.

9.4 Where those practising certificates are not paid for by an individual's employer, a free Volunteer Practising Certificate should be available (see **paragraph 10**).

Recommendation 1

The practising certificate regime in Australia should be amended so that all lawyers can obtain a practising certificate which would permit them to undertake 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 PI insurance.

10. Free Volunteer Practising Certificates

10.1 The cost of practising certificates in some States and Territories represents another barrier for many lawyers wanting to provide pro bono legal assistance. Where an individual is not required to hold a practising certificate as part of their employment, the cost of holding a practising certificate is generally born by the individual practitioner, even if it is only required to provide pro bono legal assistance. This cost can be prohibitive for graduates or young lawyers, as well as government lawyers, retiring lawyers, and other lawyers temporarily out of practice, and acts as a disincentive to help meet unmet legal need in the community.

10.2 Only in Victoria and Queensland are lawyers able to apply for a free volunteer practising certificate solely so that they can provide pro bono legal assistance at a CLC.¹⁴ This provides an incentive for lawyers who would not otherwise need a practising certificate, to practice law as volunteers of a CLC.

10.3 In other States and Territories, some legal practitioners wanting to obtain a practising certificate for the sole purpose of volunteering at a CLC have to pay for the privilege,¹⁵ the cost of which is not insignificant. In Western Australia for example, the cost of a practising certificate is \$1,000 per annum.¹⁶

10.4 This discourages qualified lawyers, who may not need a practising certificate for their employment, from volunteering at a CLC.

¹⁴ In Victoria, a new class of practising certificate was created specifically for practitioners who only engage in legal practice as a volunteer at a CLC. See Part 2.4.3(3) (b) (iii) of the *Legal Profession Act 2004* (Vic). In Queensland, volunteer practising certificates are addressed in rule 12 of the *Queensland Law Society Administration Rule 2005*, rather than the *Legal Profession Act 2007* (QLD).

¹⁵ Note that some lawyers, such as government lawyers in South Australia, cannot obtain a practising certificate so that they can volunteer at a CLC, even if they are willing to pay for it.

¹⁶ In NSW, the cost of a practising certificate as at 1 July 2009 was \$297. See <http://www.lawsociety.com.au/idc/groups/public/documents/internetregistry/008702.pdf>

- 10.5 Due to funding constraints, CLCs rely heavily on the volunteer support of the legal profession, with more than 2,200 lawyers around Australia regularly providing free legal services to clients at CLCs. In 2007, the Centre conducted a national survey of CLCs and their use of pro bono assistance.¹⁷ Seventy percent of CLCs surveyed by the Centre said that without pro bono assistance, key services such as advice clinics, complex casework and litigation, could not be delivered at current levels.
- 10.6 Volunteer lawyers inject significant human capital into CLCs and greatly assist in meeting unmet legal need in the community. In Victoria, 99 Victorian legal practitioners held a Volunteer Practising Certificate as at 31 March 2008.¹⁸ In Queensland, which has a much smaller legal profession,¹⁹ the Queensland Law Society issued seven Unrestricted Volunteer Practising Certificates and nine Restricted Volunteer Practising Certificates in the 2007/2008 financial year.²⁰
- 10.7 Whilst acknowledging that the availability of free Volunteer Practising Certificates has led over one hundred legal practitioners to volunteer at CLCs, the Authors submit that they should also allow the holder to provide other forms of pro bono assistance provided that the work is undertaken or supervised by a 'suitably qualified' lawyer, and there is appropriate PI Insurance.
- 10.8 This would appropriately reflect that those practitioners who offer their services on a purely voluntary basis should not have to pay for a practising certificate.
- 10.9 The availability of free practising certificates would act as an incentive to government and corporate lawyers that want to provide pro bono legal assistance. It may also encourage lawyers who have retired from paid legal work or temporarily left legal practice, to make a contribution to the community.
- 10.10 This change should be legislative rather than in a subordinate instrument so as to highlight the availability of such a certificate and enshrine this important ethical value in the law.

¹⁷ National Pro Bono Resource Centre, *Report on Community Legal Centres and their use of Pro Bono Assistance (2007)* available at http://www.nationalprobono.org.au/ssl/CMS/files_cms/CLCSurveyReport.pdf

¹⁸ As at 31 March 2008, there were 14,232 registered legal practitioners in Victoria. See *Legal Services Board Victoria, 2008 Annual Report*, <http://www.lsb.vic.gov.au/documents/LSBAR2008.pdf>, p8.

¹⁹ There were 7,834 practising certificates issued by the Queensland Law Society in the 2007/2008 financial year. See Queensland Law Society, *Annual Report 2007/2008*, available at http://www.qls.com.au/content/lwp/wcm/resources/file/eb2b5f483b8a557/2007-08-annual-report_web.pdf p10.

²⁰ Queensland Law Society, *Annual Report 2007/2008*, available at http://www.qls.com.au/content/lwp/wcm/resources/file/eb2b5f483b8a557/2007-08-annual-report_web.pdf p68.

Recommendation 2

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:

- (d) 'suitably qualified'; or
- (e) supervised by a lawyer who is 'suitably qualified'; and
- (f) covered by appropriate PI insurance.

E. Professional Indemnity Insurance

11. Background

- 11.1 Before a lawyer with a practising certificate can undertake pro bono legal work, they must have appropriate PI insurance cover. This insurance is essential not just to safeguard the lawyer and client against any risk, but to ensure that the lawyer is not operating outside the scope of his or her practising certificate.
- 11.2 PI Insurance coverage is available for lawyers with a valid practising certificate to undertake pro bono legal work as a volunteer of a CLC. CLCs have PI Insurance in place to cover the work undertaken by volunteer lawyers.²¹
- 11.3 In addition to volunteering at a CLC, lawyers can also provide pro bono legal assistance in-house. While the pro bono legal work undertaken by practitioners in law firms is typically covered by a law firm's PI insurance policy or Public Interest Law Clearing House (**PILCH**) PI policy, until recently PI insurance has not been widely available to cover the pro bono legal work undertaken by corporate and government lawyers in-house.
- 11.4 There are several other insurance options available to cover pro bono legal work undertaken by corporate, government and retired lawyers.
- 11.5 Where there is no other PI insurance in place, lawyers may apply to Centre to undertake pro bono legal work under the Centre's National PI Insurance Scheme (**Scheme**).
- 11.6 In addition, corporate lawyers can undertake pro bono work which is covered by their employer's PI insurance policy. In 2007, the ACLA and insurance broker Marsh Pty Ltd developed an optional PI insurance policy 'add on' for corporate lawyers, which covers the pro bono work undertaken by lawyers under the policy. However, it is important to note that

²¹ Pro bono work undertaken at CLCs is covered by the PI Insurance Policy held by the National Association of Community Legal Centres (**NACLC**).

most government and corporate lawyers do not have PI insurance that covers advice given to clients except their employer, or at all.²²

12. National Professional Indemnity Insurance Scheme

- 12.1 In May 2009, the Centre introduced the Scheme to encourage government and corporate lawyers to undertake pro bono legal work.²³ The Scheme removes one of the major barriers faced by these lawyers wanting to provide pro bono assistance, being the need to have PI insurance to cover them for any civil claims arising from pro bono legal work.
- 12.2 The Centre has taken out a PI Insurance Policy (**Policy**) with LawCover Insurance Pty Ltd (**LawCover**) that covers lawyers and paralegals carrying out or involved in the provision of pro bono legal work with the approval of the Centre.
- 12.3 Corporate, government and retired lawyers may seek cover under the Policy by completing an application form and submitting it to the Centre for approval. If the proposed pro bono work falls within the definition of pro bono legal work as set by the Law Council of Australia, and there is a solicitor with an unrestricted practising certificate willing to supervise the work, the application will be approved.
- 12.4 The Policy is a “safety net” policy and will only extend to circumstances where no other PI policy covers an approved project. PI Insurance already exists for lawyers working on many pro bono projects.²⁴
- 12.5 The Scheme has been created to provide insurance to cover gaps with a view to expanding the range of possible pro bono projects and partnerships. For example, a corporate lawyer might develop a pro bono project on their own initiative or in conjunction with a pro bono clearing house or law firm, with the supervising lawyer from the project being from the corporation, law firm or existing pro bono clearing house.
- 12.6 The Centre has paid the premium on the Policy and will cover the excess payable on any claim. The Policy provides a high level of cover of \$2,000,000 on any claim.
- 12.7 Further information on the Scheme and Policy is available at www.nationalprobono.org.au.

²² Nicolas Patrick, ‘New opportunities in corporate pro bono’, 19 *The Australian Corporate Lawyer* 3, 9.

²³ Retired lawyers may also apply for coverage under the Policy.

²⁴ These projects are often conducted in association with a pro bono clearing house or CLC. The PI Insurance cover is usually provided by a specific policy arranged for the project (such as the PILCH NSW Homeless Persons Legal Service PI Insurance Policy), or the NACLCLC PI Insurance Policy that covers all legal work signed off by a principal solicitor at a CLC or under a law firm’s PI policy.

13. Implementation issues

- 13.1 The practising certificate regimes in some States do not recognise that PI insurance coverage is now available to lawyers wanting to provide pro bono assistance and in some States, the conditions imposed on and arrangements in relation to some practising certificates prevent these lawyers from providing pro bono legal assistance, whether through a CLC or otherwise.
- 13.2 In Victoria for example, government and corporate lawyers are precluded from providing pro bono legal assistance other than as a volunteer at a CLC and cannot seek coverage under the Policy.²⁵
- 13.3 The practising certificate regime in NSW was recently changed to facilitate the provision of pro bono legal service work across all classes of practising certificate. Effective from 1 July 2009, all NSW practising certificate holders are eligible to engage in legal practice as volunteers providing pro-bono legal services in a structured manner, namely:
- (a) Through a law practice (including a complying CLC), or
 - (b) Under an arrangement approved in writing by the Council of the Law Society and upon such conditions as determined by the Council from time to time, including but not limited to the following:
 - (i) the arrangement involves supervision of the provision of pro-bono legal services by a legal practitioner holding an unrestricted principal practising certificate; and
 - (ii) any legal practitioner providing the legal services under the arrangement is covered by PI insurance where the indemnity provided is broadly equivalent to that provided by the approved insurance policy under the *Legal Profession Act 2004* (NSW).
- 13.4 On 28 May 2009, the Council of the Law Society approved the Scheme for the purpose of condition (b) above.
- 13.5 The Authors submit that changes to the practising certificate regimes in other States will be vital to enable all corporate, government and retired lawyers to undertake a broader range of pro bono work than is currently permitted.

²⁵ *Legal Profession Act 2004* (Vic) s2.4.2 (3) and 2.4.3(6). Note however that the National Pro Bono Resource Centre together with PILCH (Vic) and DLA Phillips Fox have sought amendments to the Act by Submission to the Victorian Attorney-General, the Hon Rob Hulls, and the Victorian Legal Practice Board.

Recommendation 3

Any requirements in relation to PI Insurance should be amended to reflect the availability of free PI insurance for lawyers wanting to undertake pro bono legal work.

30 October 2009