

## WORKSHOP 3A: AIMING HIGH: GOALS, TARGETS, DEFINITIONS

### ARE COMPULSORY TARGETS IN THE PUBLIC INTEREST?

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**Abstract:** *This paper argues that it is neither helpful nor appropriate to introduce mandatory pro bono targets. Rather, it is preferable, we lawyers should engender an expectation that all who profess to be legal practitioners should consider it both a professional duty and a willing goal to facilitate access to justice especially for the indigent. To that end, we should express that expectation in our Professional Conduct Rules. Those Rules being the means by which we articulate the expectation concerning the standards of our profession.*

In this paper I argue that Mandatory Pro Bono targets should not be pursued but that we should include in our Professional Conduct Rules a statement to the effect that providing legal services “pro bono publico”, in order to facilitate access to Justice, is the duty of all legal practitioners.

Any discussion concerning targets and goals for pro bono work should begin with a description of what we hope to achieve by setting those goals and targets.

The ultimate goal of the provision of legal services “pro bono publico” is to increase access to justice recognising that for many Australians, justice is not attainable because they do not have the means to pursue it or do not qualify for Legal Aid.

Pro bono work has been defined<sup>i</sup> as being:

“..... generally in the nature of legal advice or legal representation performed free of charge or at a substantially reduced rate, for clients who

cannot afford to pay full market rates or for an organisation working for disadvantaged groups or for the public good”.

There are three elements to pro bono work that flow from this definition. The first is the provision of legal services, second there is an element of volunteerism and third, the work is done for “the public good.”

These elements inform our discussion concerning pro bono goals and targets. I will deal with each.

**Pro Bono Work involves the provision of legal services:**

If “pro bono” work involves the provision of legal services, we should not include the provision of non-legal services in any discussion concerning Pro Bono targets or goals (aspirational or otherwise). We should commend Community service initiatives by firms and practitioners, but we should recognise that pro bono work is a distinct subset of such initiatives.

**Volunteerism:**

Second, not charging for legal services that is, foregoing income in order to assist another person, is inherently a charitable activity. It should be voluntary. As others have pointed out<sup>ii</sup>, “mandatory” or compulsory volunteering is an oxymoron.

Aside from the semantics however, there are some fundamental problems associated with imposing mandatory targets. There needs to be an acknowledgment that compulsory or mandatory pro bono work is a means by which governments can abrogate their

responsibility to ensure a fair and just legal system by seeking to place that responsibility on individual legal practitioners. The public responsibility of Society (to provide access to justice) should not be (in a whole or in part) made the private responsibility of one sector of Society.

Leaving aside the important issue of how fair it would be for governments to base a legal aid scheme on the free provision of legal services by the legal profession, there are real problems with any reliance on a “mandatory pro bono” scheme as a means to promote access to justice. Such services are by their nature ad hoc – as they are dependent on variable resources and expertise and would not be an effective means of achieving the ultimate goal of making access to justice equitable and fair.

Also, requiring a lawyer to forego their livelihood for the sake of a pro bono client gives rise to a fundamental and horrible conflict of interest.

A mandatory system will only work if sanctions exist to enforce compliance. In order to make Pro Bono work mandatory, it is suggested that performance of specified hours of Pro Bono work should be a pre condition to issuing a Practicing Certificate.

Practice certificates are issued to individual practitioners and not firms. Thus, the obligation to undertake the pro bono work would be placed on the individual practitioner. In the case of solicitors, the practitioner is either an employee or partner of a firm. Often employees and increasingly partners too, have limited control over the amount of non-billable hours that they can allocate to Pro Bono work. Practitioners would therefore be in the unenviable position of having an obligation placed upon them as a qualification for

obtaining a Practice Certificate but very limited power to ensure that they are able to undertake sufficient Pro Bono hours. If firms don't provide opportunities to undertake pro bono work, solicitors would only be able to meet their Pro Bono obligation outside work hours.

Placing obligations on individual practitioners in circumstances where they do not have absolute control over all the conditions, which would enable them to meet their obligation, would be untenable.

This begs the question however, whether there should be some form of mandatory Pro Bono hours undertaken by firms. Again my answer would be that such a system would be unworkable. For example, it is difficult to see how such a system could be enforced.

However, my most fundamental objection to mandatory systems relies on a sort of behaviourist principle that "*one gets what one rewards*". If the reward is a practice certificate and what is required to get a practice certificate is to sign a form that one has undertaken a certain number of hours pro bono work then, what you will get is a form certifying that the practitioner has undertaken a certain number of hours pro bono work. You will not necessarily get increased pro bono hours or a quality pro bono legal service.

Again, reverting to a sort of behaviourist approach if one rewards the actual undertaking of Pro Bono work rather than a certificate or a target, one is more likely, I think, to see voluntary work being undertaken for the profession "in the public good".

Is there such a reward? What would be a sufficiently attractive reward to undertake pro bono work? This is where the third element of our definition comes in, viz the “public good”.

There are at least two reasons why practitioners may wish to undertake pro bono work. One is “rank” self interest. The other is because pro bono work is inherently rewarding.

The self interest reason will not be persuasive but it needs to be expressed. It comes about this way: the number of unrepresented litigants is increasing substantially.

Unrepresented litigants present a particular problem. In order to ensure hearings and trials are fair, Judicial Officers must maintain a difficult balance between being independent of the parties and ensuring the unrepresented litigant is not at a disadvantage. In order to mitigate these problems, Courts are initiating innovative solutions. The *Order 80 Scheme* conducted by the Federal Court is an example.

It is conceivable however, that Courts may develop more interventionist solutions. For example, they may appoint Court Officers to assist litigants to complete Court Forms. Court Assistance may extend in future to providing legal advice and ultimately to trained specialist Court Officers assisting litigants through trials. Or, perhaps Courts may in future, abandon the adversarial system for an inquisitorial (as opposed to adversarial) process with, say, a Court Officer acting as Counsel assisting.

It would be difficult for Practitioners to resist such initiatives if the effect of these initiatives is to produce fairer trials for the majority of litigants. If these initiatives do become a reality someday, legal practitioners could find themselves substantially redundant in some

Courts. So there is then, with a “little crystal ball gazing” good reason for Lawyers to become part of the solution and in the meantime undertake more pro bono work to reduce the number of unrepresented litigants.

### **The Public Good**

Altruistic motives are however more likely to persuade Practitioners to undertake pro bono work.

Increasingly the focus of the practice of law has been the financial “bottom line”.

Notwithstanding the business outcomes, practice of law is still, I think, seen both by those who practice it and the wider community as being a profession and the standards expected of those who are members of the profession are very high. Such an expectation is not unreasonable given that the profession of the practice of law is so integrated with the Administration of Justice.

Emphasis within the legal profession on business imperatives associated with practice of law has increased markedly in recent times. Some would question whether the “professional” aspects of practicing law are losing out to the financial bottom line. There is certainly a continuing tension between the business goals of the practice of law and the ethical requirements of our profession. Should there be any doubt that such a tension exists one need only refer to the problems arising from “conflicts of interest”. From a business perspective “there is no conflict of interest where money is concerned” from a professional point of view, conflicts of interest are untenable.

I doubt however that anyone would wish to argue against the proposition that professional standards and ethics should primarily govern the practice of law. And I would want to

argue that a profession which focuses on the administration of Justice should have, as one of its goals: working for the public good by facilitating access to justice.

In my view we should engender an expectation that all who profess to be legal practitioners should consider it both a professional duty and a willing goal to facilitate access to Justice especially for the indigent. If that proposition is correct, then we should express that expectation in our Professional Conduct Rules. Those Rules being the means by which we articulate the expectation concerning the standards of our profession.

I would argue too, that law students should be required to undertake some form of pro bono work while at university. I see no contradiction in suggesting that there be a requirement to undertake pro bono work for students but not with practitioners. If we are going to expect a commitment to working pro bono of admitted practitioners we need to expose them to that work during their training. Undertaking pro bono work, especially when that work is undertaken for the benefit of the indigent, educates those who undertake the work. It gives a “first hand” view of the adequacies and inadequacies of the justice system. More importantly, it will hopefully give students a long-lasting commitment to fighting for justice for those least able to afford it.

I am not however in favour of mandating aspirational targets for the same reasons that I mentioned earlier. For example, the difficulties of enforcing targets etc. I am also against the use of the term “target” in any aspirational statement, rather, I would suggest that if we must indicate the number of hours that a practitioner should perform then it would be preferable to refer to such hours as a “goal” to which one can aspire.

Primarily, what a statement in our Professional Conduct Rules would do is point to our obligation to facilitate justice for all and to entrench that goal in our professional culture. As a profession we would be making a statement that we work not solely for our own benefit but, for the public good. Once entrenched I would expect that undertaking pro bono work would become a noble aspiration that the vast majority of the profession would embrace and point to as a hallmark of the Legal Profession, if it isn't already.

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<sup>i</sup> See the “*Report of the National Pro Bono Task Force to the Commonwealth Attorney General*” (2001) quoting the definition established by the Law Foundation of New South Wales

<sup>ii</sup> “*The Report: Learning to Serve*,” The Association of American Law Schools