

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

ESTABLISHING A VOLUNTARY MINIMUM PRO BONO TARGET FOR AUSTRALIAN LAWYERS

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Abstract: *It is time for our various legal professional associations, including the Law Council of Australia, to take the lead in establishing a voluntary (or "aspirational") minimum target for the performance of pro bono work by Australian lawyers.*

The idea of a voluntary minimum pro bono target has gained support in Australia over the past 5 years, and has been the subject of a number of recommendations, including by the Australian Law Reform Commission. A voluntary minimum pro bono goal has tremendous merit, and will encourage Australian lawyers, both in private and government practice, to become more involved in providing legal assistance to those who might otherwise be left behind by the legal system.

The National Pro Bono Task Force, created after the First National Pro Bono Conference, chose not to press for a voluntary minimum target in 2001 because of concerns that targets might be seen at that time "by some in the profession" as the first step towards compulsion, or as a ploy to reduce pressure on governments to adequately fund legal aid. The Task Force also was concerned that a target risked "appearing to establish a maximum expectation".

In its Action Plan, the Task Force was quite properly at pains to distinguish lawyers' professional and ethical obligations to do pro bono work from the fundamental government and community responsibility to provide adequate levels of legal aid. The Task Force noted that encouragement of pro bono activities must not be a precursor to the diversion of funds from basic legal aid to other areas of legal assistance.

Voluntary minimum pro bono targets must also be seen in this way - as an initiative which acknowledges the inherent professional obligation of lawyers to conduct pro bono work, but which does not provide the excuse for any further neglect of the government's and community's responsibility to provide legal aid. Accepting absolutely that this must be a matter of basic principle, voluntary minimum targets should not be viewed as any more threatening or suspicious than other recent initiatives to increase the profile of pro bono work in this country.

As Australian lawyers participate in a Second National Pro Bono Conference, we can be confident that appropriate leadership from the Law Council of Australia, the State Law Societies and the National Pro Bono Resource Centre can overcome the potential

¹ National Pro Bono Task Force, Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services, 14 June 2001.

perception issues which have so far prevented the creation of a voluntary minimum pro bono target.

This paper calls upon the Law Council of Australia to include a voluntary minimum pro bono target in the Model Rules of Professional Conduct and Practice, and for that target to be repeated within each of the State Law Societies' Rules of Professional Conduct.

What is a target?

A voluntary minimum pro bono target is precisely what its name suggests - *voluntary*.

There is no suggestion that legal professional associations should mandate compulsory levels of pro bono work to be performed each year by solicitors.

To perhaps overemphasise the point - a voluntary pro bono target is not an attempt to impose any mandatory obligation on lawyers to perform pro bono work. A target should be entirely voluntary, with no sanction or penalty for non-compliance.

A voluntary pro bono target would establish a minimum annual number of hours of pro bono performance to which lawyers should aspire. It will convey a strong message about what the profession should strive for and how the profession should judge itself. A voluntary minimum pro bono target will make a clear statement that Australian lawyers see the provision of pro bono legal services as an essential element in our concept of professionalism.

Why we need a voluntary target

The Law Council of Australia has Model Rules of Professional Conduct and Practice, promulgated in February 1997 and revised in March 2002. The section on Legal Practice recognises that a lawyer "is endowed by law with considerable privileges" and "ought to act in ways which uphold the system of administration of justice in relation to which those privileges are conferred"².

However the Model Rules make no reference to the conduct of pro bono work. The Law Council has no current published policy on pro bono.

The publication of a voluntary minimum target by the Law Council of Australia (and the State Law Societies) will send a powerful message to the legal profession that the conduct of pro bono work is a fundamental professional responsibility of all lawyers, regardless of their seniority or the nature of their practice. Without such a target, the legal profession has no benchmark by which it is able to judge itself and its performance in relation to its pro bono responsibilities.

Leadership from within the profession itself would remove any suggestion that encouraging the conduct of pro bono work is a ploy by government to further reduce funding for legal aid and community legal centres. It will also provide the profession with greater authority to convey to government that pro bono assistance cannot be a substitute for a properly-funded system of legal aid, and that the private profession is unable to fill many of the gaps left by the present legal aid arrangements.

As a profession, we should not be complacent about the amount of pro bono work provided by Australian lawyers. The responsibility for the conduct of pro bono work has

² Law Council of Australia, *Model Rules of Professional Conduct and Practice*, March 2002, page 8.

not been shared evenly across the profession. There is not an equitable system for providing access to justice, and many people are left behind in the current justice system, unable to afford and obtain legal advice or representation.

The Australian Bureau of Statistics recently estimated that Australian private practitioners conducted annually a total of 692,000 hours of pro bono legal services without expectation of a fee³. Although an impressive figure in total, it translates into a national average of just 23 hours per year⁴ for each solicitor.

The responsibility of providing these pro bono legal services without expectation of a fee does not appear to be spread evenly through the profession, either on a geographical basis or on the basis of the size of practice. The ABS figures suggest that:

- a solicitor in practice outside of a capital city will each year conduct on average more than twice the pro bono work conducted by their capital city colleague⁵; and
- a lawyer in a practice with one principal averages 36.2 pro bono hours each year, compared with 22.7 hours for lawyers in a practice with between 2 and 9 partners, and just 15.9 pro bono hours for lawyers at in a firm of 10 or more partners⁶.

Placing pro bono work squarely within the Model Rules of Professional Conduct and Practice will speak directly to lawyers about what it means to be a professional. A

³ Australian Bureau of Statistics, *Legal Practices, Australia, 2001-2002*, 8667.0, 25 June 2003, at Table 2.10.

⁴ The Australian Bureau of Statistics states at Table 2.8 that there is a national total of 29,159 solicitors.

⁵ Derived from ABS data at Table 2.2.

⁶ Derived from ABS data at Tables 2.9 and 2.10.

voluntary minimum target is an extremely practical way of reminding each member of the profession that we all share a responsibility to provide pro bono assistance, regardless of the location or type of practice which we conduct. A target will be an important step towards ensuring a more even distribution of pro bono assistance across Australia.

Finally, a target gives justification and support to those many lawyers who are already conducting pro bono work as part of their practice, but who do not presently receive recognition for their efforts. A voluntary minimum target within the Model Rules of Professional Conduct and Practice will provide support to those lawyers who may have felt the need to "hide" their pro bono work, because of the stigma that it may not be "real work". The target will help celebrate the conduct of pro bono work as very much at the heart of what it means to be in practice.

History

The concept of a voluntary minimum pro bono target is not new. Targets have existed in the United States for more than a decade, and have been discussed in Australia for at least the past 5 years.

(a) The US experience

The American Bar Association Model Rules of Professional Conduct have included a minimum voluntary pro bono goal of at least 50 hours per year, since 1993. In addition,

twenty States and the District of Columbia have included voluntary pro bono targets in their service rules⁷.

The ABA Model Rule 6.1 is as follows:

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
 - (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means;and
- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or

⁷ Oregon has an **80 hour** per year target; Arizona, California, Colorado, District of Columbia, Hawaii, Kentucky, Maryland, Minnesota, Mississippi, Montana, New Mexico, Texas and Vermont have a **50 hour** target; Utah has a **36 hour** target; Massachusetts has a **25 hour** target; Florida, Nevada, New York and Ohio have a **20 hour** target; and Virginia recommends that its lawyers aspire to providing pro bono work to the equivalent value of **2% of their professional time**.

charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

The beauty of the ABA Model Rule is that it sets a clear standard for what it means to be a professional. The Model Rule recognises that *every lawyer*, regardless of their seniority or workload, has a responsibility to provide pro bono legal services. The commentary to the Model Rule reminds us that personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer⁸.

By repeatedly tying pro bono time to the provision of legal services directly to persons of limited means or to organisations which support persons of limited means, the Model Rule is a reminder that just because legal work is conducted at no cost, it should not automatically be referred to as pro bono work. A lawyer who drafts their local golf club's

⁸ www.abanet.org/legalservices/probono/rule61.html.

constitution, or a law firm which works for an opera company in return for an appearance in the program as a sponsor, would not come within the Model Rule.

The commentary to the Model Rule calls upon employers to act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services under the Rule, and recognises that it may be more feasible to satisfy the pro bono responsibility collectively, through a firm's aggregate pro bono activities.

It is important to recognise that the Model Rule does not impose a mandatory target. Under the Model Rule the 50 hour figure is one to which lawyers should "aspire". The commentary to the Rule confirms that the responsibility set out in the Rule "is not intended to be enforced through disciplinary process".

(b) Australia

In Australia, the recent history of a voluntary minimum pro bono target includes the following:

- In December 1998, the Law Society of NSW's Access to Justice Task Force recommended establishing a voluntary "minimum pro bono commitment" in its Access to Justice Final Report⁹.
- In 1999, the Law Institute of Victoria resolved to encourage its members to dedicate a minimum of one hour per week of time to pro bono work. No

⁹ Recommendation 38 to the Council of the Law Society of New South Wales was that: "the Law Society recommend to its members that legal practices undertake a minimum pro bono commitment, calculated on the basis of ten hours per solicitor or the equivalent of 1% of billable work (whichever is the lesser) per annum". The author was a member of the Task Force.

published papers appear to have since implemented or publicised this resolution.

- In January 2000, the Australian Law Reform Commission presented its report *Managing Justice: A review of the federal civil justice system*¹⁰. One of the ALRC's 138 recommendations was in respect of Legal professional associations (such as the Law Council of Australia and the various Law Societies) establishing a voluntary target for pro bono performance by their members:

Recommendation 37. Legal professional associations should urge members to undertake pro bono work each year in terms similar to that stated in American Bar Association Model Rules of professional conduct rule 6.1.

The Law Council of Australia considered the recommendations of the ALRC report when reviewing its Model Rules¹¹. The revised Rules adopted by the Law Council in March 2002 failed to act upon Recommendation 37.

In June 2003, the Federal government released its response to the ALRC report¹². The government's response to Recommendation 37 is, not surprisingly, that "this recommendation is a matter for legal professional associations". There will be no further government action on the recommendation.

¹⁰ Australian Law Reform Commission Report No. 89, *Managing Justice: A review of the federal civil justice system*, available at www.austlii.edu.au/au/other/alrc/publications/reports/89/ltrtrans.html

¹¹ Law Council of Australia, *Model Rules of Professional Conduct and Practice*, March 2002, page 1.

¹² www.ag.gov.au/alrc89

- In November 2000, the Pro Bono Working Group convened by the President of the Law Society of NSW, recommended to the Council of the Law Society that the Law Society issue a voluntary pro bono target for all members¹³. The recommendation was not adopted by the Council.
- In March 2001, the Law Society of NSW issued instead a Discussion Paper on pro bono services by the NSW legal profession, *Pro Bono Work - Promoting Cultural Change*¹⁴ inviting comment on a range of issues including:

Should pro bono targets for the legal profession be established? If so, should these be voluntary or compulsory?

The Law Society received 13 responses to the Discussion Paper. All of the responses received from private firms¹⁵, together with the submissions of Kingsford Legal Centre¹⁶, the NSW Government's Legal Profession Advisory Council¹⁷ and NSW Young Lawyers¹⁸, encouraged the creation of a voluntary pro bono target for NSW lawyers. Despite the almost unanimous support for the proposition, the Council of the Law Society of NSW did not implement a voluntary pro bono target.

¹³ Draft Recommendation 4 reads:

"The Law Society issue a voluntary pro bono target for all members of the legal profession to undertake a minimum of 20 pro bono hours per year".

The author was a member of the Working Group.

¹⁴ www.lawsociety.com.au/about/papers . The author assisted in the preparation of the Discussion Paper.

¹⁵ Blake Dawson Waldron submission received 15 May 2001; Clayton Utz submission received 7 May 2001; Freehills submission received 27 April 2001; Gilbert + Tobin submission received 8 May 2001; Mallesons Stephens Jaques submission received 8 May 2001.

¹⁶ Received 4 May 2001

¹⁷ Received 4 May 2001

¹⁸ Received 1 May 2001

- In March 2002 the Chesterman Review of the NSW Solicitors' and Barristers' Rules commissioned by the NSW Attorney General, recommended that consideration be given to including an aspirational target of a prescribed number of hours of pro bono work per year within the NSW Solicitors' *Professional Conduct and Practice Rules*¹⁹.

What might an Australian voluntary target look like?

An Australian voluntary pro bono target should contain the following elements:

1. The target should be more than just a general statement that pro bono work is good. It should emphasise that the conduct of pro bono work is part of the inherent professional responsibility of being admitted to practice law;
2. The target should emphasise that the conduct of pro bono work is a matter for all lawyers, at every level of seniority and practice;
3. The target should state a minimum number of pro bono hours to which a lawyer should aspire;
4. The target should emphasise that it is voluntary, with no sanction or penalty for non-compliance; and
5. The target should give some guidance as to what is pro bono work, and include suggestions for how the target may be achieved.

¹⁹Emeritus Professor Michael Chesterman, *'Putting Lawyers on Good Behaviour' - A Review of the NSW Solicitors' Rules and Barristers' Rules*, Recommendation 17(b) at p 134, and see discussions at 7.39 to 7.49 and 8.33

In order to achieve these goals, the Law Council of Australia should include the following voluntary minimum pro bono target within its *Model Rules of Professional Conduct and Practice*.

The equivalent provisions should also be included in the various State and Territory Rules:

- the Law Society of New South Wales' *Professional Conduct and Practice Rules*
- the Law Institute of Victoria's *Professional Conduct and Practice Rules*
- the Law Society of Western Australia's *Professional Conduct Rules*
- the Queensland Law Society's *Professional Conduct Rules*
- the Law Society of the Australian Capital Territory's *Professional Conduct Rules*
- the Law Society of South Australia's *Rules of Professional Conduct & Practice*
- the Law Society of Tasmania's *Rules of Practice*
- the Law Society of the Northern Territory's *Rules of Professional Conduct and Practice*

**Proposed voluntary minimum pro bono target for the Law Council of Australia's
*Model Rules of Professional Conduct and Practice***

34. Voluntary pro bono practice

Every legal practitioner, regardless of seniority or workload, has a professional responsibility to provide pro bono legal services as part of their regular practice. This professional responsibility is in no way a substitute for the proper funding by government of Legal Aid and Community Legal Centres.

34.1 A practitioner should aspire to undertake on a voluntary basis a minimum of 50 hours of pro bono legal services each year.

34.2 Pro bono legal services are those which involve the exercise of professional legal skills, and are services provided on a free or substantially reduced fee basis. They are services which are provided for:

34.2.1 people who can demonstrate a need for legal assistance but cannot obtain Legal Aid and cannot afford the full cost of a lawyer's services at the market rate without financial hardship;

34.2.2 non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good;

34.2.3 public interest matters, being matters of broad community concern which would not otherwise be pursued; and

- 34.2.4 the improvement of laws or the legal system in respect of disadvantaged and marginalised people and organisations which assist disadvantaged and marginalised people.
- 34.3 Pro bono legal services do not include:
- 34.3.1 work which is performed on a contingency basis in the expectation of a fee;
 - 34.3.2 work which is performed for free or at a reduced rate for whatever reason, where such work is performed without reference to the client's capacity to afford the full cost of a lawyer's services at the market rate without financial hardship;
 - 34.3.3 work which does not involve the exercise of professional legal skills;
 - 34.3.4 the sponsorship of cultural and sporting events, work undertaken for business development and other marketing opportunities.
- 34.4 When a legal practitioner 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.
- 34.5 Law firms should act reasonably to enable and encourage all legal practitioners at the firm to provide pro bono legal services in accordance with this Rule.
- 34.6 Law firms may choose to provide pro bono legal services in accordance with this Rule by aspiring to undertake an average of a minimum of 50 hours of pro bono legal services each year per legal practitioner.

34.7 Failure to comply with this Rule will not be the subject of any sanction or disciplinary process against a practitioner or law firm.