

National Pro Bono Resource Centre

20 November 2002

Denis Hall
Director , Government Legal Services
Attorney General's Department of Victoria
By email

Dear Mr. Hall,

Issues Paper on the Victorian Government's Legal Services Panel Pro Bono Commitment

Thank you for providing the Centre with a copy of the Issues Paper on the Victorian Government's Legal Services Panel Pro Bono Commitment.

The National Pro Bono Resource Centre has been established by the Public Interest Advocacy Centre in conjunction with several partner organisations and with the financial support of the Commonwealth Government.

The Centre aims to promote and support effective pro bono in Australia. We have recently undertaken wide-ranging consultation about issues affecting pro bono service providers and potential pro bono clients and have commenced work on a number of projects designed to offer support to pro bono providers and to improve the targetting of pro bono services.

Given the Centre's national focus, we have chosen to comment only on several aspects of the Victorian Government's scheme that appear to us to have some broader significance and on which we feel in a position to comment.

We commend the Government on its aim to increase access to justice by using its bargaining power to encourage firms to undertake pro bono. We are aware that there are some views that the scheme may not in fact be the best way to achieve this aim at least in the short term. We are not however in a position to judge whether this is so and specifically decline to comment on that issue.

We provide comments on the following issues:

1. the extent to which pro bono work that benefits people and causes outside Victoria should be able to be counted towards a firm's obligations under the contract,
2. the definition of 'pro bono legal services' and the way in which 'approved causes' should be defined, and
3. the desirability of reviewing aspects of the scheme including the definition of approved causes after the scheme has been in operation for a period.

1. Should the scheme allow firms to count pro bono undertaken wholly or partially outside Victoria?

Yes it should. Work that counts in compliance with the contracts should not be limited to work undertaken for clients or causes in Victoria. It should cover pro bono services that enhance access to justice by low income or disadvantaged clients or groups that are provided by Victorian-based staff of firms.

For better or worse legal resources in Australia are concentrated in the major cities, especially in Melbourne and Sydney. But legal need is more evenly spread throughout Australia. Melbourne firms receive and respond to requests for pro bono assistance from smaller and less well-resourced jurisdictions, for example from Indigenous organisations in the Northern Territory. They thus make valuable contributions to access to justice in Australia. We note that the Action Plan prepared in 1994 by the Commonwealth Access to Justice Advisory Committee stressed the need for national equity as one of the three overarching principles in any approach to access to justice. We are concerned that a requirement that all effort in relation to pro bono under the contracts provide a direct benefit to clients or causes in Victoria may focus the entire pro bono effort of the Victorian branch of a firm on Victoria and thus exacerbate inequities in Australia in relation to access to justice. We also believe that equity in access to justice is a matter of interest to all Australians, including Victorians. Lack of access to legal services in any part of Australia diminishes all Australians.

Moreover we suggest that there will be a natural tendency for firms to provide pro bono services close to their offices where access is easier. There is unlikely to be any significant diversion of resources out of Victoria even if no specific requirement is made that work be done in Victoria.

2. Definition of "approved causes".

We would encourage you to adopt a broad and flexible definition of approved causes at this stage.

As you will know, pro bono in Australia is going through some fairly rapid development at the moment. There are different ideas about what counts as pro bono and the best way to deliver it. New arrangements are being proposed and put in place on a fairly regular basis. We do not think that it is appropriate that a fixed or prescriptive definition be settled on at this time. We are a little concerned that if the Victorian Government proposed a detailed definition for the purposes of the scheme then there is some scope for that definition to be used *de facto* for other purposes and that this may stifle development of new and effective pro bono arrangements.

The definition should be broad enough to include at least the following forms of assistance:

- matters done by firms in house,
- secondments to community legal centres, PILCH and similar organisations, and outreach services such as the PILCH homeless persons project
- contribution of funds, in-kind assistance, advice and non legal staff in ways which will increase access to justice including by providing them to organisations such as community legal centres and PILCH.

The activities included in the definition should be limited to those that constitute or promote legal assistance that will directly or indirectly benefit disadvantaged or low-income people or which advance the public interest.

As noted above we tend to the view that it is premature to draft a precise definition of pro bono, even for the particular purposes of the definition of 'pro bono legal services' in the tender contracts (which is what a precise definition of 'approved causes'; would effectively amount to).

We suggest instead that one of the following approaches be adopted for a period of 12 months with a review to be undertaken in plenty of time to consider changes for calendar 2004:

A. *leave the definition of approved cause to the firm involved provided the relevant activity increases access to justice for low income or disadvantaged people.*

B. *use a simple inclusive definition*

We are not proposing that our drafting be used, however by way of example such a definition could be along the following lines:

'approved cause' means the provision of pro bono services that enhance access to justice including:

- secondments of legal or non-legal staff to community organisations that undertake activities that increase access to justice
- provision of financial, in-kind assistance or other assistance to community organisations that undertake activities that increase access to justice.

As this definition only adds to the ordinary meaning of pro bono, it will obviously cover in house legal services and has the flexibility to cover other arrangements.

C. *use a more complex inclusive definition.*

Again we are not proposing that our drafting be used, however by way of example such a definition may include the following points:

For the purposes of this contract legal services for an approved cause includes:

- a) legal work undertaken by staff employed by the firm (whether or not those staff are based at the firm, seconded to a community organisation or otherwise engaged), and
- b) financial, in-kind or other assistance provided to an organisation that provides legal assistance or in some other way contributes to access to justice including by undertaking referral, community education, policy advocacy, co-ordination or support work

provided that in either case:

- c) the work is undertaken for the benefit of a disadvantaged client or social group or involves a matter of public interest, and
- d) the assistance provided by the firm (but not necessarily disbursements) is provided at no cost to the client *or at a substantially reduced fee¹.*

We note that the definition of 'pro bono legal services' in Clause 15 of the contract includes words limiting those services to legal services provided by the firm's lawyers . We think this

¹ See below for discussion of reduced fee work.

is unfortunate and that the Government should indicate an intention to allow a firm to count pro bono assistance that is provided otherwise than by one of its lawyers where that work promotes access to justice.

D. Supplement the Law Council Definition

The Issues Paper asks whether the Law Council of Australia definition of pro bono should be used. While that definition was extremely useful when first produced it is our feeling that subsequent developments have rendered the definition a little out of date in relation to the range of activities now undertaken by firms which do advance access to justice.

We would discourage rewriting or tinkering with the LCA definition for the reasons give above. However the LCA definition has the advantage of wide currency. It would be feasible to use the LCA definition as part of the guidelines on what is acceptable as an approved cause. It needs, however, to be clear that some forms of assistance that are not contemplated by the LCA definition will also be acceptable.

This could be achieved along the following lines:

For the purposes of this contract “pro bono legal services” includes

- a) activities which fall within the Law Council of Australia definition of pro bono, and
- b) secondments of staff (legal or not) or provision of financial or in-kind assistance to community organisations that undertake activities that enhance access to justice.

Another aspect of the Law Council definition with which we have some concerns is the implication contained in it that all 'reduced fee' work ought to count as pro bono work. However we do not think that the solution to this problem is to try to debate between now and when the contracts come into force on 1 January 2003 what, if any, reduced fee work should count as pro bono. The complexities and likely debate in relation to what kind of reduced fee counts as pro bono for the purposes of the tender is a further argument against attempting to rewrite or expand the Law Council definition at this time.

In conclusion we suggest using a simple inclusive definition as outlined at (A) above or the Law Council definition with the suggested supplementation as specified at (D). In either case the definition should be reviewed after an appropriate period.

3. Review

We suggest that the definition of 'pro bono legal services' and of 'approved cause' should be reviewed after 6 months to allow more considered discussion in the light of some experience of the operation of the scheme.

We trust that these comments are of some assistance. If you would like to discuss them further please contact me on 02 9385 7371 or by email gordon@nationalprobono.org.au.

Thank you for the opportunity to contribute in relation to this issue.

Yours faithfully,

Gordon Renouf
Director