

Practical findings from the PILCH ACLA Corporate Pro Bono Project

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Short Description:

This paper describes the PILCH/ACLA Corporate Pro Bono Project, its advocacy to overcome barriers for corporate pro bono legal practice, and practical findings on why and how in-house lawyers should undertake pro bono.

1. Introduction

Marginalised and disadvantaged members in the community experience significant levels of unmet legal need. Pro bono legal practice¹ plays an important and meaningful role in meeting that need. It impacts positively on the personal and professional experience of legal practice, and contributes to organisational objectives.

Whilst most in-house lawyers would support the idea of pro bono legal work, many will think it is not an option at their workplace due to regulatory, time and budgetary constraints. However, with regulatory reform and greater awareness, it is reasonable to anticipate that in-house lawyers will have greater interest and opportunities for pro bono practice.

This paper discusses the PILCH ACLA Corporate Lawyers Pro Bono Project (the **Project**), and its endeavours to facilitate in-house pro bono, including addressing regulatory and practical barriers. The paper provides examples of corporate pro bono and a framework for initiating a pro bono program.

2. The PILCH ACLA Corporate Lawyers Pro Bono Project

PILCH and ACLA established the Project in March 2011. The Project addresses elements of PILCH and ACLA's strategic objectives, respectively to improve access to justice,² and to

¹ The Law Council of Australia defines pro bono as:

- Where a lawyer, without fee or without expectation of a fee or at a reduced fee, advises and/or represents a client in cases where a client has no other access to the courts and the legal system; and/or the client's case raises a wider issue of public interest.
- The lawyer is involved in free community legal education and/or law reform.
- The lawyer is involved in the giving of free legal advice and/or representation to charitable and community organisations.

² PILCH is a leading Victorian not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights, *by facilitating the provision of pro bono legal services*, and also by undertaking law reform, policy work and legal education. In carrying out its mission,

represent and promote the contribution of in-house lawyers. Taking an access to justice perspective, the Project has the stated goal of addressing unmet legal need in the community by facilitating in-house pro bono legal practice.

To achieve that goal the Project aims to:

- ▶ remove the legislative barriers that are the principal obstacle to corporate (and government) lawyers engaging in pro bono legal practice in Victoria and under the National Legal Profession Reform; and
- ▶ identify models of best practice corporate pro bono legal work and to facilitate opportunities for corporate lawyers to participate in pro bono legal practice.

The Project has been managed on a day-to-day basis by PILCH, with support and guidance from the ACLA executive. The Project benefited from a corporate pro bono partnership with Telstra, which provided a six-month part-time secondee from its legal department.

3. Background - unmet legal need

There is a significant body of literature³ on unmet legal need, and this paper does not seek to provide a comprehensive summary of it. Suffice to indicate that access to justice system is hampered by barriers experienced by many in the community. Those barriers are not only financial, although that is a significant reason. Other barriers arise from circumstances, which are themselves contributing causes of legal issues, such as marginalisation, disadvantage, oppression and discrimination.

There are a number of identifiable cohorts in the community that experience particular unmet legal need, including, for example, single parents, those on social security, the elderly, the homeless, prisoners, newly arrived persons and others from culturally and linguistically diverse communities (CALD). There are also identifiable areas of law in which need is experienced, including, for example, family law, employment law, fines, civil debt and immigration.

Assisting those persons pro bono can be a simple matter of taking instructions and providing legal information or advice. For those people, their principal legal problem is that they do not understand their legal rights. In other cases, it may be appropriate to provide further case work, including negotiating or preparing correspondences, or prosecuting or defending claims, including test cases in the superior courts. This work is often undertaken or completed with the help of the legal assistance sector (legal aid commissions and community legal centres), barristers and the private legal profession acting pro bono.

PILCH seeks to address marginalisation and disadvantage, effect structural change to address injustice and foster a strong pro bono culture in Victoria. See www.pilch.org.au

³ See, for example: Coumarelos, C, Wei, Z & Zhou, 2006, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, Sydney and Judith Stubbs and Associates, 2010, *Summary Report Planning for Legal Needs: Legal Needs Assessment Framework*, prepared for Community Legal Centres NSW, Bulli.

4. Law reform campaign

4.1. Practising certificates

As mentioned, one of two goals for the Project has been to advocate reform of practising certificate regimes, which have been the principal barrier to in-house pro bono.

Practising certificates available to in-house and government lawyers in Australia have typically limited those practitioners to providing legal advice to their employer only. In some cases, government lawyers do not require, or have no access to, a practising certificate. Combined with laws prohibiting unauthorised legal practice, those regulations have effectively prevented in-house lawyers from providing legal services (pro bono or otherwise) to private clients.

A number of recent reforms in the eastern States have unlocked those regulatory constraints in the case of pro bono. Specifically, the NSW and Queensland Law Societies made resolutions and rule amendments to allow the holders of all practising certificates in their jurisdictions to act pro bono (in 2009 and 2010 respectively). The National Pro Bono Resource Centre (**NPBRC**) and DLA Phillips Fox, now DLA Piper Australia (**DLA**) were the principal promoters of those reforms.

Following those successes, the Project's law reforms activities have focused on the National Legal Profession Reform (**NLPR**) and on legislation in the Project's home jurisdiction of Victoria.

The **attached** *Practising Certificates in Australian States and Territories for Corporate Lawyers* sets out the current position regarding practising certificates for corporate lawyers undertaking pro bono work in Australian States and Territories.

4.2. Victorian practising certificates

In the case of Victoria, limitations to in-house pro bono are enshrined in the *Legal Profession Act (Vic) 2004* (the **Act**).⁴ Amendment of the Act requires intervention of the Parliament, a more complex process than the resolution and rule amendments that the NSW and Queensland Law Societies were able to implement.

PILCH and the NPBRC first raised legal reform in Victoria with the then Labour Attorney-General in August 2009. Despite the Attorney's support for pro bono, he did not support amendment of the Act ahead of the NLPR process. Notably, Victoria was committing considerable resources to preparation of the draft national Law and Rules, and there was some confidence the NLPR, when implemented, would permit corporate pro bono legal practice

Our position, however, was that the NLPR had already been promoted over many years, and was at best a number of year's away.

⁴ The restriction arises out of the definition of 'corporate legal practitioner' in section 1.1.1 of the Act. The change advocated by the Project is the addition to that definition, below, of the words in bold:

an Australian legal practitioner who engages in legal practice as an employee of a person who, or body that, is not an Australian legal practitioner, an Australian-registered foreign lawyer or a law practice, and who provides legal services to, and for the purposes of, his or her employer **or otherwise on a pro bono basis.**

Following the change of government in November 2010, PILCH advocated the reforms with the new Victorian Attorney-General, Mr Robert Clark. We were invited to submit a memorandum on our proposal, and the Attorney subsequently indicated he would support reforms in Victorian ahead of the NLPR. We understand the Attorney will support amendment of the Act alongside introduction of the NLPR enabling legislation, likely in early 2012.

4.3. The National Legal Profession Reform

Regulators and Australian governments have been working toward consistent national regulation of the legal profession for many years, often hampered by substantial differences as to substance and detail.

The Council of Australian Governments (**COAG**) initiated the NLPR project in April 2009, as part of its microeconomic reform agenda. It has the intended purpose of creating a national legal profession, with uniform regulation. A package including the draft National Law and Rules, was released in April 2010.

PILCH actively engaged in the consultation process through its membership of a Victorian stakeholder group, convened by the Department of Justice, and which included the principal legal (statutory) regulatory bodies in Victoria.

PILCH also made a formal submission, addressing a failure in the draft Law to authorise pro bono legal practice, although they authorised volunteer practice within community legal centres (**CLC**).⁵ Likely, this was an unintentional, but crucial oversight. Amendments advocated by PILCH (and others) were ultimately adopted in the revised draft Law accepted by the Standing Committee of Attorneys-General.

The final National Law will now permit all holders of an Australian practising certificate (including corporate and government lawyers) to engage in pro bono legal practice.⁶ It also makes provision for a separate category of practicing certificate that authorises the practitioner to engage in legal practice as a volunteer at a community legal service, or otherwise on a pro bono basis.⁷ This category will allow career break or retired lawyers to practice pro bono.

⁵ See 'National Legal Profession Reform' at: <http://www.pilch.org.au/lawreformsubmissions2010/>

⁶ See Draft National Law 3.3.7(5) at www.ag.gov.au/legalprofession/:

An Australian practising certificate also authorises the holder to provide legal services as a volunteer at a community legal service, or otherwise on a pro bono basis. This does not apply to the extent that the certificate is subject to a discretionary condition that specifically prohibits, restricts or regulates the provision of legal services at community legal services or otherwise on a pro bono basis.

⁷ See Draft National Law 3.3.7(1):

An Australian practising certificate is subject to the condition, as determined by the Board, that the holder is authorised to engage in legal practice:... (c) as a volunteer at a community legal service, or otherwise on a pro bono basis, only.

The NLPR only applies, however, to the four jurisdictions - New South Wales, Queensland, Victoria and the Northern Territory – which are currently taking part in the reforms. Collectively, this covers around 85 per cent of Australia’s practising lawyers, with the other jurisdictions able to sign up in the future. Queensland has carved out the requirement for its government lawyers to hold a practising certificate, so those lawyers will not benefit from the pro bono enabling clause.

It is expected that the NLPR will commence on 1 January 2013. NSW was selected to become the location for the new National Legal Services Board and National Legal Services Commissioner. Victoria has agreed to accept the role of host of the new national legislation, meaning that the Legal Profession National Law will be passed as a substantive law of Victoria and the Victorian Attorney-General will become the 'host Minister' under the scheme.

5. Professional Indemnity Insurance and other ‘barriers’

5.1. PII Insurance

A further historic barrier to in-house lawyers providing pro bono legal services has been the requirement for lawyers to hold professional indemnity insurance (**PII**) for clients other than their employer. In-house lawyers do not typically hold PII for those files.

In-house lawyers providing legal services on a pro bono basis now have access to PII through the National Pro Bono Professional Indemnity Insurance Scheme (the **Scheme**). The Scheme was introduced in July 2009, and is administered by the NPBRC.

The Scheme insures lawyers and paralegals that undertake work on pro bono legal ‘projects’ approved by the NPBRC. Approved projects are broadly defined and can include ongoing work with a charity, a single case or a larger project involving a law firm pro bono program. Thirteen projects have been approved by the NPBRC to date. Further information on the Scheme, including how to obtain cover, is contained in the **attached** documents *Corporate pro bono in Australia* and the *Australian In-House Legal Counsel Pro Bono Guide*, and at the NPBRC website.⁸

In-house lawyers should note that the NPBRC Scheme:

...is only applicable for in-house and government lawyers seeking to undertake pro bono work.

If (an in-house lawyer is) volunteering at a Community Legal Centre, (their) work will be generally supervised by the principal solicitor and is covered by the professional indemnity insurance held by the Centre. Generally speaking, such legal work is

⁸ See: www.nationalprobono.org.au

performed by volunteer lawyers working on-site at the Centre, and will not be able to be performed off-site in (the in-house lawyer's) own office.⁹

A copy of the letter that is given to General Counsels by the NPBRC in respect of lawyers who have been approved by the Scheme to provide pro bono legal advice. See the **attached NPBRC PII Advice**.

5.2. Other barriers

Apart from PII, there are a number of other professional and ethical concerns, which have been cited by in-house lawyers as barriers to developing a pro bono program. These include requirements around retainer letters, conditional cost agreements, disbursements, and complaints. In practice, these concerns may have more to do with a lack of familiarity that actual risk or compliance difficulties. Specifically, most of those issues are addressed in the **attached DLA Australian In-House Legal Counsel Pro Bono Guide**. Guidance and support with these matters is also readily available from pro bono clearing houses (including PILCHes and JusticeNet in SA) and from private profession firms with pro bono legal practices.

6. What does in-house legal counsel pro bono look like?

Part of the Project involved the mapping of opportunities for in-house pro bono legal programs, by reviewing a number of corporate pro bono programs already operating in Australia, and in America (where corporate pro bono is well established). The Project considered examples of best practice, how various programs were established, and their notable features.

In so doing, the Project drew on the work of the NPBRC and the Pro Bono Institute in Washington D.C. (**PBI**). Both organisations encourage and support lawyers and legal practices to provide high quality pro bono legal services. Like PILCH, they work with the legal profession and the community sector to match services with the clients and groups most in need of assistance.

6.1. In-house pro bono in Australia

The **attached, Corporate pro bono in Australia** summarises:

- ▶ details about the NPBRC and its PII Scheme;
- ▶ the thirteen projects that have been approved by the NPBRC to date;
- ▶ key points from PILCH's discussions with corporations which do and do not provide pro bono legal advice; and
- ▶ details of the pro bono legal work currently undertaken by 3 corporations in Australia - two of which are approved by the Scheme and one with alternate insurance coverage.

6.2. In-house pro bono in the United States of America

In-house legal counsel pro bono in America is more established than in Australia. The PBI has specific corporate programs:

⁹ DLA Piper Australia, *The Australian In-House Legal Counsel Pro Bono Guide*, 2011, 3.

Corporate Pro Bono, a partnership project of the Pro Bono Institute and the Association of Corporate Counsel (**ACC**), is designed to substantially increase the amount of pro bono work performed by in-house counsel and to enhance the pro bono culture of in-house legal departments through technical assistance to the in-house community, targeted research and publications, online information and services, and outreach and educational programming. Corporate Pro Bono also works closely with ACC chapters to focus their resources and agendas on pro bono service.¹⁰

The Corporate Pro Bono program and the PBI Corporate Pro Bono Challenge,¹¹ provide some guidance for the Project into the future. The **attached** *Pro Bono Best Practice in the United States* showcases six examples of corporate pro bono programs, as described by the PBI, and details how those programs were established as well as their notable features.

6.3. Key learnings

Key learnings, some of which are contained within the attached narratives, are distilled below.

Grounds for hesitation in initiating a pro bono program included:

- ▶ Regulation - some businesses might consider providing pro bono legal advice once the legislation in Victoria is amended;
- ▶ There are many competing demands on corporate lawyers' time, and they need to find the time to undertake pro bono legal advice;
- ▶ If corporations were informed about the type of work they could do or with whom they could partner, this would assist them to evaluate pro bono legal opportunities in a more informed manner;
- ▶ Some industries may have greater impetus or connection to pro bono legal activities than others;
- ▶ It is necessary to match the right skill set of corporate lawyers to the pro bono advice, though this can usually be addressed by training;
- ▶ Whereas the provision of legal services is a cost item for corporations, it is a revenue stream for the private legal profession; and
- ▶ There are stronger economic and cultural imperatives for private law firms to engage in pro bono legal practice.

¹⁰ See: www.probonoinst.org/projects/corporate-pro-bono.html

¹¹ "The Challenge is a simple, voluntary statement of commitment to pro bono service by legal departments, their lawyers and staff. All Challenge Signatory legal departments receive information, guidance and tailored support, free of charge, from Corporate Pro Bono to strengthen their existing pro bono programs or start new ones". see <http://www.cpbo.org/challenge/>

While pro bono work should always be undertaken for the benefit of the client and/or the community, investment in pro bono may deliver business benefits to the organisation. The business case for pro bono includes:¹²

- ▶ Corporate pro bono is well established in the US, and global and multinationals will experience synergies in developing local pro bono programs;
- ▶ Pro bono is an opportunity to develop close relationships with panel law firms;
- ▶ Early adopters will develop leadership skills and recognition;
- ▶ Job satisfaction, personal engagement in the workplace, professional experience and satisfaction, and staff recruitment and retention can all be positively influenced by a pro bono program;
- ▶ Improved reputation and profile;
- ▶ A tangible legal-team contribution to the organisation's broader corporate social responsibility (CSR) strategy;
- ▶ The practical demonstration of the organisation's values; and
- ▶ Positive ethical considerations.

Features of successful programs include:

- ▶ Support from General Counsel and the corporation executive;
- ▶ Recognition of the CSR and personal and professional benefits of pro bono;
- ▶ The existence of a pro bono policy, including identifying an appropriate area in which to assist;
- ▶ Partnering with referral agencies that can triage appropriate matters, determine legal merit and to take initial instructions;
- ▶ Partnering with the private profession (including on an existing program) to gain administrative, structural and legal support;
- ▶ Finding a program that matches existing skill sets, or alternatively, benefiting from the diversity of practice that comes from moving into a new area (with training, which can typically be arranged with partner legal services); and
- ▶ Services that can be delivered flexibly, in-house and in short blocks of time.

7. How-to toolkit

The **attached Australian In-House Legal Counsel Pro Bono Guide** (the **Guide**) prepared by DLA is a detailed toolkit for in-house legal counsel. It offers practical guidance for corporate and government lawyers and legal departments interested in establishing or joining existing pro bono programs. The Guide provides a snapshot of how and why to set up a pro bono program, addresses key concerns such as PII and retainers, and contains a sample pro bono policy and sample costs agreement.

As mentioned, guidance and support is readily available from pro bono clearing houses (including PILCHes and JusticeNet in SA) and from private profession firms with pro bono legal practices.

¹² This sentence, and a couple of the bullet points, taken from the DLA Guide, p.4. Other bullet points derived from the Project findings.

8. Next stage

The Project will now advance its second objective to identify develop and foster pro bono practice, including by:

- ▶ Strengthening and building on the relationships established to date with key legal practices;
- ▶ Encouraging corporate pro bono interest and capacity;
- ▶ Identifying appropriate pro bono projects, clients and referrals;
- ▶ Advocating and promoting corporate pro bono; and
- ▶ Evaluating the effectiveness of the Project.

In order to deliver those additional activities and services, PILCH will seek support from corporate partners to place or co-fund a (part-time) referral lawyer (secondee), to be located at PILCH.

9. Conclusion

The Project has found that many of the real and perceived structural and procedural barriers to in-house pro bono legal practice have now been addressed.

There are good reasons for corporate and government legal departments to harness the opportunities, interest and benefits of an emerging corporate pro bono legal practice in Australia. Whilst those grounds include CSR and professional engagement, it is the expertise of lawyers providing access to justice for the most vulnerable in our community which marks the true success of corporate pro bono

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- ▶ DLA Piper and in particular Nicolas Patrick, Partner, for preparing and providing the Australian In-House Legal Counsel Pro Bono Guide and permitting PILCH to use and share it.