

National Pro Bono Resource Centre

Pro Bono, Conflicts and Government

Summary

Private lawyers and law firms are sometimes reluctant to provide pro bono legal services in matters against government agencies because of a perception that this will prejudice them in securing or retaining government legal work. This Paper proposes that Governments in Australia adopt a Protocol aimed at minimising this obstacle to the delivery of pro bono services. The Protocol should be adopted by governments at a senior level in such a way as to give it real practical force and effect. At the Commonwealth level, the Paper recommends that the Protocol be incorporated in Legal Services Directions issued by the Attorney-General.

The National Pro Bono Resource Centre (the Centre) invites comment on:

- the draft Protocol;
- strategies for reducing the incidence of direct legal conflicts of interest.

Please provide comments to the Centre by Monday 31 March 2003, by:

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Background

This Paper uses the term 'pro bono' to refer to legal assistance provided without fee, or at a significantly reduced fee, to clients or organisations who cannot afford ordinary market rates or to clients whose cases raise wider issues of public interest. Many of these low income and disadvantaged clients need assistance in relation to matters against or involving Government agencies – for example matters involving social security, community services, migration, public housing or public education.

Government agencies are a major and attractive source of work of varying kinds for private lawyers and law firms. This work is allocated in different ways by different governments and government agencies. Sometimes panels of lawyers or law firms are chosen. Another arrangement involves selection of a law firm following tenders for specific pieces of work. Other agencies may brief a variety of firms and/or counsel from time to time.

Lawyers and law firms can sometimes be reluctant to provide pro bono assistance in matters against Government because of concerns about real and perceived conflicts of interest causing them to be prejudiced in securing or retaining government legal work. In

many cases there is no direct or legal conflict of interest. Rather there is a perceived conflict, sometimes referred to as a ‘commercial’ or ‘indirect’ conflict. The term ‘commercial conflict’ has been described as ‘expressing the reason for an unwillingness to act, usually in a pro bono matter, because of concerns that past, existing or potential clients will question a law firm’s allegiances’.¹

The Report² of the National Pro Bono Task Force to the Commonwealth Attorney-General refers to,

...the difficulty some times in securing pro bono legal assistance in actions involving Government departments and agencies that retain large numbers of private lawyers and law firms (or a significant portion of experts in an area of specialist legal expertise) – and thus cast a large shadow of real and perceived conflict of interest.

The Task Force recommended that:

... the [National Pro Bono Resource] Centre would be well placed to work with the Office of Legal Services Coordination in the federal Attorney-General’s Department (the office which provides advice to government agencies in relation to the supply and procurement of legal services to the Commonwealth, and oversees compliance with the Attorney’s legal services directions) to develop a protocol aimed at minimising this obstacle to the delivery of pro bono services. Similar initiatives should be pursued in relation to State and Territory governments.

The problem referred to by the Task Force was identified by participants in the First National Pro Bono Conference in 2000³ and in the National Pro Bono Workshop in August 2002. It has emerged again in subsequent consultations carried out by staff of the Centre.

Issues

The problem identified is that legal and commercial conflicts of interest prevent lawyers and law firms providing pro bono assistance in matters against government agencies. The Protocol put forward in this Paper seeks to address the latter kind of conflict – that is, commercial conflict of interest.

Direct legal conflicts

A real or direct legal conflict of interest would arise in a particular pro bono case if the lawyer or firm already acts for the government agency in the matter. It may also arise if the lawyer or firm has done so much work for the agency that they have confidential

¹ E Wentworth, ‘Barriers to Pro Bono: Commercial Conflicts of Interest Reconsidered’ in C Arup & K Laster, *For the Public Good: Pro Bono and the Legal Profession in Australia*, Vol 19, Law in Context, The Federation Press, 2001, 166 at 167; E Wentworth, ‘Pro Bono: Should commercial conflict of interest be a barrier to work pro bono?’ (2000) 38 (9) LSJ 68. See also P Sofronoff, ‘Governmental Responses to Commercial Conflicts of Interest’ and B Moore, ‘Commercial Firms and Commercial Conflicts of Interest’ in C Arup & K Laster, *For the Public Good: Pro Bono and the Legal Profession in Australia*, at 182 and 185 respectively.

² Report of the National Pro Bono Task Force to the Commonwealth Attorney-General, 14 June 2001, p 18.

³ See E Wentworth, ‘Pro Bono: Should commercial conflict of interest be a barrier to work pro bono?’, (2000) 38 (9) LSJ 68 and references in note 1 above.

information about it and how it works that would make it unreasonable for the firm to act against that agency. Legal conflicts of interest are properly the basis of a refusal to act.

The Centre is interested in hearing suggestions as to how the incidence of legal conflicts could be minimised. For example, are there particular ways of governments allocating their legal work (for example, small panels, large panels, distinguishing between different kinds of legal work and so on) that minimise the frequency of legal conflicts arising?

Indirect 'commercial' conflicts

In situations not involving a direct legal conflict, there should be no 'conflicts' reason why particular lawyers or firms could not act for the pro bono client. Nevertheless there is anecdotal evidence that some lawyers are reluctant and may refuse to do so because of a perception that the particular government agency, or government agencies generally, will disapprove and they will be commercially disadvantaged in obtaining or retaining government work. Some firms feel they have been punished for acting against government in pro bono matters in the past. There is also anecdotal evidence that some government agencies have told or suggested to particular firms that they should not act in matters against government including in cases where there is no direct legal conflict.

Whether or not the perception of disadvantage is well-founded, it exists and is widespread among firms doing government work. This perception needs to be addressed in order that it not operate as a barrier to the delivery of pro bono legal services.

A Protocol

The Centre proposes the following Protocol for adoption by governments. At the Commonwealth level, the Centre suggests that the Protocol be included in the form of Legal Services Directions issued by the Attorney-General pursuant to section 55ZF *Judiciary Act 1903*. These Directions are statutory instruments and thus have the force of law. They set out requirements for the way in which the Commonwealth Government and its agencies conduct their legal affairs. The Office of Legal Services Coordination (OLSC) is responsible, amongst other things, for educating agencies about the scope and content of the Directions and for investigating complaints about breach of the Directions. The Centre also suggests that the Protocol be included in the Commonwealth's Procurement Guidelines and in relevant information produced by the OLSC, for example documents concerning the purchasing of legal services.

The Centre suggests that, in addition, the OLSC and, in the States and Territories, senior government officers, should be available to provide advice to agency staff on what is and is not a direct legal conflict of interest, to reduce the risk that government may inadvertently discriminate against legal service providers on the basis of their pro bono work.⁴

⁴ As suggested by E Wentworth, note 1 above, at 176-177.

Draft Protocol

1. The Government encourages lawyers to provide legal services on a pro bono basis.
2. The Government accepts that it is proper for legal service providers to act against government agencies in pro bono matters where there is no direct legal conflict.
3. In making purchasing or other procurement decisions relating to legal services, government agencies must not prejudice or penalise a legal service provider on the ground that the provider has or is or is likely to represent parties pro bono in actions against the Government or its agencies. The fact that the provider has or is or is likely to represent parties in actions against the Government or its agencies is to be disregarded by the agency unless there is a direct legal conflict.
4. Each agency should nominate a senior person for legal service providers to contact in relation to issues arising from pro bono legal work against the agency, including to clarify potential conflicts of interest.
5. This Protocol applies to all forms of engagement of legal service providers including but not limited to: selecting panels of firms; making decisions to retain particular lawyers in particular cases; engagements for expert advisory committees.

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