

## NATIONAL PRO BONO PROFESSIONAL INDEMNITY INSURANCE SCHEME

### Guidelines for considering a proposed pro bono project providing free legal advice and/or representation to charitable and community organisations

#### BACKGROUND

The Australian Pro Bono Centre (**Centre**) runs the National Pro Bono Professional Indemnity Insurance Scheme (**Scheme**) to encourage lawyers to undertake pro bono legal work.<sup>1</sup>

The Centre has taken out an insurance policy with Lawcover Insurance Pty Ltd which provides free professional indemnity insurance for lawyers and paralegals working on pro bono projects approved by the Centre. This “safety net” policy only extends cover to circumstances where there is no other professional indemnity insurance available.

#### A “PRO BONO PROJECT”

The Centre’s key consideration when assessing applications under the Scheme is whether the proposed project meets the following definition of “pro bono legal work” specified in the Centre’s policy with Lawcover:

**Pro Bono legal work** means work done or business transacted by:

- (i) a lawyer or paralegal, who without fee or expectation of a fee, advises and/or represents a client in cases where:
  - a. the client has no other access to the courts and the legal system; and/or
  - b. the client's case raises a wider issue of public interest; or
- (ii) a lawyer or paralegal is involved in free community legal education and/or law reform; or
- (iii) a lawyer or paralegal is involved in the giving of free legal advice and/or representation to charitable and community organisations.

Where a proposed pro bono project will provide advice or representation to a charitable or community organisation (limb iii), the Centre will consider:

- whether the legal matter raises an **issue of public interest** which would not otherwise be pursued, and
- whether the organisation **works for the public good**.

#### **Raises an issue of public interest**

An “issue of public interest” is best understood as one that is distinct from an issue of private interest, and must be an issue that:

- is likely to affect a significant number of people;
- raises a matter of broad public concern; and/or
- has an impact on disadvantaged or marginalised groups.

<sup>1</sup> Not all work undertaken by a lawyer requires professional indemnity insurance cover. For example, the provision of legal information and/or community legal education may not constitute the provision of legal advice and so may not require a lawyer to have professional indemnity insurance cover for that work.

## An organisation that works for the public good

Many organisations can be considered to work for the public good (e.g. charities, churches, schools, clubs), but not all will be eligible for pro bono legal services. The Centre draws on the framework of the Association of Pro Bono Counsel by using a “**mission, matter, means**” approach,<sup>2</sup> and applies these factors based on its experience of how Australian law firms decide on the eligibility of not-for-profit organisations to obtain pro bono assistance.

The Centre looks first to the **mission** of the organisation, then to the nature of the proposed **matter**, and finally the **means** of the organisation to afford to pay for the proposed work. Other factors may also be relevant (see below). Any one of the mission, matter or means factors alone may be sufficient for the Centre to form the view that the proposed work is pro bono legal work, but in most cases all of these factors will need to be considered.

**MISSION:** If the sole **mission** of an organisation is compelling (i.e. to benefit low income or disadvantaged individuals), or clearly in the broad public interest (e.g. a homeless person’s support service, volunteer fire fighting, environmental protection, ending world blindness, or animal rescue), then any free legal work for that organisation will most likely be considered pro bono legal work.

**MATTER:** If the mission is mixed or not particularly compelling, the Centre will then look to the nature of the proposed legal **matter**. If the matter is one that aims to benefit a low income, socially disadvantaged or a marginalised individual or group, or is clearly in the broader public interest, the matter is likely to be considered pro bono legal work.

**MEANS:** Where neither the mission or matter test provides a clear answer, a project may still be approved if the organisation cannot afford to pay for legal services. The issue of whether an organisation has the funds to pay for the legal work will always be considered,<sup>3</sup> however, a lack of **means** alone is not sufficient to meet the criteria for pro bono legal work.

Others factors to consider may include:

- the constituency ordinarily served by the organisation and their disadvantage (if any);
- the nature and extent of the legal services requested and the possible outcome if legal services are not obtained;
- whether the organisation has been referred by a pro bono legal referral agency; and
- the overall financial position of the organisation.

## DESCRIPTION OF A PRO BONO PROJECT

A pro bono project under the Scheme can be described broadly to minimise the need for multiple applications to be made to the Centre. For example, a project can be simply described as:

- legal work for a particular named charity or community organisation (if its mission is compelling);
- a certain type of work referred from a pro bono clearing house; or
- work as part of a multi-partner project involving a law firm pro bono program.

<sup>2</sup> This approach follows that developed by the Association of Pro Bono Counsel (APBCo) on the eligibility of non-profit entities for pro bono legal services. See [here](#), specifically the *Statement on the Eligibility of Non-Profit Entities, For-Profit Entities, Social Enterprise Entities and Impact Finance Transactions for Pro Bono Legal Services*.

<sup>3</sup> In deciding whether an organisation has the funds to pay for the legal work, the Centre considers whether the organisation would be able to pay commercial legal fees without incurring significant financial hardship.

## Examples

The following examples may help to illustrate the application of the above criteria.

### 1. Legal work for a childcare centre

The Centre considers that the mission of caring for children is not of itself compelling. Therefore, the proposed legal matter will be relevant, as will the means of the childcare centre to afford the proposed legal work. The outcome and the ultimate beneficiary of the work are also likely to be relevant in deciding whether it is an eligible pro bono project under the Scheme. For example, legal work for a locally owned childcare centre that seeks to advise about the establishment of a new not-for-profit foundation to support children with special needs would be approved.

### 2. Legal work for a local school

The mission of providing education alone is unlikely to be determinative. For example, legal work for a remote community-owned school serving students from a low-socioeconomic background would likely be approved, whilst general legal work for a government owned metropolitan primary school would be unlikely to be approved. However, the nature of the proposed legal matter may be relevant. The Centre would look to the ultimate beneficiary of the legal matter in considering the likely public good. For example, if the advice sought related to a school program to recycle computers and distribute them to children from low-income or disadvantaged families, the matter may be approved as a pro bono project.

### 3. Animal rescue not-for-profit

A not-for-profit organisation with the sole mission of rescuing deserted and orphaned animals that is run by volunteers and funded by donations would likely be considered to have a mission that is for the public good. Therefore, any free legal work done for this organisation would likely be approved.

### 4. Small business providing animal care

A small business operating for-profit with the mission of providing an onsite pet-minding and dog-walking service is unlikely to be considered eligible for coverage by the Scheme. Work for a business operating for-profit is not likely to be approved, and nor is this business's mission compelling. Nevertheless, there may be legal work done for this business that would still be considered a valid pro bono project. For example, proposed legal advice about establishing an associated not-for-profit program that sought to provide pets as companions for elderly disabled persons (without charge to them) may be approved.

## FURTHER INFORMATION

For further information on the application of these guidelines, please email the Centre at [info@probonocentre.org.au](mailto:info@probonocentre.org.au).