

# National Pro Bono Aspirational Target: The Target at Ten Years

INTERIM REPORT  
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# 1. Introduction

The [National Pro Bono Aspirational Target \(Target\)](#) is a voluntary target that Australian law firms, incorporated legal practices (together, **firms**), individual solicitors (including in-house corporate and government lawyers) and barristers are encouraged to adopt by becoming signatories and by signing a [Statement of Principles](#).

Signatories to the Target agree to use their best efforts to provide at least 35 hours of [pro bono legal services](#) per lawyer per year, adhere to the Statement of Principles and report annually to the Australian Pro Bono Centre (**Centre**) on whether they have met the Target in the previous year.

The Centre launched the Target on 26 April 2007. In its first year of operation, the Target gained 58 signatories covering 3,000 FTE lawyers. By 2007 the Target registry had grown to 138 signatories covering 11,000 FTE lawyers collectively conducting 420,195 hours of pro bono legal work.

The Target's ten-year anniversary has provided an opportunity to review the Target and consult with members of the Australian legal pro bono community to ensure that it remains relevant as a benchmark of performance and a catalyst for further growth in pro bono legal work.

A forum of Target signatories was held on 14 August 2017, led by the Centre and hosted by Ashurst in Sydney, to assist the Centre in identifying key issues relating to the Target's reach and operation to be addressed through a staged consultation process with members of the Target signatory community.

The forum discussion informed the Centre's October 2017 release of the [National Pro Bono Aspirational Target: The Target at Ten Years – Public Discussion Paper \(Discussion Paper\)](#). The Discussion Paper invited Target signatories to comment on key elements of the Target.

Responses to the Discussion Paper were due by 30 November 2017. The Centre wishes to thank the 13 Target signatories which provided responses to the Discussion Paper.

## This Report

This Interim Report consolidates and summarises key responses by the Target signatory community to each of the six questions raised in the Discussion Paper and presents the Centre's suggested next steps. The full list of questions is set out in Attachment A to this Interim Report. Please also see section 3 of this report for a summary of select additional issues raised by Target signatories in their responses to the Discussion Paper.

Readers are encouraged to refer to the Discussion Paper for further background.

## Target Discussion Forum - Questions 1 and 2 – 19 March 2018

Given the diversity of responses received by the Centre to **Questions 1 and 2** in the Discussion Paper, the Centre will hold a Target discussion forum to enable Target signatories to debate, and seek to reach a consensus on, how the issues raised by each of those two questions should be resolved.

To that end, the Centre invites Target signatories to a **Target Discussion Forum to be held at Ashurst, Sydney on Monday, 19 March 2018 between 12-2.30pm**. If you wish to attend, please **rsvp to [info@probonocentre.org.au](mailto:info@probonocentre.org.au) by Monday, 12 March 2018**.

Furthermore, if you wish to raise additional topics for discussion at the Target Discussion Forum please contact the Centre at [info@probonocentre.org.au](mailto:info@probonocentre.org.au) by 12 March 2018 and we will consider them for the agenda.

## Final Step in Target Review Process

Following the Target Discussion Forum on 19 March 2018 the Centre proposes to issue a Final Report which will set out the final results of the Target review process and the Centre's proposed course of action.

## 2. Responses to Discussion Paper Questions

The following section summarises and consolidates the main responses received by the Centre to each of the questions raised in the Discussion Paper.

As indicated below, Questions 1 and 2 will be raised for further discussion at the Target Discussion Forum to be held on Monday, 19 March 2018. See Introduction above for further details about the Forum.

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Question 1: **Should the definition of “pro bono legal services” exclude legal services provided at a substantially reduced fee?**

### 1. Background

The Centre’s [definition of Pro Bono Legal Services](#)<sup>1</sup> is a lynchpin of Australian pro bono practice and gives expression to the Centre’s policy as to the meaning of pro bono. The definition is as follows:

1. Giving **legal assistance for free or at a substantially reduced fee** to:
  - a. individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or
  - b. individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or
  - c. charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;
2. Conducting **law reform and policy work** on issues affecting low income or disadvantaged members of the community, or on issues of public interest;
3. Participating in the provision of **free community legal education** on issues affecting low income or disadvantaged members of the community or on issues of public interest; or
4. Providing a **lawyer on secondment** at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

Responses to the Discussion Paper indicate a diversity of views on whether the definition of pro bono legal services should exclude legal services provided at a substantially reduced fee. The following summarises the answers received by the Centre on each side of the debate.

2. **The case for excluding from the definition of “pro bono legal services” legal services provided at a substantially reduced fee:**

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<sup>1</sup> See full definition in Appendix 1 to Discussion Paper or at <http://www.probonocentre.org.au/information-on-pro-bono/definition/>.

- (a) The words “substantially reduced fee” are ambiguous and open to interpretation and cover a broad range of fee structures. In practice, this type of work can sit at the “grey margins” of pro bono.
- (b) It is easier for firms to report consistently on their pro bono work if the definition does not allow for ambiguity.
- (c) Excluding reduced-fee work would align Australian pro bono practice more closely with the practice of leading overseas jurisdictions.<sup>2</sup> Several key pro bono initiatives in the US and Europe restrict their definitions to work which is done “for free or without expectation of a fee”. Examples include the American Bar Association Model Rules of Professional Conduct, which have been adopted in most States, the Pro Bono Institute’s Law Firm Pro Bono Challenge®, and the TrustLaw Index of Pro Bono which has been adopted by the UK Collaborative Plan.

**3. The case for retaining in the definition legal services provided “at a substantially reduced fee”:**

- (a) The inclusion of reduced-fee work (sometimes called “low-bono” work) in the definition of “pro bono legal services” enables firms to take on matters for organisations that have a limited budget for legal fees. Examples of clients in this category include large charities, not-for-profit organisations (**NFPs**) and social enterprises. Some firms offer “blended” fee models that combine free, discounted and standard-fee work within one matter.
- (b) “Low-bono” practices allow access to justice for some low- to mid-income earning individuals who have limited capacity to pay for legal assistance. For many firms, taking on those clients would only be financially viable if managed through their pro bono programs.
- (c) The current definition of “pro bono legal services” is appropriate in light of the different types of pro bono legal work that Target signatories engage in and should be a matter for each firm by reference to its own pro bono policy and procedures.
- (d) Only 48.6% of Target signatories are currently achieving the Target. If the definition becomes narrower it will be even harder to achieve. Small and mid-sized firms will be particularly affected and participation by this group in the Target may decline.
- (e) The legal profession’s commitment to pro bono services is already much greater than any other profession in Australia. Firms should be proud of their contribution and there is no reason to make the requirements prohibitive for individuals or firms that do not have significant pro bono budgets.
- (f) Fees generated from reduced fee work are likely to be minor, but may pay for the costs of running a pro bono program. This may result in greater support for pro bono work within the firm and, critically, increased access to justice for vulnerable individuals.
- (g) Given the wide use of, and reliance by, law firms and other legal organisations and government agencies on the Centre’s definition throughout the last decade, a change is unnecessary and could cause confusion.

**4. If pro bono work for a “substantially reduced fee” is retained in the definition the following measures have been raised for consideration:**

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<sup>2</sup> For further information see Appendix 4 to the Discussion Paper — Initiatives in other jurisdictions.

- (a) “Substantially reduced” could be defined in either the definition itself or a Guidance Note to ensure there is consistency in reporting on pro bono legal services undertaken.
- (b) Target signatories could report separately on work done for no fee and work done for a substantially reduced fee.
- (c) Hours reported against the Target could be reduced by the same percentage as the reduction in fees, whether or not work done for a substantially reduced fee is reported separately.
- (d) The number of “substantially reduced fee” hours that a Target signatory can count towards meeting the Target could be capped.

***Next Step:***

***Question 1 will be raised for further discussion at the Target Discussion Forum on Monday, 19 March 2018.***

Question 2: Should the definition of “pro bono legal services” include some types of work done for particular clients operating wholly or partly for profit? If so, what types of work, clients or circumstances might be appropriate?

## 1. Background

As described in the Discussion Paper, this issue arises most commonly in the context of social enterprises that assist disadvantaged individuals or communities rather than in a public interest context. A social enterprise may be for-profit,<sup>3</sup> not-for-profit (NFP) or a hybrid of the two.

Examples of where the issue may arise include:

- small start-up businesses that trade for the benefit of the disadvantaged, or to fund a social mission;
- impact investment projects aimed at generating social outcomes as well as financial returns;
- developers of open-source technology being developed to assist disadvantaged persons or organisations supporting them;
- established NFPs looking to fund their operations via a commercial arm; and
- one or more for-profit businesses collaborating to develop and fund a new NFP.

Leaving aside questions of interpretation, the issue raised for discussion is whether legal work without fee (or for a substantially reduced fee) for any of the above *should* be included in the definition of “pro bono legal services”.

In practice, many firms restrict their pro bono programs to NFP clients, although the advent of social enterprises may challenge this approach. Other firms apply a “mission, matter, means”<sup>4</sup> approach and assess the circumstances of each potential pro bono client.

To date, there is no legislative framework in Australia defining the status of social enterprises or regulating their operation, although progress is being made. In 2011, the Senate Economics References Committee released its report on the subject<sup>5</sup> and in January 2017 the Commonwealth released its “Social Impact Investing Discussion Paper”<sup>6</sup> which investigates ways in which the government can develop the social impact investing market.

Please see the Discussion Paper for further background. Responses to the Discussion Paper received by the Centre on each side of the debate include:

## 2. The case for including in the definition of “pro bono legal services” work done for particular clients operating wholly or partly for profit

- (a) There is an increasing development of social enterprises acting wholly or partly for profit which are having a significant impact on vulnerable and disadvantaged members of the community and for which firms are acting on a pro bono basis. This work should therefore be recognised in the definition.

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<sup>3</sup> Also known as a “social business”.

<sup>4</sup> See the Association of Pro Bono Counsel, “Statement on the eligibility of non-profit entities for pro bono legal services”, <https://www.apbco.org/wp-content/uploads/2013/12/Mission-Matter-Means1.pdf>.

<sup>5</sup> Commonwealth of Australia, Senate Economics References Committee, “Investing for good: the development of a capital market for the not-for-profit sector in Australia” (Report), 2011, Chapter 1 – ‘Referral of Inquiry’.

<sup>6</sup> Commonwealth of Australia, “Social Impact Discussion Paper”, January 2017, <https://cdn.tspace.gov.au/uploads/sites/72/2017/01/Social-Impact-Investing-Discussion-Paper.pdf>.

- (b) The definition of “pro bono legal services” does not currently expressly include work for clients operating wholly or partly for profit, in particular part 1(b), which relates specifically to work for individuals or organisations whose matter raises an issue of public interest, and part 1(c) which is restricted to non-profit organisations. The definition therefore needs changing.

**3. The case against changing the definition of “pro bono legal services” to include some types of work done for particular clients operating wholly or partly for profit:**

- (a) Until the term “social enterprise” is defined in Australia and an Australian legislative framework is enacted defining the status of these organisations and regulating their operation, it is too early to consider adjusting the definition of “pro bono legal services” for this purpose.
- (b) Instead of changing the definition, a guidance note could help firms to assess when it might be appropriate to assist organisations that operate wholly or partly for profit, taking into account, for example:
- (i) The primary objective and “mission” of the organisation, which should be to assist marginalised and disadvantaged persons or be otherwise in the public interest,
  - (ii) the organisation’s size and capacity to pay, where paying for legal fees would unreasonably deplete the organisation’s resources and/or the social enterprise would otherwise be unsustainable,
  - (iii) the stage of development of the organisation, particularly if the organisation is in the start-up phase,
  - (iv) how the profits generated by the organisation are used, and in particular whether the organisation reinvests all or the majority of its profits back into its social purpose,
  - (v) how the owners, directors and staff are remunerated, and/or
  - (vi) whether any other suppliers to the organisation are providing services on a commercial basis.

**Note:**

The US Law Firm Pro Bono Challenge allows certain work to count for “charitable, religious, civic, community, governmental and educational organisations”.<sup>7</sup>

The TrustLaw Index allows certain work to count for “social enterprises” (businesses with a social, humanitarian, cultural or community focus) as validated by the law firm or pro bono referral organisation unless the focus is incidental or a fortunate by-product of the organisation’s mission.<sup>8</sup>

**Possible approaches:**

1. To amend 1(c) of the definition to include “social enterprises” and define the term by a guidance note in a similar way as it is in the TrustLaw Index (which could then be changed if and when Australia develops a legislative definition)
2. To provide a guidance note that indicates that “organisations whose matter raises an issue of public interest” in 1(b) can include social enterprises provided that factors (i) to (vi) above are taken into account in deciding whether or not to take on the matter on a pro bono basis.

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<sup>7</sup> See [http://www.probonoinst.org/wpps/wp-content/uploads/law\\_firm\\_challenge\\_commentary.pdf](http://www.probonoinst.org/wpps/wp-content/uploads/law_firm_challenge_commentary.pdf).

<sup>8</sup> See <http://www.trust.org/contentAsset/raw-data/9838ba06-a760-4da9-a20b-1b14b7203a32/file?bylnode=true>.

3. If a change to the definition is made, to monitor the amount of this work being reported by including a question about this in the annual Target reporting process.

***Next Step:***

***Question 2 will be raised for further discussion at the Target Discussion Forum on Monday, 19 March 2018.***

## Question 3: Should “aspirational” be dropped from the name of the Target?

### 1. Background

The Target of 35 hours of pro bono legal work per lawyer per year is “aspirational” in the sense that, on adopting the Statement of Principles underpinning the Target, signatories commit to use their “best endeavours” to meet it,<sup>9</sup> while being under no compulsion to do so. There are no direct consequences for a signatory who fails to meet the Target.

### 2. Responses to the Discussion Paper

A large majority of responses to this question were in favour of dropping “aspirational” from the name of the Target. The primary reasons given were:

- (a) A target is, by its very nature, “aspirational”.
- (b) The word “aspirational” implies there is no real obligation to make progress towards achieving the Target and hampers meaningful engagement by signatories with the Target. This interpretation can undermine the Target’s effectiveness in driving the growth of a firm’s pro bono program and in strengthening its pro bono culture.
- (c) Dropping “aspirational” would assist in framing the Target as an industry standard for the practice of pro bono in Australia.

***Proposed Next Step:***

***The Centre will drop the word “aspirational” from the title of the Target.***

***For the avoidance of doubt, making this change will not alter the voluntary nature of the Target and all communications about the Target issued by the Centre will continue to emphasise its voluntary nature.***

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<sup>9</sup> The words “best endeavours” are directly incorporated into the NSW government panel arrangements.

Question 4: Should signatories be encouraged to adopt an internal timeframe for meeting the Target? If so, how?

## 1. Background

Setting an internal timeframe for meeting the Target can be a useful and powerful device for building a firm's pro bono culture and for making progress towards meeting the Target. Currently, the Centre supports the adoption of an internal timeframe in its guidance notes for Target signatories.

There are a number of ways in which signatories could be further encouraged to set an internal timeframe:

- (a) Signatories could be required to indicate in their annual Target report whether an internal timeframe has been set.
- (b) The Centre can take a more active role in working with signatories who consistently fail to make progress against the Target, helping them to identify measures, including the development of internal timeframes, that could help to improve their progress.
- (c) Signatories who consistently fail to meet the Target could be required to comply with it within a certain timeframe or be struck off the Target signatory list.

Responses to the Discussion Paper indicate the following arguments for and against requiring signatories to formally report on whether an internal timeframe has been set:

## 2. Mandatory reporting

### **The case for mandatory reporting on whether an internal timeframe has been set:**

- (a) Reporting on the setting of internal timeframes can effectively encourage compliance with both internal pro bono targets and the Target.
- (b) Timeframes which are subject to external review can be a useful tool for ensuring regular review of pro bono projects and encouraging greater buy-in and accountability amongst senior management and staff.

### **The case against mandatory reporting on whether an internal timeframe has been set:**

- (a) Requiring firms to put a timeframe on meeting the Target might be counter-productive by putting undue pressure on some firms.
- (b) Individual firms will have preferred systems and processes for the setting of internal targets. There needs to be flexibility to accommodate variations in forms of legal practice, including practices that do not use formal time-recording. It is important that the Centre is not too prescriptive.
- (c) To encourage the greatest uptake in pro bono work and the meeting of the Target, voluntary compliance must be simple and effective. Any further administrative burden could be a barrier to both meeting and reporting on the Target.
- (d) An over-focus on hours should be avoided, since equal weight needs to be given to the quality and sustainability of a pro bono practice.

### 3. The Centre's role

The Centre thanks the pro bono community for its responses to this question in the Discussion Paper. The Centre is not currently considering introducing either mandatory reporting on internal timeframes or a mechanism to 'strike off' Target signatories if they consistently fail to meet the Target. The Centre would prefer to provide more active support on a case-by-case basis to signatories not reaching the Target and to continue to use positive messaging around the setting of internal timeframes and mechanisms for reaching the Target.

Specifically, the Centre proposes to regularly check-in with select Target signatories to enquire about support they may require to meet the Target, what barriers they face, and what they are doing to improve their Target performance. The Centre proposes to assist those signatories to build a framework to reach the Target within a set timeframe. As part of this strategy, the Centre may request additional information in the annual reporting process from those signatories that consistently fail to improve their performance against the Target.

Additionally, the Centre will further develop its Guidance Notes to provide best practice examples to encourage the setting of internal timeframes, and provide more information about the setbacks and successes of the more established pro bono practices in reaching the Target to reflect the Centre's intention to more closely engage with those signatories that fail to make progress against the Target.

#### **Next Steps:**

- (1) The Centre will work with Target signatories on a case-by-case basis to assist them to build a framework for building their pro bono programs and for reaching the Target within a certain timeframe.***
- (2) The Centre will develop its Guidance Notes to further encourage and support the setting of internal timeframes.***
- (3) The Centre may request additional information in the annual reporting process from signatories that consistency fail to improve their performance against the Target.***

Question 5: How can the number of Target signatories be increased?

The Centre thanks the pro bono community for all responses provided to this question. Information on the Centre's programs and strategies for strengthening and promoting pro bono legal work within the Australian legal profession is continually updated on the Centre's website at: [www.probonocentre.org.au](http://www.probonocentre.org.au).

Question 6: Are there further measures by which governments could more strongly integrate the Target into their legal service tender arrangements and thus encourage further pro bono growth?

## **1. Background**

The Commonwealth, Victorian, South Australian and New South Wales Governments include pro bono requirements in their tender arrangements for legal services.<sup>10</sup> While the arrangements between jurisdictions are inconsistent with each other in various ways, they have been successful in increasing the pro bono contribution made by participating law firms. Please see the Discussion Paper for further background on government legal service tender arrangements.

## **2. Measures by government to more strongly integrate the Target into their legal service tender arrangements**

The Centre wishes to thank members of the pro bono community for their views on further measures governments could take to strengthen the operation of these arrangements as a way of encouraging further pro bono growth.

Responses received by the Centre include:

- (a) The Centre should encourage all state and territory governments to adopt a clear and cohesive approach to the integration of the Target into legal service tender arrangements, including uniformity in reporting of pro bono legal work by panel firms.
- (b) Governments' definition of "pro bono legal work" should be consistent with the Centre's definition. At present, only Victoria uses a different definition.
- (c) Each government should be encouraged to include a pro bono conflicts protocol alongside their legal service tender arrangements to ensure that the pro bono work which governments expect their law firm providers to undertake will include the sorts of government-related matters that low-income and disadvantaged citizens most typically face.
- (d) In their legal service tender arrangements governments should strengthen communication and language around their expectation that panel firms will meet their pro bono obligations within a realistic timeframe. This should include specifically requiring that firms meet the Target as part of their legal service panel arrangements.
- (e) Clause 12(b) of the NSW Panel Deed stipulates that mid- to large-size law firms must undertake to use their "best endeavours" to meet the Target. Similar language is also included in the Commonwealth Government's Legal Services Multi-Use List (LSMUL) Deed. However, "best endeavours" is not defined and what it means in practice for a firm in meeting the Target is unclear. The NSW and Commonwealth governments could provide guidance on the measures a firm should implement to illustrate a genuine commitment to meeting the Target. Such measures could include a requirement that firms set an internal timeframe for doing so.

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<sup>10</sup> For further information see <http://www.probonocentre.org.au/provide-pro-bono/government-tender-arrangements/>.

- (f) Governments should be encouraged to provide strong and clear feedback on how and what weight they attribute to a firm's pro bono work in their panel tender processes and allocation of work.
- (g) All governments should adopt the Victorian approach to its panel with respect to pro bono legal work.
- (h) The Centre should more actively engage and work with firms to create a pro bono plan and framework (see Question 4 above) and support firms' endeavours to meet the Target as part of their government legal service panel arrangements.
- (i) More strongly integrating the Target into government legal service arrangements may result in leading the Target from an aspirational model into a compliance-driven model, which could potentially weaken the collegiate approach that has been the feature of Australia's pro bono community.

**Next Steps:**

***(1) In the context of the application of transitional arrangements to the procurement of legal services by Commonwealth entities and the upcoming expiration of the LSMUL on 30 June 2018, the Centre will continue its advocacy with the Commonwealth Government to ensure that legal pro bono work, including the requirement to be a Target signatory, continues to be reflected in the procurement conditions for government legal services.***

***(2) The Centre will continue to advocate for all state and territory governments to adopt a clear and cohesive approach to the integration of the Target into legal service tender arrangements.***

### 3. Other Issues

A variety of other issues were raised in responses to the Discussion Paper received by the Centre. These are noted below to acknowledge them and to respond, but are not intended to be on the agenda for the Target Discussion Forum.

#### 1. Hours per lawyer as a metric

The Target requires signatories to measure and report annually on the amount of pro bono legal work undertaken, using the metric of “hours of pro bono work per lawyer per year”. This metric is also used in the National Pro Bono Law Firm Survey administered by the Centre, and in the tendering and reporting requirements of the Commonwealth LSMUL, NSW and South Australian legal services tendering schemes.<sup>11</sup>

The Centre wishes to thank the pro bono community for their responses to the Discussion Paper on this issue. The vast majority of responses accord with the Centre’s current policy that hours, rather than financial value, is the best metric for measuring pro bono legal work. The primary reasons for using hours include: (i) ‘hours’ is a constant across firms; and (ii) this metric takes into account a firm’s overall size, instead of the financial value of the work. As one response to the Discussion Paper suggests, measuring pro bono in dollar terms calculated at commercial charge-out rates may artificially inflate the amount and value of the pro bono work performed and may not adequately reflect the cost of the work performed or what the clients who receive the services can afford. It may also give government a false comfort that Legal Aid and community legal services funding do not need to be strengthened.

Moreover, as noted by the Centre in the Discussion Paper, measuring pro bono legal work by hours makes pro bono work referable to the individual professional responsibility of every lawyer to engage in pro bono work.<sup>12</sup>

#### 2. Social Impact

One response raised a concern that reliance on measure of hours does not allow the Centre to report meaningfully on whether the Target’s core objectives are being met. i.e. enhancing access to justice for people who would not otherwise have access to legal assistance. Reporting on impact in a meaningful way is a challenge not just for the Target, but the whole community.

Currently, there are no fully developed methodologies for measuring impact in the Australian context. It is acknowledged to be a particularly difficult task. However, the Centre notes that there are a number of evaluation models being used with a view to obtaining a clear picture of the success of particular projects to enhance access to justice. As noted in one response, some pro bono initiatives built on collaborative models, including outreach legal clinics for homeless clients in NSW, Queensland and Victoria, are already tracking collective impact. There are similar initiatives abroad, as described in the Discussion Paper,<sup>13</sup> which also analyse impact.

As one response put it, the question of “impact” involves a highly subjective judgement call about whether particular types of work are more valuable or worthwhile than others. By way of simple example, if a matter involves advising a client who otherwise has no access to legal advice that their case has no merits, how is its “impact” assessed?

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<sup>11</sup>For further information see <http://www.probonocentre.org.au/provide-pro-bono/government-tender-arrangements>.

<sup>12</sup> See Discussion Paper Part B, section 2.

<sup>13</sup> See Discussion Paper Part B, section 2.

For a discussion of social impact-centred methods of evaluating pro bono programs, see Australian Pro Bono Centre, *Australian Pro Bono Manual*, 3<sup>rd</sup> Edition, Sydney, LexisNexis, 2016, Chapter 1.13.

### **3. The target of at least 35 hours**

One response suggested that the target number of pro bono hours should be increased from 35 to 45 or 50 hours per year to reflect the fact that half of the Target signatories already achieve the target and it is therefore no longer serving as a goal but more as a minimum for many firms.

Raising the target was discussed at the forum of Target signatories held on 14 August 2017. The view expressed by the majority of attendees accorded with the Centre's own view that 35 hours per lawyers continues to provide an effective benchmark of pro bono performance in Australia. 35 hours sits right in the middle of current performance with 51 signatories meeting it and 54 yet to achieve it.<sup>14</sup>

The Centre notes that a number of firms with strong pro bono cultures have set internal targets of 50 hours per lawyer per year, and this trend is increasing. It also notes that 28 signatories in FY2017 achieved 50 hours. For many signatories, 35 hours or more per lawyer per year remains a realistic aspiration. The target is also not so high as to dissuade potential new signatories joining the Target community. Moreover, as noted in one response, creating a multi-tiered target which incorporates a "gold standard" may lead to a focus on quantity of hours rather than the quality and impact of pro bono work undertaken.

As noted in the Discussion Paper,<sup>15</sup> given that at least 35 hours is the standard of pro bono performance incorporated in the tender arrangements of the Commonwealth, State and South Australian governments, there is little to recommend altering it at this time.

### **4. Reporting pro bono work for individuals**

One response supported segmentation of Target hours for reporting purposes to distinguish between pro bono work for individual disadvantaged and/or marginalised clients and work for not-for-profit organisations.

The Centre notes that this information is already collected in the biennial national law firm survey of firms with more than 50 lawyers and that 26 of 41 (63%) of reporting firms in the 2016 survey<sup>16</sup> indicated that their response was only an estimate. Whilst the amount of pro bono work undertaken to assist individuals does provide important information about the pro bono community's work to enhance access to justice, requiring this segmentation in reporting would seem to be difficult for some firms and may adversely affect the accuracy of data provided. However, the Centre would welcome further comment on this.

### **5. Contingency Cost Arrangements**

The definition of "pro bono legal work" excludes work done on a speculative or contingency basis ("no win, no fee") which is undertaken with the commercial expectation of a fee.<sup>17</sup>

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<sup>14</sup> In FY2017 51 Target signatories (48.6% of those who reported) met or exceeded the Target and 54 did not (51.4%). See Australian Pro Bono Centre, *Tenth Annual Performance Report of the National Pro Bono Aspirational Target*, October 2017, <http://www.probonocentre.org.au/wp-content/uploads/2017/09/Aspirational-Target-2017-V11-FINAL.pdf>.

<sup>15</sup> See Discussion Paper Part B, section 3.

<sup>16</sup> See <http://www.probonocentre.org.au/information-on-pro-bono/our-publications/survey>.

<sup>17</sup> Australian Pro Bono Centre, *What is Pro Bono?*, <http://probonocentre.org.au/information-on-pro-bono/definition/>.

One response advocated for an amendment to the definition of “pro bono legal work” to cover appropriately limited contingency cost structures. The arguments put forward in support of this change include:

- (a) in these structures no solicitor/client fees or disbursements are charged to the client irrespective of the outcome and the proportion of the costs recoverable is well below the commercial value of the work performed.
- (b) including this work in the definition is in keeping with the recent practice notes and legal decisions from the Supreme Court of Appeal in Victoria, where the Court confirmed that a “conditional costs agreement” does not offend the indemnity principle.<sup>18</sup> Reference was also made to the Supreme Court (General Procedure) Rules specifically Order 63.64.
- (c) contingency arrangements are normally only utilised when major pro bono litigation is embarked on to protect an entitlement to partially recover the costs of performing work on the matter.
- (d) these structures significantly increase access to justice and have significant social impact, for example, by assisting class action work on behalf of vulnerable community groups.

In the Centre’s view, there should be a clear distinction between matters taken on a contingency fee basis and those taken on a pro bono basis. The Centre acknowledges that this distinction has become somewhat blurred by firms using “limited contingency cost structures” in their pro bono client agreements in order to create a solicitor-client indemnity sufficient upon which to found a costs order by a court in the event of a successful outcome of litigation.

However, this practice has developed in response to uncertainty in the common law about whether costs could be recovered in a pro bono matter and should not define pro bono.

The Centre, along with several other public interest and pro bono referral organisations, has advocated for legislative change regarding the recovery of costs in pro bono matters. It would be desirable for legislation to clarify the court’s power to award costs in pro bono matters, regardless of whether the client has contractually indemnified the lawyers for costs. Legislation would also reinforce the distinction between matters conducted on a pro bono basis (which would include matters where legal costs are recovered from the opponent at the conclusion of the matter despite the pro bono firm having no expectation at the outset of recovering fees) and matters taken on a speculative/no-win-no-fee basis.<sup>19</sup> Legislative reform in this area has already taken place in the United Kingdom.

The Centre will continue to advocate for legislative change in this area. The Centre does not propose to change the definition of “pro bono legal work” to accommodate conditional or speculative cost structures.

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<sup>18</sup> *Mainieri & Anor v Cirillo* [2014] VSCA 227.

<sup>19</sup> See National Pro Bono Resource Centre, Submission to the Productivity Commission, *Access to Justice Arrangements*, 21 May 2014, p 5 <http://probonocentre.or.au/information-on-pro-bono/our-publications/Submissions>.

# Attachment A: List of Discussion Paper Questions

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## *Question 1*

***Should the definition of “pro bono legal services” exclude legal services provided at a substantially reduced fee?***

**(To be discussed at the 19 March 2018 Target Discussion Forum)**

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## *Question 2*

***Should the definition of “pro bono legal services” include some types of work done for particular clients operating wholly or partly for profit? If so, what types of work, clients or circumstances might be appropriate?***

**(To be discussed at the 19 March 2018 Target Discussion Forum)**

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## *Question 3*

***Should “aspirational” be dropped from the name of the Target?***

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## *Question 4*

***Should signatories be encouraged to adopt an internal timeframe for meeting the Target? If so, how?***

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## *Question 5*

***How can the number of Target signatories be increased?***

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## *Question 6*

***Are there further measures by which governments could more strongly integrate the Target into their legal service tender arrangements and thus encourage further pro bono growth?***

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The Australian Pro Bono Centre is an independent, non-profit organisation that supports and promotes pro bono legal services. The Centre receives financial assistance from the Federal Attorney-General's Department and from the Departments of the Attorney-General in the States and Territories. Accommodation and other support is generously provided by the Faculty of Law at the University of New South Wales. For more information visit the Centre's website at [probonocentre.org.au](http://probonocentre.org.au).

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