

HITS & MISSES

Pro bono opportunities under the National Legal Profession Reform

Submission to the COAG National Legal Profession Reform Taskforce
in response to the draft Legal Profession National Law, Rules and
Consultation Report, 14 May 2010

13 August 2010



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Endorsements

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Australian Corporate Lawyers Association

Cancer Council NSW

Consumer Action Law Centre (Victoria)

DLA Phillips Fox

JusticeNet SA

National Association of Community Legal Centres (NACLC)

National Pro Bono Resource Centre (NPBRC)

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1. Executive summary

1.1 Summary

This submission considers the implications for pro bono and volunteer legal practice under the National Legal Profession Reform.

PILCH welcomes the opportunity to submit to the Council of Australian Governments (**COAG**) National Legal Profession Reform (the **Reform**). We commend COAG, the Reform Taskforce and the Reform Consultative Group on their initiative in undertaking the Reform.

The Reform provides a unique and valuable opportunity to establish a national legal profession, with improved regulation mechanisms for both practitioners and consumers. Importantly, the Reform makes a positive contribution to expanding the opportunities for volunteerism in the profession. With minor, but important amendments, the Reform can harness significant additional pro bono opportunities, particularly for corporate and government lawyers.

In summary:

Recommendation 1

PILCH endorses provisions in the Draft Legislation under which all Australian Legal Practitioners (excluding those engaged only in legal policy work) are required to hold an Australian practicing certificate.

Recommendation 2

PILCH endorses provisions in the Draft Legislation which authorise the holder of an Australian practicing certificate to engage in legal services as a volunteer at a community legal service (CLS).

Recommendation 3

PILCH endorses provision in the Draft Legislation for a stand-alone CLS practicing certificate.

Recommendation 4

PILCH recommends that the stand-alone CLS practicing certificate should be available at no cost.

Recommendation 5

PILCH recommends amendment to the Draft Legislation to allow the holder of an Australian practicing certificate to engage in defined pro bono legal practice (provided the practitioner has complying professional indemnity insurance cover (PII) and appropriate experience or supervision).

Recommendation 6

PILCH recommends amendment to the Draft Legislation so that the stand-alone CLS practicing certificates includes an authority to engage in defined pro bono legal practice (provided the practitioner has complying PII and appropriate experience or supervision).

Recommendation 7

PILCH recommends that “pro bono” legal work should be defined by adopting the Law Council of Australia definition of pro bono.

Recommendation 8

PILCH submits that the requirements for “supervised legal practice” in the Draft Legislation are adequate and sufficient to ensure appropriate experience or supervision for practitioners engaged in pro bono legal practice. Additional supervision for non-practicing lawyers, if any, could be regulated under the discretionary conditions power at 3.3.11 of the Draft National Law, and 4.2.3 (b) and (c) of the Draft National Rules.

Recommendation 9

PILCH submits pro bono legal practice will be subject to appropriate regulation under the Draft Legislation, by reason of the requirement that it must be conducted by a “qualified entity”.

Recommendation 10

PILCH submits that the requirements for PII in the Draft Legislation are adequate and sufficient to ensure practitioners engaged in pro bono legal practice have complying PII.

1.2 The Submission

This submission continues in Part 2 with a brief discussion of PILCH and its experience in pro bono. Part 3 considers positive measures in the Draft Legislation, and the potential for it to further facilitate pro bono. Part 4 considers implementation issues and lays out a structure for amendment to the Draft Legislation.

Part 5 provides indications of pro bono capacity and interest, in particular for in-house services by government and corporate lawyers. Part 6 provides an access to justice perspective on CLS volunteering and general pro bono legal practice.

Suggested amendments to the Draft Legislation are set out in Appendix 1.

1.3 “Pro Bono” & Abbreviations

In this submission, **general pro bono legal practice**, means pro bono legal practice undertaken by a lawyer, *other than as a volunteer at a CLS, or in private practice*. It includes in-house or independent pro bono legal services provided by government or corporate practitioners, pro bono legal services undertaken by otherwise non-practicing lawyers, and pro bono legal services undertaken by employee practitioners independent of their employment.

Draft Legislation refers collectively to the Draft Legal Profession National Law (**Draft National Law**) and the Draft Legal Profession National Rules (**Draft National Rules**).

2. About PILCH

2.1 General

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 undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and

- ▶ foster a strong pro bono culture in Victoria; and
- ▶ increase the pro bono capacity of the legal profession.

2.2 PILCH experience in CLS and pro bono legal practice

PILCH is well placed to comment on CLS and general pro bono legal practice within the legal profession. PILCH is the largest facilitator of pro bono legal referrals in Australia. In the 2009-10 financial year it made more than 850 pro bono legal referral and facilitated direct pro bono services on behalf of some additional 1,000 clients.

PILCH has particular knowledge of the contribution which lawyers can make by volunteering at a CLS. PILCH is itself a CLS and is active in CLS and not-for-profit (**NFP**) sector development. CLS constitute the largest source of referrals to PILCH.

PILCH similarly has detailed knowledge of pro bono within the broader legal profession. It has entered into agreements with the Victorian Bar and the Law Institute of Victoria to manage their respective pro bono schemes, and works closely with those organisations and their members. It also has direct relationships with the major top tier and progressive mid-tier law firms (which are PILCH members).

Notably, PILCH also works closely with corporate and government lawyers. It receives secondees and in-kind support from government departments and has close ties with the corporate legal departments of major telecommunications, banking and professional service firms.

3. Reform hits and misses

3.1 Background

Current State and Territory practicing regimes raise a number of structural barriers to the pro bono aspirations and capacity of the legal profession. In the first instance, a number of jurisdictions do not require corporate and government lawyers to hold practicing certificates. Absent a practicing certificate, those lawyers are precluded from providing legal services to any party outside of their employment.

Even where lawyers do hold one of the many categories of practicing certificates available in Australian jurisdictions, the authority to practice is typically limited to providing legal services on account of the employer only. For that reason, government and corporate practitioners are typically unable to provide external pro bono legal services. Similarly, private employee practitioners are constrained from working pro bono independent of their employment. Further, non-practicing lawyers are typically unable to obtain a stand-alone certificate to engage in general pro bono legal practice.¹

Other barriers to general pro bono legal practice have been a lack of available professional indemnity insurance (**PII**) and an absence of regulation to ensure adequate experience or supervision.

There are, however, some notable exceptions to these restrictions. In Victoria and Queensland, legal practitioners are able to apply for a free practicing certificate solely to volunteer at a CLS. In NSW holders of all classes of practicing certificates are able to engage in general pro bono legal practice. A PII scheme is

¹ *Joint Submission to the Task Force for the National Legal Profession Reform Project*, National Pro Bono Resource Centre, October 2009, pp 5-7

available, which ensures the matter is pro bono and is conducted or supervised by an appropriately experienced practitioner (see Part 4.5 below). Queensland has a similar pro bono regime (**the NSW & Qld Schemes**).²

Private pro bono legal practice continues to be supported under the Draft Legislation (as it currently is in Australian jurisdictions).

3.2 Positive Reforms in the Draft Legislation

The Draft Legislation takes a positive step towards expanding CLS and, potentially, general pro bono legal practice, by providing that all Australian lawyers engaged in legal practice must hold a practicing certificate (excluding those engaged only in legal policy work).³ This requirement clarifies and brings into conformity the current disparate State and Territory regimes. It provides an appropriate platform for regulation of the profession, including of CLS and general pro bono legal practice.

Recommendation 1

PILCH endorses provisions in the Draft Legislation under which all Australian Legal Practitioners (excluding those engaged only in legal policy work) are required to hold an Australian practicing certificate.

The reform builds on this, by providing in the Draft National Law that an Australian practicing certificate authorises the holder to provide legal services as a volunteer at a CLS as of right.⁴ Further, the Draft National Law establishes a stand-alone CLS volunteer practicing certificate.⁵

The CLS authority attaching to all practicing certificates automatically entitles all legal practitioners (including employee, corporate and government lawyers) to volunteer at a CLS, presumably without the need for further application, fee or endorsement. The stand-alone CLS practicing certificates will in turn facilitate and encourage retired, career break and other non-practicing lawyers to volunteer at a CLS.

Recommendation 2

PILCH endorses provisions in the Draft Legislation which authorise the holder of an Australian practicing certificate to engage in legal services as a volunteer at a community legal service (CLS).

Recommendation 3

PILCH endorses provision in the Draft Legislation for a stand-alone CLS practicing certificate.

² In NSW, this follows a resolution of the Council of the New South Wales Law Society, dated 19 February 2009. For Queensland, see the Queensland Law Society Administration Rules 2005 (as amended) Rule 15A & 15B. Per the *Joint Submission to the Task Force for the National Legal Profession Reform Project*, National Pro Bono Resource Centre, October 2009, p 13

³ An Australian lawyer is defined as a "person admitted to the Australian legal profession". An Australian legal practitioner is defined as "an Australian lawyer who holds a current Australian practicing certificate". An Australian practicing certificate is a practicing certificate granted under Part 3.3 to an Australian lawyer". Corporate and government lawyers are required to have an Australian practicing certificate as they are both defined as Australian legal practitioners, however, this is only so if they "engage in legal practice". To engage in legal practice "includes practice law, but does not include engage in legal policy work", meaning that those government and corporate lawyers who engage in policy work only do not require a legal practicing certificate." See Draft National Laws 1.2.1 (1).

⁴ Subject to discretionary conditions that specifically prohibit, restrict or regulate volunteer CLS practice, see Draft Law 3.3.6(3)

⁵ Draft Law 3.3.6(b)(iv)).

PILCH acknowledges comments in the National Legal Profession Reform Taskforce Consultation Report⁶ that the stand alone CLS volunteer certificate will be issued for free or at low cost. PILCH submits that any fee would be an unwelcome disincentive for non-practicing lawyers wanting to volunteer at a CLS. Victoria and Queensland currently offer free practicing certificates for this purpose.

Recommendation 4

PILCH recommends the stand-alone CLS practicing certificate should be available at no cost.

The Draft Legislation introduces a broad definition for CLS, which further enhances the ability of the profession to provide volunteer legal services. The definition covers a range of not-for-profit organisations, including organisations that provide not-for-profit legal, or legal-related, services that are conducted in the public interest or which are "directed generally to people who are disadvantaged in accessing the legal system... in protecting their legal rights".⁷

The Draft Legislation sends a clear signal in support of volunteerism in the CLS sector.

3.3 The case for further reform

Whilst the Reform does much in support of volunteerism, it (perhaps inadvertently) fails to establish a regulatory framework that would allow or facilitate government, corporate, employee or non-practicing lawyers to engage in "general pro bono legal practice" (See Part 1.3).

Leaving aside the authority conferred on all practitioners to volunteer at a CLS, the Draft Legislation limits holders of corporate practicing certificates to engage in legal practice only in the capacity of an in-house lawyer for their employer or a related entity. Government lawyers may engage in legal practice only for or at the direction of a government authority.^{8 9} Holders of employee certificates are authorised to practice in an employee capacity only, meaning they can not engage in general pro bono legal practice on their own account.¹⁰ Career break, retired and other non-practicing lawyers are unable to obtain a stand-alone certificate to engage in general pro bono legal practice (unless they pay for and obtain a principle practicing certificate).

This combined situation reverses the opportunities for general pro bono legal practice under the mentioned NSW and Queensland Schemes and represents a significant lost opportunity more broadly.

Corporate and government legal departments, for example, have significant capacity and interest in providing in-house general pro bono legal services, including: accepting referrals from a clearing house (like PILCH); by conducting their own clinics for a CLS, (like the PILCH Homeless Persons Legal Clinic or the African Persons Legal Service at Footscray CLC); or to targeted individuals or NFPs, particularly those whom they partner in corporate social responsibility programs.

⁶ COAG National Legal Profession Reform Taskforce Consultation Report April 2010, p11.

⁷ Draft Law 1.2.1, definition of "community legal service"

⁸ Draft Law 1.2.1, definition of "corporate lawyer" and "government lawyer", and Draft National Law 3.3.6 (b)(iv)

⁹ Lawyers at the Australian Government Solicitor and Commonwealth Attorney-Generals Department have broad powers to practice, which would include acting pro bono, under the *Judiciary Act 1903*, ss 55Q & E respectively

¹⁰ Draft National Law 3.3.6.(1)(b)(iii), "as an employee of a law practice only"

Approximately 25 percent of Australian solicitors are in-house either in government or in a corporation. In increasing numbers these lawyers want to undertake pro bono legal work similar to their counterparts in the private legal profession.

General Counsel at the National Australia Bank (**NAB**) and Telstra make the case as follows:

Telstra strongly supports the provision of pro bono legal services. We encourage the Taskforce to include provisions in the National Legal Profession Reform Law which would allow corporate and government lawyers to undertake pro bono legal work in-house (other than auspiced through a community legal centre). The national reform provides an important opportunity to enhance access to justice for marginalized and disadvantaged members of the community. It is an opportunity to draw on the resources of corporate legal departments like that at Telstra, which have capacity and interest to undertake pro bono legal services on referral from agencies like PILCH and working directly with the not-for-profit sector.

Will Irving - Group General Counsel Telstra

NAB recommends amendment to the proposed Legal Profession Law to allow pro bono legal services by government and corporate lawyers. Allowing qualified government and corporate lawyers to undertake pro bono services within their organisations would remove an unnecessary constraint to pro bono and tap a willing and significant pro bono resource. In particular NAB would be in a position to accept pro bono referrals and to establish pro bono relationships with our corporate giving clients.

Nathan Butler - Group General Counsel at the NAB

Further potential sources of general pro bono legal practice include employee and non-practicing lawyers, who might also assist NFPs or disadvantaged clients with whom they have an established relationship. More examples of general capacity, and of the pro bono work undertaken under the NSW & Qld Schemes, are discussed in Part 6.

PILCH submits that the lacuna regarding general pro bono legal practice should be addressed by allowing all suitably qualified or supervised lawyers to engage in defined pro bono practice, provided they have appropriate professional indemnity insurance (**PII**). This is examined in detail in the following Part.

4. Implementation issues for pro bono practice

4.1 Principal revision framework

In practice, PILCH submits that opportunities to engage in general pro bono legal practice should be incorporated at 3.3.6 of the draft National Law, in the same way that the CLS volunteer opportunities are introduced.

That is, there should be a two-step pro bono legal practice regime. Firstly, all Australian practicing certificates should also authorise the holder to engage in defined pro bono legal practice (subject to any appropriate conditions). Secondly, the stand-alone CLS practicing certificate in the Draft Legislation should be extended to also allow the holder to engage in defined pro bono legal practice (subject to any appropriate conditions).

The imperative for the stand-alone certificate to cover both CLS and general pro bono legal practice arises from provision in the Draft National Law restricting an Australian lawyer from holding more than one practicing certificate.¹¹

Recommendation 5

PILCH recommends amendment to the Draft Legislation to allow the holder of an Australian practicing certificate to engage in defined pro bono legal practice (provided the practitioner has complying professional indemnity insurance cover (PII) and appropriate experience or supervision).

Recommendation 6

PILCH recommends amendment to the Draft Legislation so that the stand-alone CLS practicing certificates includes an authority to engage in defined pro bono legal practice (provided the practitioner has complying PII and appropriate experience or supervision).

4.2 Definition of pro bono

PILCH submits that the widely adopted Law Council of Australia Limited (**LCA**) definition of pro bono legal work should be applied as the test of whether particular pro bono legal practice is appropriately pro bono.¹² This definition could be incorporated at 1.2.1 of the Draft National Law.

Recommendation 7

PILCH recommends that “pro bono” legal work should be defined by adopting the Law Council of Australia definition of pro bono.

¹¹ Draft Law 3.3.7 (2)

¹² The LCA in 1992 defined pro bono work as situations where:

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

4.3 Qualification for general pro bono legal practice

The Draft Legislation makes it a statutory condition of an Australian practicing certificate that the holder must engage in “supervised legal practice” for either 18 months or two years, depending on the prior practical legal training.¹³ The practitioner may engage in unsupervised legal practice after that period of supervised legal practice, at which time they also satisfy the requisite experience criteria for a principal practicing certificate.¹⁴

PILCH submits that these provisions are appropriate to ensure that practitioners engaged in general pro bono legal practice will have the requisite experience or supervision. The two year threshold is equal to or exceeds the supervision requirements to obtain a principle or unrestricted practicing certificate in Australian jurisdictions at present.

It may be appropriate to impose further supervisory conditions in the case of retired, career break or other non-practicing lawyers, (whether the lawyer is returning to pro bono or other practice). PILCH suggests this could be regulated under the discretionary conditions power at 3.3.11 of the Draft National Law, and 4.2.3 (b) and (c) of the Draft National Rules.

Recommendation 8

PILCH submits that the requirements for “supervised legal practice” in the Draft Legislation are adequate and sufficient to ensure appropriate experience or supervision for practitioners engaged in pro bono legal practice. Additional supervision for non-practicing lawyers, if any, could be regulated under the discretionary conditions power at 3.3.11 of the Draft National Law, and 4.2.3 (b) and (c) of the Draft National Rules.

It is noted, however, that special mention is made in the Draft National Law that a CLS or its governing body must have at least one supervising practitioner who is the principal of the legal practice.¹⁵ The Reform may similarly decide to specify a supervising practitioner regime for general pro bono legal services.

4.4 Regulation of general pro bono legal practice

PILCH notes that any “entity” engaged in legal practice, including general pro bono legal practice, must be a “qualified entity”¹⁶ (typically an Australian legal practitioner or one of the categories of “law practice”¹⁷). By that reason, general pro bono legal practice will be subject to the regulatory regime in the Draft Legislation, including the responsibilities and liabilities attaching to the “principal” of a law practice,¹⁸ and a “supervising legal practitioner”.¹⁹

Recommendation 9

PILCH submits general pro bono legal practice will be subject to appropriate regulation under the Draft Legislation, by reason of the requirement that it must be conducted by a “qualified entity”.

¹³ See Draft National Law 3.3.8

¹⁴ See Draft National Law 3.7.4 (1) (b)

¹⁵ Draft National Laws 1.2.1, definition of “principal of a law practice” & “supervising legal practitioner”, and 3.7.4 and 3.8.2 (1)

¹⁶ Draft National Laws 1.2.1, definition of “entity” and “qualified entity”, and 2.1.2 & 2.1.3

¹⁷ Draft National Laws 1.2.1, definition of “law practice”

¹⁸ Draft National Law 1.2.1, definition of “principal”, and 3.2.3 and 3.2.4

¹⁹ Draft National Laws 1.2.1, definition of “supervising legal practitioner”, and 3.7.4 and 3.8.2 (1)

4.5 Professional indemnity insurance

It is noted that a practitioner holding the stand-alone CLS practicing certificate under the Draft Legislation is exempt from the requirement to hold PII.²⁰ The CLS itself is required to have a complying policy of PII that provides cover for its volunteers.²¹

Employee, corporate, government and stand-alone pro bono lawyers would, however, be required to obtain approved PII if engaged in general pro bono legal services.²² That is because government and corporate practitioners are otherwise exempt from the requirement to have PII under the Draft Legislation, and private practitioners will only be covered for legal work undertaken on behalf of, or for, their law practice.²³

The National Pro Bono Resource Centre (**NPBRC**) has established an approved PII scheme for this specific purpose (the **Scheme**).²⁴ By addressing the need for PII, the Scheme removes one of the key constraints to employee, government and in-house lawyers engaging in general pro bono legal practice.

The Scheme insures lawyers and paralegals who undertake work on pro bono legal projects approved by the NPBRC. An approved project is defined broadly and can include work with a charity, a single case or a larger project involving a law firm pro bono program.

To gain coverage, projects must also be undertaken or supervised by a practitioner eligible to hold an unrestricted practising certificate, and meet the LCA's definition of "pro bono legal work". Insofar as the PILCH proposals in this Submission mirrors those standards, the requirement for PII is a further safeguard that general pro bono legal practice matters are genuinely pro bono and are undertaken by appropriately experienced or supervised practitioners – noting that PII for general pro bono legal practice is currently only available through the Scheme (apart from a private policy available to corporate lawyers).²⁵

PILCH does not consider there is any need for further amendment to the Draft Legislation on account of PII requirements for general pro bono legal services, for the reason that the Draft Legislation footnoted in this section covers the field.

Recommendation 10

PILCH submits that the requirements for PII in the Draft Legislation are adequate and sufficient to ensure practitioners engaged in general pro bono legal practice have complying PII.

²⁰ Draft National Law 4.4.5 & Draft National National Rules 9.2.5

²¹ Draft National s 9.2.6. For CLS, this would appear to override an alternative position at Draft National Law 4.4.2 (2), whereby certain law practices are not required to hold PII if all of the practice's legal practitioner associates hold or are covered by PII

²² See PII requirements at Draft National Law 4.2.2 and Draft National Rules 9.2.5

²³ Ibid. But note that corporate lawyers can undertake pro bono work which is covered by their employer's PII policy. In 2007, the ACLA and insurance broker Marsh Pty Ltd developed an optional PII policy 'add on' for corporate lawyers, which covers the pro bono work undertaken by lawyers under the policy. However, it is important to note that most government and corporate lawyers do not have PII that covers advice given to clients except their employer, or at all. See Nicolas Patrick, 'New opportunities in corporate pro bono', 19 *The Australian Corporate Lawyer* 3, 9

²⁴ The Pro Bono Professional Indemnity (PI) Insurance Scheme (Scheme) was launched in July 2009 to encourage government and in-house lawyers to undertake pro bono legal work. The Scheme is underwritten by LawCover Insurance Pty Ltd and is administered by the National Pro Bono Resource Centre. For more information see the National Pro Bono Resource Centre website: <http://www.nationalprobono.org.au/page.asp?from=8&id=236>

²⁵ See footnote 23

It is noted, however, that special mention is made in the Draft Rules of the requirement that a CLS must have a complying policy of PII²⁶, and the Reform may similarly decide to clarify the situation for general pro bono legal practice.

4.6 Compliance

PILCH sees no need for special provisions to ensure compliance with the general pro bono legal practice regime outlined above. For example, ensuring that lawyers only provide genuine pro bono services, with requisite experience and with appropriate PII would not be different to otherwise ensuring lawyers practice in accordance with the regulatory regime prescribed in the Draft Legislation.

It may be argued that a blanket prohibition against general pro bono legal practice, as is the case under the Draft Legislation, leaves no room for ambiguity. But if it is accepted that general pro bono legal practice is to be recommended, then compliance is adequately based upon the same ethical responsibilities and sanctions to which practitioners are subject by operation of the many laws and rules in the Draft Legislation. The successful operation of the NSW and Qld Schemes is further indication that the proposed model can operate effectively.

²⁶ Draft National Rule 9.2.6

5. Indicators of pro bono capacity

PILCH considers there is significant capacity and interest in provision of general pro bono legal services. In NSW, where general pro bono legal practice is available to corporate and government lawyers, the NPBRC PII Scheme has encouraged in-house legal teams to undertake pro bono legal work by providing those lawyers with the same opportunity to undertake pro bono legal work as practitioners within private law practices or law firms.

Approved projects under the Scheme have included legal advice and assistance provided by private practitioners and in-house legal teams (e.g. Optus, Ramsay Health, Benevolent Society and Telstra) to the Cancer Council Legal Referral Service, Karma Currency Foundation, Information and Cultural Exchange (which provide services to young people in the greater western suburbs of Sydney), the Touched by Olivia Foundation (which supports children with special needs), and the Strathfield Plaza Community Legal Advice Service (which provides legal assistance to the Korean community).

The Cancer Council Legal Referral Service has indicated:

The proposed reforms will prevent government and in-house legal teams from providing legal assistance to individuals through the organisations such as the Cancer Council Legal Referral Service (CCLRS). The CCLRS acts as a conduit for pro bono matters without engaging in 'legal practice', and does not fall within the definition of a 'community legal service'. Since 1 March 2010, the CCLRS has linked 250 clients in NSW with law firms and in-house legal teams will provide pro bono legal assistance on matters such as wills, credit and debt issues, and enduring powers of attorney for clients in need of urgent pain relief.

To date, in-house lawyers at Ramsay Health have provided assistance to 10 clients under the supervision of a 'principal solicitor' within their in-house legal team, with work covered by the National Pro Bono Professional Indemnity Insurance Policy. Demand for pro bono services has been so high that the CCLRS quickly anticipates exhausting the capacity of Sydney firms. In-house lawyers have been (and will continue to be) critical in filling this gap, particularly because many are located outside the Sydney CBD and are better placed to provide assistance in the outer suburbs where demand is high. Further, in-house legal teams have been invaluable in representing clients facing mortgage hardship and consumer credit issues due to the high cost of cancer treatment because they do not have the same conflicts of interest as law firms when acting for clients against major creditors.

Many other corporations have indicated interest in undertaking in-house pro bono work to PILCH, including accepting referrals through PilchConnect on behalf of NFPs, and conducting clinics like the Seniors Rights Legal Clinics or prison clinics.

Although a number of large government and in-house legal teams have expressed an interest in and capacity to undertake pro bono legal work in-house, the Draft Legislation has acted as a disincentive to seeking PII coverage through the NPBRC PII Scheme because government and in-house lawyers will be prohibited from providing pro bono legal assistance other than through a CLS if the Draft Legislation is introduced. Failure to support general pro bono legal practice would constitute a significant missed opportunity to leverage substantial pro bono support from government and in-house legal teams, which

represent 25 percent of the legal profession, and a significant setback for organisations such as the Cancer Council Legal Referral Service, which will no longer be able to rely on the generous support of in-house legal teams such as Ramsay Health.

Regrettably, the NPBRC PII Scheme will also cease to exist if the Draft Legislation fails to pick up general pro bono legal practice since it is dependant on government and corporate lawyers having the opportunity to engage in such practice.

6. A perspective on pro bono and volunteerism

6.1 Access to Justice & Human Rights Perspectives

PILCH considers that equitable access to the legal system is central to the effective protection and promotion of human rights in Australia, including the rights to a fair hearing, to equality of and before the law, and to access justice. Lawyers undertaking pro bono legal services have long played an integral role in securing human rights and access to justice in Australia. This is especially true with respect to marginalised and disadvantaged individuals.

The Australian Government is obligated, under international and domestic human rights law, to ensure access to justice for everyone, everywhere, everyday.²⁷ Yet, in PILCH's experience and observation, equitable access to justice is not always realised in practice in Australia. For example, the cost of delivering and achieving justice has become increasingly high, placing it beyond the reach of many ordinary individuals, particularly the marginalised and disadvantaged.

It is often and correctly stated that pro bono is no substitute for an adequately funded Legal Aid and CLS sector. In reality, we know from our own practice²⁸ and from the landmark Justice Made to Measure report that there is significant unmet legal need, that marginalised and disadvantaged members of the community (including low-income earners, those with chronic illness or disability, the young and elderly, and amongst Indigenous members of the community) often experience multiple and compounding legal and social problems, and that this entrenches social exclusion.²⁹

These are precisely the issues which are addressed by lawyers acting pro bono.

In this context, it is important to recognise that pro bono does not only include high profile public interest test cases. Whilst those matters are appropriately recognised, lawyers understand that the public interest is also served by the provision of pro bono services generally to individuals whose matters have legal merit, and where the individual is unable to afford private representation or access free legal services.

Lawyers acting pro bono also provide significant assistance to NFP organisations, enhancing NFP capacity, and by extension, assisting many more individuals and public interest causes.

Pro bono is a fundamental plank in providing access to justice, advancing the rule of law and the integrity of the justice system, and in supporting social change and social inclusion.

²⁷ See, eg, International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 and for Australia 13 August 1980), arts 14-16; Charter of Human Rights and Responsibilities Act 2006 (Vic), ss 8, 24.

²⁸ In the 09-10 Financial year, PILCH received 2947 inquiries for legal referral assistance. Of these inquiries, PILCH was only able to facilitate 861 referrals.

²⁹ Coumarelos, C, Wei, Z & Zhou, AH, Justice made to measure: NSW legal needs survey in disadvantaged areas, Law and Justice Foundation of NSW, 2006

6.2 Government Position

The Commonwealth Attorney-General, the Honourable Robert McClelland MP, speaking on the Reform to the Law Society of Western Australia³⁰, said:

"The Taskforce is committed to developing a national system that: ...facilitates pro bono and the work of community legal centres."

This approach is consistent with a view taken by the Access to Justice Taskforce to the Attorney-General's Department, which acknowledged the significant and effective contribution to the community made by the pro bono legal sector, including private lawyers undertaking pro bono legal work.³¹

Both State and Federal Governments' have introduced positive initiatives in support and promotion of private pro bono legal practice. Notably, the Commonwealth Attorney-General introduced measures which require each Commonwealth agency, when procuring ongoing legal services, to take into account the amount and type of pro bono work that the providing law firm has carried out, or will carry out, and whether the firm is a signatory to the National Pro Bono Aspirational Target, which establishes a benchmark of 35 pro bono hours per lawyer per year.³²

The Victorian Attorney-General, Rob Hulls, was an early driver of pro bono, establishing pro bono targets for private legal service providers under the Victorian Government's legal procurement program. Under the Victorian program, panel firms must deliver pro bono legal services to "approved causes"³³ typically equal to 10% of their fees from Government.³⁴ Most panel firms deliver a pro bono dividend of 15% or more.

The Draft legislation itself reflects the positive approach of COAG to pro bono. Unfortunately, it does not provide opportunities for lawyers, and particularly corporate or government lawyers, to undertake pro bono work other than under the auspices of a CLS. This represents a significant lost opportunity to better engage these lawyers in pro bono work by providing these lawyers the same flexibility to undertake pro bono legal work as private legal practitioners.

³⁰ Hon Robert McClelland MP speech to the Law Society of Western Australia 'National Legal Profession Reform' Perth, 26 February 2010.

³¹ A Strategic Framework for Access to Justice in the Federal Civil Justice System, Report by the Access to Justice Taskforce, Attorney General's Department, September 2009, at pp 52, 151.

³² Amendment to the Legal Services Directions, intended to cut red tape and streamline the way in which Australian Government agencies procure legal services and encourage external legal service providers to undertake pro bono work, 18 September 2008

³³ Approved cause means the provision of legal services which will enhance access to justice for disadvantaged persons or organisations and/or promote the public interest...". Government Legal Services Panel, Parliament of Victoria, Deed of Standing Offer for the Provision of Legal Services, 2010, clause 11.1(a)

³⁴ Government Legal Services Panel, Parliament of Victoria, Deed of Standing Offer for the Provision of Legal Services, 2010, clause 11.1 and Schedule 1, Item 9

Appendix 1

Suggested Legislative Amendments

Drafting is a matter for the Office of Parliamentary Counsel but with that disclaimer the following amendments to the Draft Law are suggested:

- ▶ Introduction of new language at subclauses 3.3.6 (1)(b)(vi) and s 3.3.6 (3) of the Draft National Law to facilitate general pro bono legal practice (all of 3.3.6 is reproduced for clarity) as follows:

3.3.6 Conditions – Trust money and categories of practice

(1) An Australian practising certificate is subject to the following conditions, as determined by the Board:

- (a) a condition that the holder is authorised or not authorised to receive trust money;
- (b) a condition that the holder is authorised to engage in legal practice:
 - (i) as a principal of a law practice; or
 - (ii) as or in the manner of a barrister only; or
 - (iii) as an employee of a law practice only; or
 - (iv) as a corporate lawyer or government lawyer only; or
 - (vi) as a volunteer at a community legal service **or otherwise on a pro bono basis.**

(2) An Australian practising certificate authorising the holder to engage in legal practice as a principal also authorises the holder to engage in legal practice as an employee of a legal practice or as a corporate lawyer or government lawyer.

(3) An Australian practising certificate authorises the holder to provide legal services as a volunteer at community legal services **or otherwise on a pro bono basis**, subject to any discretionary condition that may be imposed by the Board that specifically prohibits, restricts or regulates the provision of legal services at community legal services **or otherwise on a pro bono basis.**

- ▶ PILCH also recommends introduction of a definition of “pro bono” at 1.2.1 of the Draft National Law as follows:

pro bono means work in situations where:

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