

**Submission to the Australian Government
Attorney-General's Department,
the Honourable Robert McClelland MP
Reform of Commonwealth legal service purchasing
proposals**

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Reform of Commonwealth legal services purchasing proposals

Submission to the Australian Government Attorney-General's Department, the Honourable Robert McClelland MP

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1. Introduction

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to comment on the Australian Government Attorney-General's Department (**the Attorney-General**) reform of Commonwealth legal services purchasing.
2. PILCH does not intend to comment on all aspects of the Attorney-General's reform proposals. As discussed below, PILCH's primary aims are to facilitate access to justice through a number of mechanisms including through co-ordinating pro bono legal service delivery amongst the legal profession. Indeed, since its establishment in 1994 PILCH has become the largest co-ordinator of pro bono legal services in Australia. PILCH is therefore in a unique position to comment on the social justice aspects of the reform proposals, particularly the use of government procurement power to promote pro bono legal services.

2. About PILCH

3. PILCH is a leading Victorian, not-for-profit organisation which 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.

PILCH coordinates the delivery of pro bono legal services through five schemes:

- the Public Interest Law Scheme ("PILCH Scheme");
- the Victorian Bar Legal Assistance Scheme ("VB LAS");
- the Law Institute of Victoria Legal Assistance Scheme ("LIV LAS");
- PILCH Connect ("Connect"); and
- the Homeless Persons' Legal Clinic ("HPLC").

PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify matters of public interest requiring legal assistance;
- seek redress in matters of public interest for those who are disadvantaged or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;

- support community organisations to pursue the interests of the communities they seek to represent; and
 - encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.
4. In 2006-2007, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.
5. PILCH's primary source of funding comes from its membership. PILCH's membership represents the diversity of the Victorian Legal profession and includes private law firms, the Victorian Bar, corporate legal departments, community legal centres and university law faculties.

3. Executive Summary

6. PILCH's submission considers the Attorney-General's reform of Commonwealth legal services purchasing from its experience in the access to justice sector, in particular as a facilitator of pro bono services in the legal profession. PILCH considers that it is in a unique position to comment on the proposed reforms as it has seen first hand the social justice outcomes of the Victorian Government's Legal Services to Government Panel Contract (**the Victorian scheme**) which were introduced in 2002.
7. It is PILCH's view that the Government has a responsibility to promote and support the professionalism of pro bono legal services in the private sector through Government policy designed to increase socially responsible outcomes.
8. PILCH reiterates its letter to the Attorney-General dated 7 January 2008 which broadly endorsed the operation of the Victorian scheme. In particular, PILCH recommends that the Attorney-General introduces a mandatory contractual requirement that each legal firm that is a participant of the Commonwealth legal scheme must "commit to provide pro bono services of at least 5% of the value of the legal fees they derive under the panel

arrangements".¹ PILCH also recommends adopting definitions of pro bono services and approved causes that are consistent with the Victorian scheme.

9. It is PILCH's experience that without the outstanding contribution of the legal profession acting on a pro bono basis, many Victorians would find it impossible to navigate a complex legal system and would be subject to a number of access to justice limitations. Since 2002, the Victorian scheme has delivered approximately \$11 million in pro bono legal advice, assistance and advocacy to people who are marginalised or disadvantaged or for matters which are in the public interest.² In PILCH's view, the Victorian scheme has been a significant contributing factor to the strengthening and expansion of pro bono legal work undertaken by Victorian lawyers.

4. The Government's role in access to justice

10. PILCH strongly submits that the provision of pro bono legal services should not be seen as a substitute for a properly publicly funded legal aid and community legal services sector. However, until adequate funding is made available, the contribution of the private profession acting pro bono makes an absolutely critical contribution to the realisation of access to justice. It is PILCH's view that the Government has a responsibility to promote and support the professionalism of pro bono legal services in the private sector through Government policy designed to increase socially responsible outcomes.
11. PILCH believes that the promotion of pro bono legal services can and should be viewed within a human rights framework. While the right to equality before the law and the administration of justice is recognised as a human right, without the provision of adequate access to legal services, this right cannot be realised.³ PILCH considers that this imposes an obligation on the Government to actively commit to the protection and fulfilment of human rights, including the right to the administration and access of justice.
12. In this context, PILCH notes that universal standards on the responsibility and accountability of government have been endorsed by the United Nations. The *UN Norms*

¹ Department of Justice (Victoria), *Government Legal Services*
<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Government+Legal+Services>

² *Government Legal Services Annual Report 2005/2006*, Department of Justice, April 2007

³ Philip Lynch, *Policy Design Strategy Paper: Strategies to Increase the Quantity and Quality of Pro Bono Services Provided by the Legal Profession in Victoria*

*on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*⁴ (**Draft Norms**) impose an obligation on the conduct of government and businesses to respect human rights legal principles, including the right to equal opportunity and non-discriminatory treatment.⁵ It is PILCH's view that the use of the government procurement power to promote pro bono legal services is consistent with the human rights principles articulated in the Draft Norms.⁶ In particular, Article 15 of the Draft Norms encourages governments to recognise and incorporate these human rights into contracts and other arrangements, businesses, corporations, entities and natural persons.⁷

5. The Victorian Scheme

5.1 Introduction

On 1 July 2002, the Victorian government introduced a tender scheme for the provision of legal services to government which aimed to provide a more transparent system of allocating legal work to law firms, lower costs for the government and make an increased commitment to social policy objectives.⁸ The tender scheme led to the formation of a general panel and nine specialist panels which now include some 35 law firms, some of whom provide advice across all nine defined areas and others firms which are confined to one or a number of specialist areas.

The Victorian Government Solicitor's Office (**VGSO**) remains the Victorian government's core legal adviser but competes with Panel members for work. All Victorian government departments (and Victorian statutory bodies who opt in) are required to select their legal counsel and services from the general or specialist panel or the VGSO, save for some prescribed exceptions.

⁴ Commission on Human Rights, *Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003)

⁵ Ibid, art 2

⁶ Commission on Human Rights, *Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003)

⁷ Philip Lynch, *Policy Design Strategy Paper: Strategies to Increase the Quantity and Quality of Pro Bono Services Provided by the Legal Profession in Victoria*

⁸ Victorian Government Legal Services panel arrangements, *Promoting and Encouraging Pro Bono Legal Services*, National Pro Bono Resource Centre, April 2008

Panel members are subject to a range of performance tests and audits to ensure that they adhere to the terms and conditions of their service level agreements. The penalty for adverse assessment is removal or suspension from the Panel. Unique aspects of the tender include that it requires firms to provide pro bono legal services and follow both model litigant principles and the Victorian Bar Association's Model Briefing Policy. These social justice obligations are an innovative feature of the Panel arrangements and demonstrate the indirect ways in which government can use its contractual weight to promote better social justice outcomes.⁹

5.2 Mandatory Requirements of the Victorian Scheme

When tendering to provide legal services under the Victorian scheme, each legal firm commits itself to providing pro bono services as a percentage of the legal fees (ex GST & disbursements) derived from Government work.¹⁰

The Victorian scheme contractually requires legal firms undertaking governmental legal work to provide pro bono services of at least 5% of the value of the legal fees they derive. However, firms may tender a pro bono commitment of between 5% – 15% of the legal services undertaken. The firms obtain extra weighting for pro bono services in the tender by committing to provide up to 15% of the value of the work undertaken, to a maximum weighting of 10. To date the average pro bono commitment by the firms is 10%.¹¹

PILCH recommends that the same minimum percentage requirement and range as prescribed by the Victorian scheme be introduced at the Commonwealth level.

5.3 Pro Bono legal services and Approved Causes

The Policy Guidelines for the delivery of Pro Bono services for an Approved Cause under the Legal Services to Government Panel Contract (**Guidelines**) for the Victorian scheme define “pro bono services” as follows:

For the purposes of law firms meeting their obligations under the Panel arrangements, “pro bono” is interpreted to mean the provision of legal services that are socially responsible and without expectation of a fee, at a reduced fee or where payment is considered inappropriate and where the primary objective of

⁹ Ibid

¹⁰ *Pro bono Fact Sheet*, Government Legal Services, Department of Justice, Victoria, October 2007.

¹¹ Ibid

those services is the assistance to disadvantaged persons or organisations or the promotion of the public interest.

Pro bono services can include, but are not limited to:

- *Legal or paralegal advice, representation or assistance;*
- *Legal research, education or law reform work; and*
- *Provision of staff, financial assistance, equipment, sponsorship or other in kind assistance.*¹²

A diversity of pro bono service provision is encouraged and no differentiation is made between categories of work performed, subject to the above criteria.

Importantly, work performed without expectation of a fee or at a reduced fee for persons or organisations that would be otherwise able to afford those services is not recognised as pro bono services. The Guidelines also exclude work performed on a “no win, no fee” commercial basis.

There is an additional requirement within the Guidelines that the requested legal service be for an Approved Cause. An “Approved Cause” is defined as:

...the provision of any services by lawyers or other staff based in Victoria which will enhance access to justice for disadvantaged persons or organisations and/or promote the public interest including circumstances where a Panel Firm:

1. *without fee or without expectation of fee or at a reduced fee, advises and/or represents a client in cases where:*
 - a) *a 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;*
2. *is involved in free community legal education and/or law reform;*
3. *is involved in the giving of free legal advice and/or representation to charitable and community organisations;*
4. *provides staff (legal or other) on secondment to a community organisation;*
or

¹² Government Legal Services, Department of Justice, Victoria

5. *provides financial or in kind assistance (eg equipment, sponsorships etc) to a community organisation.*¹³

PILCH endorses both definitions contained within the Guidelines and suggests the adoption of the definitions by the Commonwealth Attorney-General's Department for the purposes of jurisdictional consistency.

5.4 Administrative and Reporting Requirements

The Victorian scheme is administered by a specially created business unit of the Department of Justice known as Government Legal Services which, in conjunction with the Client Legal Services Contract Managers, manage internal access to the firms. These two parties have joint responsibility for co-ordinating the arrangements and managing and monitoring the delivery of legal services.

The legal firms must record the dates the pro bono services were provided, for which individual or organisation, the name and level of pro bono services and the number of hours of service performed.¹⁴ All firms are required to provide annual reports at audit level detail on the discharge of their contractual obligation.¹⁵

A survey completed by the National Pro Bono Resource Centre in April 2008 found that 74% of the firms surveyed agreed the completion of the annual Pro Bono Activity Report was 'straightforward'.¹⁶ In PILCH's view, the reporting requirements of the Victorian scheme ought to be endorsed as representing the appropriate balance between accountability and placing too onerous a burden upon participating legal firms.

5.5 Effect on the Legal Profession

Following the introduction of the Victorian scheme, Beaton consulting conducted a review in 2006 which concluded that the pro bono requirement has:

- raised the profile of pro bono work and encouraged 'cultural change' across the legal profession in Victoria;

¹³ Ibid

¹⁴ *Pro bono Fact Sheet*, Government Legal Services, Department of Justice, October 2007

¹⁵ Ibid

¹⁶ Survey Results of Victorian Government Legal Services Tender Scheme Pro Bono Conditions from National Pro Bono Resource Centre Paper – *Promoting and Encouraging Pro Bono Legal Services*, April 2008

- encouraged an increase in pro bono directed towards 'approved causes' and access to justice;
- been an impetus for firms to develop and formalise their pro bono programs;
- created a clear model for government support for pro bono services;
- provided lawyers with help in making pro bono a priority on their firm's agendas; and
- encouraged support to pro bono clinics through firms membership fees.¹⁷

PILCH has noted other changes by legal firms in response to the Victorian scheme including, inter alia, attributing a financial value to pro bono services and including it as part of fee earner billings; including pro bono work as a requirement in staff annual performance reviews; establishing defined pro bono policies for firms; and appointing pro bono co-ordinators or pro bono partners. Anecdotally, PILCH has also become aware of lawyer's entering the profession critically evaluating potential employer legal firms based upon their participation in the provision of pro bono legal services or otherwise.

The survey of participating firms in the Victorian scheme undertaken by the National Pro Bono Resource Centre reported that the vast majority of legal firms believe the Victorian scheme to be beneficial.¹⁸ This is an encouraging response to a mandatory government requirement to provide pro bono services. In addition, 30% of survey respondents said their firms had commenced or increased pro bono work *because of* (emphasis added) the Victorian scheme.¹⁹

In PILCH's view, the overall effect of the introduction of the Victorian scheme has been a "normalising" effect across the legal profession in Victoria as a whole, that is, that the provision of pro bono work and services is increasingly seen as a normal adjunct to the provision of commercial legal work and services.

5.6 Conflict of interest

There is no reference in either the Victorian scheme or Guidelines about what type of pro bono work would constitute a conflict of interest to the legal firms involved, particularly in

¹⁷ *Report on the Review of Legal Services to Government Panel Contract*, see <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/JUSTICE>

¹⁸ Ibid

¹⁹ Ibid

the commercial context. Given the wide scope of government work that can be tendered for pursuant to the Victorian scheme, the issue is one that has created some difficulty. It was alleviated to some extent by comments delivered by the Attorney-General of Victoria encouraging legal firms to accept work involving the government in public interest matters.

In PILCH's view, any ambiguity could be resolved by providing a clear direction, should the Commonwealth adopt a similar scheme, that provides encouragement to participant firms (in keeping with the Victorian Attorney-General's comments) perhaps by way of policy type guidelines and, additionally, that compliance with policy is monitored.

An option to address the issue of the number of commercial conflicts potentially arising against the government would be the development of a Protocol which required the legal firm concerned to provide a written outline to the government of the conflict and the scope of the legal service requested. If no objection is raised then the government is precluded from drawing or relying upon any adverse inference regarding the firm concerned. The National Pro Bono Resource Centre has suggested a Draft Protocol to similar effect, although they make no comment about its practical implementation.²⁰

5.7 Mandatory Scheme or Evaluated Criteria

PILCH understands that other interested bodies have proposed that as an alternative to making pro bono services provision mandatory, as provided for in the Victorian scheme, any pro bono commitment given by legal firms attempting to procure Commonwealth government work be framed as an optional requirement. Such a requirement would merely provide a weighted criteria for evaluation of the firm's tender for work.

Framing the provision as evaluation criteria, although helpful, has the deleterious effect of making any pro bono legal service provision unenforceable in the context of the service level agreements with the participating firms. In addition, reducing the pro bono commitment to an aspirational target would be of limited practical effect in increasing pro bono service provision generally.

Importantly, it is only participating firms that are required to comply with any contractual requirements. The mandatory nature of any proposed Commonwealth scheme places no obligations upon the wider legal profession. However, mandatory requirements such as those proposed is an opportunity to demonstrate the Commonwealth government's support for broader social justice outcomes such as pro bono services provision.

²⁰ *Pro Bono, Conflicts and Government*, National Pro Bono Resource Centre, March 2003

Conclusion

While governments have a clear role in regulating market participants, governments can also increasingly play a role as active market participants by purchasing works, supplies and services. This submission draws on particular evidence from the Victorian Government Legal Services Panel that shows that government can simultaneously participate in the market as a purchaser and also regulate the market through the use of its purchasing power to advance conceptions of social justice.

We are buoyed by the Commonwealth's commitment to reform its procurement arrangements and encourage the government to seize this opportunity to entrench, promote and require a commitment of its service providers to contributing to better social and justice outcomes by imposing a mandatory requirement of firms participating on the Commonwealth legal services panel to perform pro bono work.

This model is already operating extremely effectively in Victoria. In the 6 years since its implementation we have seen a very significant increase in the quality, quantity and diversity of pro bono legal services being offered to members of the community by the private profession. Increasingly lawyers are demanding that their firms provide a range of pro bono opportunities for them to use their legal skills to help marginalised and disadvantaged individuals and communities. As well as improving the skills, commitment and engagement of the legal profession the most important benefit of the Victorian scheme has been directed to the thousands of Victorians who without this much needed pro bono assistance would have been left without representation, advice and practically denied a meaningful right to access to justice.