



THE LAW SOCIETY
OF NEW SOUTH WALES

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16 February 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
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By email: natalie.cooper@lawcouncil.au

Dear Dr Popple,

2024 National Pro Bono Target Review

Thank you for the opportunity to participate in a possible Law Council submission to the Australian Pro Bono Centre's 2024 National Pro Bono Target Review. The Indigenous Issues Committee and the Access to Justice Department have contributed to this submission.

General comments:

Australian legal practitioners have a proud history of providing pro bono services to those who are unable to access legal support. We would like to take this opportunity to highlight the large amount of goodwill amongst the profession in this regard.

Traditionally, we have seen high demand for pro bono services for disadvantaged individuals in areas such as family law, housing, children's law, immigration and criminal law. In our view, it is in the public interest for scarce pro bono services to be prioritised to assist individuals over businesses, and we strongly advocate for legal practitioners to focus their pro bono work in these areas. There have, however, been ongoing issues with matching demand with supply for individuals because many law firms (particularly large law firms) often do not practise in these areas of law. We acknowledge and highlight the large volume of pro bono work they perform in other areas, including assisting charities, not-for-profit organisations and by way of secondments to community legal centres.

In the last five years we have experienced natural disasters on an unprecedented scale, COVID-19, and, more recently, an uncertain economy. As a result, we have seen new cohorts emerge who are struggling to afford legal services, such as farmers affected by drought, and small businesses impacted by government lockdowns. These groups need assistance in areas of law different to the traditional areas, such as business, tax and insurance law, which will often be better matched to medium and large law firms.

In principle, therefore, it would seem appropriate to support measures to expand the definition of pro bono legal assistance to include other forms of legal work that serve these impacted groups. This should not reduce the current pro bono work being provided by the profession in

traditional areas of need, but rather expand and enhance the volume of pro bono work by tapping into the expertise of legal practitioners who can provide assistance in other areas such as business law.

Specific comments in relation to relevant consultation questions are below.

Proposal 1: *Expand the Definition to incorporate pro bono work for Indigenous owned for-profit organisations. To determine eligibility, organisations must align with the definition provided by Supply Nation, that a business:*

- *be at least 50% owned by Indigenous persons;*
- *be located in Australia;*
- *make the majority of its revenue through providing a product or service as opposed to grants and donations; and*
- *be either a sole trader, partnership, incorporated company (Pty Ltd or Ltd), not-for-profit, Aboriginal corporation, social enterprise or franchise.*

Question 1

Do you agree that Indigenous owned for-profit organisations should be included in the Definition?

Yes, we agree.

Question 2

Do you agree with the proposed criteria for eligibility, which aligns with the Supply Nation definition above?

Please refer to our response to question 4.

Question 4

*Other than meeting the proposed criteria set out in Questions 2 and 3, do you agree that there should **not** be any limitations placed on the inclusion of Indigenous owned for-profit organisations for the purposes of the Definition? For example, there would not be limits set in terms of the provision of pro bono legal assistance to such entities in circumstances where they become self-sufficient and are earning adequate profit to be able to afford private legal assistance?*

The Law Society does not support an approach to eligibility without limits. In this regard we provide some background based on our experience in establishing the Indigenous Enterprise Legal Assistance (IELA) scheme, which operated from 2015-19.

In 2015, the Law Society commenced the scheme, via a partnership with the NSW Indigenous Chamber of Commerce (NSWICC). The scheme was essentially a clearinghouse, matching eligible NSWICC members with Law Society members, who were mostly volunteer solicitors/firms already providing assistance through the Law Society's Pro Bono Referral Scheme.

Indigenous enterprises were eligible for the scheme if they were an Indigenous business, as defined by NSWICC; passed a means test; and were in the first three years of operation. Further information in respect of the eligibility criteria is attached to this submission, noting in particular that the details of the means test may no longer be appropriate for 2024.

In formulating a currently appropriate means test, it may be useful to also consider the classifications of small, medium and large corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). Relevantly, the criteria for a "small corporation"

under the CATSI Act requires the corporation to have at least two of the following in a financial year:

- consolidated gross operating income of less than \$100,000.00.
- consolidated gross assets valued at less than \$100,000.00.
- fewer than five employees.

Adopting the classifications under the CATSI Act has the advantage that it is a test many Aboriginal corporations will already be aware of, and know whether they qualify.

When we developed these parameters, the Law Society considered a number of factors, including at what stage in an enterprise's life cycle would legal assistance be of most utility, and the ongoing sustainability of the scheme, particularly in respect of the availability of pro bono legal assistance. For these reasons, it was determined that the scheme should be available to Indigenous enterprises within the first three years of operation, but that the Law Society's discretion to provide access to the scheme in exceptional circumstances should also be preserved.

We suggest that the approach of merely requiring a business to be Indigenous owned should not be adopted. In our view, it is unhelpful to conflate the concepts of Indigenous ownership with the disadvantage/need usually associated with eligibility for pro bono assistance. Building in legal expenses into ordinary business expenses is an essential part of long-term commercial viability for all businesses. Furthermore, it has the real potential to take paying work away from First Nations lawyers and law firms, as First Nations businesses with capacity to pay regularly use these firms.

The Law Society also queries the requirement for the corporation to make the majority of its revenue through providing a product or service as opposed to grants and donations. While this requirement is appropriate in the framework of the definition for Supply Nation, it is not appropriate in the context of pro bono legal services. Relevantly, a corporation which makes the majority of its revenue through grants and donations but has a small start-up commercial venture, is likely to be the type of organisation that is most appropriate for the expanded definition of pro bono assistance.

Moreover, this requirement is likely to have unintended consequences. For example, if a corporation that makes 100% of its revenue from grants and meets the requirements for pro bono assistance at the time was to start a small commercial venture, this requirement would preclude that corporation from continuing to qualify for pro bono assistance until the commercial venture generated 51% of its revenue.

We suggest that the concerns the Supply Nation criterion was intended to address (primarily that the corporation is or will be a viable and productive commercial venture) are better addressed by limiting access to pro bono assistance to enterprises that are within the first three years of operation.

Proposal 2: *Expand the Definition to include small businesses in trouble.*

Question 1 *Do you agree that small businesses in trouble should be included in the Definition?*

Yes, however we suggest that eligibility should be framed around exceptional circumstances, rather than "in trouble", as per our answer to Question 4 below.

Nationwide, small businesses employ millions of people, provide vital services and contribute to the well-being of their communities. Providing pro bono legal assistance to small businesses to ensure their ongoing viability in certain circumstances not only directly benefits the small

business but also indirectly benefits local communities. Neighbourhoods become stronger and more resilient when small business owners are supported through legal issues outside of their control.

Question 2 *How should the term ‘small business’ be precisely defined for the purposes of the Definition? It is noted that a small proprietary company is defined under s45A(2) of the Corporations Act 2001 but more nuanced and specific criterion may be required, for example, should there be a narrower maximum revenue and/or maximum number of employees threshold that should be met?*

We note that there is no one Australian definition of a ‘small business’, because different laws define it differently. The definition provided under the *Corporations Act 2001* is as follows:

Section 45A

(2) A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:

- (a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than \$10 million;
- (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$5 million;
- (c) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.

In our view, the maximum revenue and maximum number of employees allowed for under this definition is too great to be eligible for pro bono assistance.

We suggest that in order for a “small business” to qualify for pro bono assistance, it satisfies at least two criteria, perhaps along the following lines:

- consolidated gross operating income of less than \$500,000.00.
- consolidated gross assets valued at less than \$500,000.00.
- fewer than 10 employees.

Question 4 *Should there be further specific limitations on the inclusion of small businesses in the Definition? For example, should eligibility be restricted to certain small businesses affected by particular events (e.g., natural disasters and/or pandemic-related lockdowns), and/or should it extend to small businesses owned by someone from a community experiencing disadvantage/marginalisation?*

Yes. Exceptional circumstances do not include the provision of legal advice and/or representation that a prudent small business owner should have forecasted and therefore budgeted for. It also does not automatically capture small businesses that are merely owned by someone from a community experiencing disadvantage/marginalisation.

We suggest a definition of exceptional circumstances refer to particular unforeseeable events/occurrences, for example in the nature of:

- Legal issues arising from a natural disaster in the business owner’s LGA.
- The owner/operator is diagnosed with a serious illness or suffers significant injury.
- The owner/operator is a victim of crime that impacts their ability to operate the business as usual.
- When a sudden and significant change in the law impacts that small business, such as the COVID-19 lockdowns.

In summary, for a small business to be eligible, in our view, it should:

- Fall under the definition of a ‘small business’.
- Have a legal problem that a prudent business owner could not have foreseen and therefore reasonably budgeted for.
- Not have the financial means to pay legal fees.

Question 5 *Would you be in favour of the Centre providing guiding questions in the Guidance Notes aimed at assisting Target signatories to make informed decisions about whether pro bono legal work for a small business would fall within the Definition? Questions would be informed by responses to the discussion above and could include for example:*

- *Does the business have fewer than X employees?*
- *Does the business have less than \$X annual revenue?*
- *Can the small business demonstrate a genuine financial need for legal assistance?*
- *Has the business been significantly and negatively impacted by recent events outside of its control (i.e. weather events, flood, bushfire, pandemic etc.)?*
- *Is the business owned by someone from a community experiencing disadvantage/marginalisation?*

Yes, we are in favour of including guiding questions. Some law firms may be reluctant to provide pro bono assistance to a small business, on the basis that, without clear guidance, significant additional demand might be generated. These guiding questions will not only assist firms determine eligibility but also give the firms something to rely on when advising a small business that they do or do not qualify for pro bono assistance.

We however do not agree with the guidance question on whether a business is owned by someone from a community experiencing disadvantage/marginalisation. We refer you to our response at Question 4 above, in relation to Indigenous ownership.

Question 6 *Is there a point at which a Target signatory should cease to provide pro bono legal work to a small business?*

As part of the engagement, the law firm should be given autonomy to structure the relationship, so that if the small business exceeds a certain financial threshold on an ongoing basis or that if a particular legal issue is resolved, the small business may then become a paying client of the firm (if they choose to become one). In terms of when that particular point should be, that should be a matter for the law firm and the small business to determine.

Proposal 3: *Expand the Guidance Notes to include the following guiding questions: 1. Would a lawyer typically charge commercially for the service in question? 2. Does the work require legal expertise or a legal mind to undertake it effectively? Does the activity go beyond purely administrative tasks? 3. Does the matter involve the external sharing of legal knowledge?*

Question 1

Do you have any comments on this specific proposal?

When looking at the distinction between legal work and non-legal work, the issue of whether a lawyer would typically charge for the work is not an appropriate test. In a commercial context, firms routinely record hours of legal work – such as legal research or work undertaken by a junior lawyer – which are then written off or discounted for commercial or client-related reasons. It does not follow that these types of work should fall outside the definition of pro bono legal work if they go towards assisting one or more disadvantaged clients.

Thank you for the opportunity to provide comment. Questions in the first instance may be directed to Ms. Nerida Harvey, Director, Access to Justice on (02) 9926 0379 or by email to nerida.harvey@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', with a large, sweeping flourish extending to the right.

Brett McGrath
President

Encl.

ATTACHMENT: Eligibility for the Law Society of NSW Indigenous Enterprise Legal Assistance (IELA) scheme (means test last revised in 2017)

Indigenous enterprises are eligible if they:

- Are an “Indigenous business” as defined by the NSW Indigenous Chamber of Commerce; and
- Pass a means test; and
- Are in the first three years of operation.

What is an ‘Indigenous business’?

An Indigenous business is a business that has an Australian Business Number (ABN), is trading as a viable enterprise and is 51% Indigenous owned, controlled and operated.

An Indigenous business includes a couple where one partner is Indigenous and holds a 50% shareholding and the other partner is non-Indigenous and holds 50% shareholding.

Means test

Individual	Business
<p>If applying as a single person:</p> <p>Gross income of less than \$70,000 for a single person. Equity in property less than \$300,000; and Other assets less than \$15,000.</p> <p>If applying as a couple:</p> <p>combined gross income less than \$90,000 (with up to \$8,000 per child in the applicant’s care to a maximum of \$32,000); Equity in property less than \$450,000; and Other assets less than \$22,500.</p>	<p>Gross income of less than \$120,000; and Assets of less than \$120,000.</p>

Clients should have sufficient funds or be able to obtain sufficient funds to pay those any external costs prior to signing the Costs Agreement.

Length of operation

The IELA scheme will assist businesses that have been in operation for 3 years or less.

The Law Society’s Pro Bono Solicitor may accept matters that are outside the IELA guidelines due to exceptional circumstances, including disability, risk of physical harm to the applicant and extreme financial hardship.