



Law Council
OF AUSTRALIA

2024 National Pro Bono Target Review: Consultation Paper

Australian Pro Bono Centre

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council thanks the Law Society of New South Wales and the Law Society of Western Australia for their contributions in the preparation of this submission, in addition to the guidance of the Law Council's Access to Justice Committee.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Australian Pro Bono **Centre** in relation to its December 2023 Consultation Paper, *2024 National Pro Bono Target Review*.
2. The Centre is seeking feedback on the following three proposals in relation to the Australian Pro Bono **Target**:
 - (a) Expand the definition of ‘pro bono legal services’ (the **Definition**) to incorporate pro bono work for Indigenous owned for-profit organisations.
 - (b) Expand the Definition to include small businesses in trouble.
 - (c) Expand the Guidance Notes to include the following guiding questions:
 - (i) Would a lawyer typically charge commercially for the service in question?
 - (ii) Does the work require legal expertise or a legal mind to undertake it effectively? Does the activity go beyond purely administrative tasks?
 - (iii) Does the matter involve the external sharing of legal knowledge?
3. As the Law Council remarked in its 2018 Final Report of the Justice Project, the pro bono contribution of the Australian legal profession is a substantial—and celebrated—aspect of Australia’s legal culture.¹ Australian lawyers provide hundreds of thousands of pro bono work hours every year to those who are otherwise unable to access legal services. The Law Council was particularly pleased to note that, in the 2022–23 financial year, signatories to the Target reported undertaking 700,910 hours of ‘pro bono legal services’, an increase of 8.6 per cent on the previous financial year.²
4. The Law Council recognises that there are ongoing challenges with meeting demand for individuals and organisations that require pro bono legal support, noting in particular that disadvantaged individuals often have complex legal needs, and face multiple barriers to accessing justice, particularly in regional, rural and remote (**RRR**) areas. Traditionally, there has been high demand for pro bono services for matters involving family law, immigration, employment, housing and criminal law.
5. In addition, the legal profession is increasingly engaging in pro bono work with a new strategic focus by identifying priority groups—and priority areas of law—for pro bono assistance. It has been a tumultuous several years for Australia, including extreme weather events, the COVID-19 pandemic, and an uncertain economy. As a result, new cohorts have emerged who are struggling to access legal services: for example, farmers affected by droughts and floods, and small businesses impacted by emergency public health measures or natural disasters. These groups require assistance in different areas of law, such as business law, taxation and insurance.

¹ Law Council of Australia, *The Justice Project: Legal Services* (Final Report, August 2018) <<https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/18%20-%202018%2009%20-%20Final%20-%20Legal%20Services%20%28Part%20%29.pdf>> 13-15.

² Australian Pro Bono Centre, 16th Annual Performance Report of the National Pro Bono Target (September 2023) <<https://www.probonocentre.org.au/wp-content/uploads/2023/09/16th-Performance-Report-of-the-National-Pro-Bono-Target-2023-FINAL.pdf>> 4.

6. In principle, therefore, it is appropriate to expand the Definition to include other forms of legal work that serve these impacted groups. However, the Law Council is concerned with ensuring that any significant widening of the Definition, particularly with a focus towards for-profit clients or commercial needs, will not have the effect of reducing the supply of pro bono services at the expense of those most in need. Ideally, any such change should expand and enhance the volume of pro bono work by harnessing the expertise of additional legal practitioners who can provide assistance in other areas, such as business law.
7. Similarly, with any proposed expansion to the definition of pro bono legal services, it must be acknowledged that pro bono assistance should not be regarded as a substitute for properly funded legal assistance from government in areas of identified need.

Proposal One

8. The Centre's first proposal is to expand the Definition to incorporate pro bono work for Indigenous owned for-profit organisations. Consistent with the **Supply Nation definition**, to determine eligibility, an organisation must:³
 - be at least 50 per cent 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, 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?

9. There are times when it is appropriate for pro bono legal assistance to address entrenched disadvantage across a general cohort of the population. This need has long been recognised in law reform work. The proposed expansion of the Definition to include Indigenous owned for-profit organisations may well advance this purpose and may also constitute a legitimate reconciliation measure.
10. The Law Council, therefore, agrees in principle that these organisations should be included in the Definition, noting the additional comments against the following questions.

Question 2: Do you agree with the proposed criteria for eligibility, which aligns with the Supply Nation definition above?

11. It is important to recognise the limits of pro bono supply, and that every provision of pro bono legal assistance to an organisation may impact the availability of pro bono legal assistance for others. Pro bono legal assistance should continue to be targeted towards the greatest impact in matters of public interest.

³ Australian Pro Bono Centre, *2024 National Pro Bono Target Review* (Consultation Paper, December 2023) 12.

12. The proposal would see a shift away from the current Definition's approach to assessing an organisation's eligibility, which focuses on whether its mission and impact is likely to benefit low income or disadvantaged members of the community, or if the organisation works for the public good. The proposal's focus on the ownership structure of an entity, rather than its sole or primary purpose, is a significant departure, and one that requires careful consideration. For example, the Law Council has received feedback that suggests:
- It may be unhelpful to conflate the concepts of Indigenous ownership with the disadvantage, or need, usually associated with eligibility for pro bono assistance.
 - Factoring in potential legal costs into ordinary business expenses is an essential aspect of long-term commercial viability for all businesses.
 - This approach has potential to take paying work away from Aboriginal and Torres Strait Islander lawyers and law firms, given that Indigenous owned businesses with the capacity to pay will often use these lawyers and firms.
13. While the Law Council supports the Consultation Paper's suggestions regarding the identification and verification of Indigenous enterprises, including the adoption of the Supply Nation definition, it queries whether it is appropriate to refer to revenue source. As noted above, if the intent is to support Indigenous-owned organisations and entrepreneurs, it should not matter whether revenue is made through the provision of a product or service as opposed to grants and donations, noting the latter would likely be eligible for pro bono assistance under the current Definition as a charitable entity.
14. The Law Council does, however, consider that the Definition should place certain limitations on eligible pro bono support for for-profit Indigenous-owned businesses based on size and revenue, as set out in the following section.

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.

15. The Law Council does not support an approach to eligibility without limits for Indigenous owned for-profit organisations. The Law Council has received mixed views on what limitations should be implemented, outlined below for the Centre's consideration.

16. The Law Society of Western Australia (**LSWA**) has expressed the view that the Definition should be limited to Indigenous businesses that:
 - are classified as a 'small business employer' under section 23 of *Fair Work Act 2009* (Cth) by employing fewer than 15 employees; and
 - are classified as a 'small business entity' by the Australian Taxation Office (**ATO**) having an aggregated annual turnover of less than \$10 million.⁴
17. The Law Society of New South Wales (**LSNSW**) considers that it may be more appropriate for the Definition to have regard to the classifications of small, medium and large corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**). For instance, to be classified as a 'small corporation', 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;
 - consolidated gross assets valued at less than \$100,000;
 - fewer than five employees.⁵
18. The Law Council notes that many Indigenous organisations will likely already be aware of the classifications under the CATSI Act, and will know whether they qualify, which would be beneficial.
19. The stage of an organisation's life cycle may also be an appropriate further limitation. For instance, it could be determined that the Definition only applies to Indigenous enterprise within the first three years of operation. This criterion may more effectively achieve the intent of the proposed criterion relating to revenue.

Proposal Two

20. The Centre's second proposal is to 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?

21. Nationwide, small businesses employ millions of people, provide vital services and contribute to the wellbeing 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, especially in RRR areas. Neighbourhoods become stronger and more resilient when small business owners are supported to address legal issues outside of their control.

⁴ Australian Taxation Office, *Small business entities* (Web Page, May 2024) <<https://www.ato.gov.au/forms-and-instructions/deductions-for-prepaid-expenses-2023/small-business-entities>>.

⁵ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 37-10 and *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (Cth) reg 8(1)-(2).

22. It is consistent with the purpose of pro bono work to provide legal assistance to address risks to vulnerable individuals who earn their livelihood through business ownership, not just salaried employment. Therefore, while the Law Council agrees that small businesses in trouble should be included in the Definition, it considers that the eligibility requirements should be reframed, as set out in its response to the questions below.

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 section 45A(2) of the *Corporations Act 2001* but a 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?

23. There is no singular definition of ‘small business’ in Australia. For example:
- the *Corporations Act 2001* (Cth) requires a ‘small proprietary company’ to satisfy at least two of the following:⁶
 - (i) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than \$10 million;
 - (ii) 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;
 - (iii) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.
 - the Australian Bureau of Statistics (**ABS**) requires a small business to have fewer than 20 employees⁷ (as at June 2023, 97.3 per cent of Australian businesses satisfied this definition);⁸
 - the ATO requires a ‘small business entity’ to have an aggregated annual turnover of less than \$10 million⁹ (as at June 2022, 98.3 per cent of Australian businesses satisfied this definition);¹⁰ and
 - the Australian Securities and Investments Commission (**ASIC**) considers that a small company is one that has an annual turnover of less than \$25 million, no more than 50 employees, and less than \$12.5 million in assets.¹¹

⁶ *Corporations Act 2001* (Cth) s 45A.

⁷ Australian Small Business and Family Enterprise Ombudsman, *Number of small businesses in Australia* (Report, August 2023) <https://www.asbfeo.gov.au/sites/default/files/2023-10/Number%20of%20small%20businesses%20in%20Australia_Aug%202023_0.pdf> 2.

⁸ Australian Small Business and Family Enterprise Ombudsman, *Number of small businesses in Australia* (Report, August 2023) <https://www.asbfeo.gov.au/sites/default/files/2023-10/Number%20of%20small%20businesses%20in%20Australia_Aug%202023_0.pdf> 2.

⁹ Australian Taxation Office, *Small business entities* (Web Page, May 2024) <<https://www.ato.gov.au/forms-and-instructions/deductions-for-prepaid-expenses-2023/small-business-entities>>.

¹⁰ Australian Small Business and Family Enterprise Ombudsman, *Number of small businesses in Australia* (Report, August 2023) <https://www.asbfeo.gov.au/sites/default/files/2023-10/Number%20of%20small%20businesses%20in%20Australia_Aug%202023_0.pdf> 3.

¹¹ Australian Securities and Investments Commission, *Are you a large or small proprietary company* (Web Page, 2019) <<https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/are-you-a-large-or-small-proprietary-company/>>.

24. Noting the inconsistencies in the existing definitions and approaches relating to small businesses, it will be important to place the purpose of pro bono work at the forefront of any changes, rather than simply adopting an existing definition. The Law Council has received mixed views on how ‘small’ a business ought to be to be eligible to obtain pro bono legal assistance, outlined below for the Centre’s consideration:
- The LSWA suggests that, to qualify as a ‘small business’ for the purpose of obtaining pro bono assistance, an organisation should be:
 - classified as a ‘small business employer’ under section 23 of *Fair Work Act 2009* (Cth) by employing fewer than 15 employees; and
 - classified as a ‘small business entity’ by the Australian Taxation Office (ATO) having an aggregated annual turnover of less than \$10 million.¹²
 - The LSNSW is of the view that the maximum revenue and maximum number of employees in the existing definitions above are too great for a small business to be appropriately eligible for pro bono assistance. The LSNSW suggests that, in order for a small business to qualify for pro bono assistance, it ought to satisfy at least two criteria, such as:
 - consolidated gross operating income of less than \$500,000;
 - consolidated gross assets valued at less than \$500,000;
 - fewer than 10 employees.

Question 4: Should there be further specific limitations on the inclusion of small businesses in the Definition?

25. The Law Council agrees that there should be further specific limitations on the inclusion of small businesses in the Definition, given that providing pro bono assistance to businesses in relation to commercial matters will impact the available supply for other clients. However, the Law Council has received varied views on what those limitations should be, and how they should be framed in the Definition.
26. The LSWA suggests that, for a small business to qualify for pro bono assistance:
- any means test for individuals should also apply to the shareholders of the business;
 - the business should be at imminent risk of insolvency; and
 - the assistance should be limited to matters directly impacting the financial security of the business.
27. The LSNSW suggests that the eligibility for small businesses under the Definition should be reframed from ‘in trouble’ to ‘in exceptional circumstances’. This framework would ensure the exclusion of the provision of legal advice and/or representation that a prudent small business owner should have forecast and subsequently budgeted for. A definition of ‘exceptional circumstances’ could refer to particular unforeseeable events, such as:
- legal issues arising from a natural disaster or extreme weather event in the business owner’s local government area;

¹² Australian Taxation Office, *Small business entities* (Web Page, May 2024) <<https://www.ato.gov.au/forms-and-instructions/deductions-for-prepaid-expenses-2023/small-business-entities>>.

- the owner or operator of the business is diagnosed with a serious illness, or suffers significant injury;
 - the owner or operator of the business is a victim of a crime that impacts their ability to operate the business as usual; or
 - when a sudden and significant change in the law impacts that small business, such as a pandemic lockdown.
28. Consideration could also be given to including location-based factors more generally to assist in determining the eligibility of a small business for pro bono assistance. For instance, farms/producers and other RRR-based small businesses may experience difficulties due to the impacts of events largely beyond their control (e.g., drought, weather events, collapse in commodity prices, and the depopulation of RRR towns for reasons unrelated to the business).

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 questions about whether pro bono legal work for a small business would fall within the Definition?

29. The Law Council is in favour of the Centre providing guiding questions in the Guidance Notes.
30. Some Target signatories 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 assist signatories to determine the eligibility of applicants, while also providing signatories with guidance to consistently rely upon when advising a small business whether they do, or do not, qualify for pro bono assistance.

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

31. The Law Council considers that, as part of the engagement, a Target signatory should be given autonomy to structure the relationship so that, if the small business exceeds a certain financial threshold on an ongoing basis, or a particular legal issue is resolved, the small business may then choose to become a paying client of the firm. The appropriate threshold should be a matter for the Target signatory and the small business to determine.

Proposal Three

32. The Centre's third proposal is that the Guidance Notes be expanded to include the following guiding questions:
- (a) Would a lawyer typically charge commercially for the service in question?
 - (b) Does the work require legal expertise or a legal mind to undertake it effectively? Does the activity go beyond purely administrative tasks?
 - (c) Does the matter involve the external sharing of legal knowledge?

33. The Law Council notes that the Centre intends for these guiding questions to be accumulative in nature rather than strict criteria, so that if a lawyer can affirmatively respond to most of the questions, they can reasonably consider the activity as a pro bono legal service.¹³

Question 1: Do you have any comments on this specific proposal?

34. In relation to the first proposed guiding question in relation to whether a lawyer would typically charge commercially for the service, the Law Council makes the following comments:
- It is unclear why this question is of value, and it is not likely to be easily answered objectively, having regard to the practices and priorities of a Target signatory.
 - In a commercial context, firms routinely record hours of legal work—such as legal research, or work undertaken by a junior lawyer—that are then written off, or discounted, for commercial or client-related reasons. It does not follow that this type of work should fall outside the Definition if it contributes towards assisting disadvantaged clients.
 - It would be more appropriate for the question to refer to whether the work is ‘able’ to be charged commercially (e.g., according to solicitors’ scales of costs), rather than whether the work is ‘typically’ charged.
35. In relation to the second proposed guiding question, the Law Council makes the following comments:
- Pro bono work should include all tasks that are necessary for the delivery of a legal service that would ordinarily be included in a solicitor’s bill of costs for full-paying clients. This includes paralegal or quasi-legal tasks, such as research, due diligence searches, and the preparation of bundles of documents.
 - These are costs of the service that can be charged to a client, as opposed to costs of the business, that cannot be charged to a client. It is unclear whether the Definition would benefit from elaboration on this point, or whether this has the potential to introduce inconsistent concepts, contrary to the intention of the guiding questions to ‘enhance the precision of the Definition’.¹⁴
36. The Law Council is supportive of the third proposed guiding question and observes that it is consistent with the Law Council’s longstanding definition of pro bono, which includes activities beyond legal assistance, including where the lawyer is involved in free community legal education or law reform advocacy.¹⁵

¹³ Australian Pro Bono Centre, *2024 National Pro Bono Target Review* (Consultation Paper, December 2023) 20.

¹⁴ *Ibid.*

¹⁵ Law Council of Australia, *Pro Bono Publico—For the Public Good* (Policy Statement, 1995) <<https://lawcouncil.au/publicassets/276c7bd7-e1d6-e611-80d2-005056be66b1/95-Policy-Statement-Pro-Bono-Publico-For-the-Public-Good.pdf>>.