

‘Are regulatory restrictions in practising rules for in-house lawyers justified?’

Introduction

LawWorks is the operating name of the Solicitors Pro Bono Group, a charity working in England and Wales. We work with solicitors, law schools and law students to support, promote and encourage legal pro bono. We facilitate the provision of legal advice and assistance to individuals and not-for-profit organisations unable to access legal aid and unable to afford legal representation.

Over 100 law firms and companies are members of LawWorks, including international firms based in London, and regional and local private practices. Companies with in-house lawyers are also members, and we are keen to encourage and support more in-house lawyers to contribute their skills and expertise to pro bono.

In-house lawyers can volunteer with the LawWorks Not-For-Profits Programme (previously LawWorks for Community Groups) or at a legal advice clinic registered with the LawWorks Clinics Network.

As the Legal Services Board will be aware, it is a time of unprecedented need for free legal advice services. 84 per cent of LawWorks registered clinics have seen an increase in demand for legal advice since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Similarly, the economic climate of recent years has contributed to a growing need for legal advice and support among disadvantaged members of the community, and by the not-for-profit organisations that support them. Pro bono is not, and should not be seen as, a substitute for a publicly funded system of legal aid. The overall contribution of pro bono in enabling people to access justice may be relatively small, but its impact and importance for individuals and organisations is significant and profound. The current climate has made it imperative that all legal stakeholders focus whatever pro bono resources they have available to provide assistance to vulnerable individuals.

For many, pro bono is an essential part of being a lawyer. It is an opportunity to use professional skills, experience and knowledge to support the most vulnerable in our communities to access justice. However, at present, there are unjustified burdens in place that prevent in-house counsel from participating in pro bono projects in contradiction to the overarching objectives of the Legal Service Act 2007 (the Act).

We welcome the discussion paper by the Legal Services Board and the opportunity for LawWorks to highlight the impact of the regulatory restrictions for in-house lawyers in the context of pro bono. LawWorks strongly believes that the current regulatory framework unjustifiably restricts the provision of pro bono advice by in-house solicitors. It is our contention that the legislation and accompanying regulatory guidelines need to be reviewed and amended so that in-house lawyers can provide advice to pro bono clients, irrespective of the connection with their employer, in reserved legal areas.

Our response includes how the particular issues for the provision of legal pro bono, arising from the current regulations, are not consistent with the regulatory objectives in the Act, and the Legal Services Board's approach.

Question 1:

What is your experience of current arrangements for in-house lawyers?

In our experience the current regulatory arrangements for in-house solicitors are unduly restrictive. We believe that the restrictions on providing pro bono advice in reserved legal areas present an unnecessary barrier for potential pro bono volunteers. Furthermore, even in cases where in-house lawyers can provide pro bono advice, we believe the Act and accompanying guidelines are so unclear and ambiguous that they act as a deterrent for in-house teams, and individual in-house lawyers, who would otherwise be willing to volunteer.

As the Legal Services Board's discussion paper outlines, section 15 of the Act prevents the delivery of the six categories of reserved legal activities by in-house counsel to anyone other than their employer, where such activities are carried out as part of their employer's business. Although in-house lawyers are free to provide pro bono advice in other areas, the current regulatory landscape restricts in-house lawyers who want to do areas of pro bono work that fall within the definition of

'reserved legal activity' and can be seen to be connected to their employer's business.

The SRA Practice Framework Rules 2011 (the Rules) has created a specific provision for pro bono work. Rule 4.10 states that in-house lawyers can provide services in connection with reserved legal activities to the public on a pro bono basis provided this is not done as part of their employer's business. However, the Solicitors Regulation Authority (SRA) has given a broad interpretation to the phrase '...part of your employer's business', as detailed in Guidance Note (x) of the Rules. This extends to situations, amongst others, where the employer requires him or her to undertake pro bono legal work or where the employer provides management, training, supervision or professional indemnity insurance in relation to such work; it also includes factors such as the extent to which the employer publicises the pro bono work or rewards the employee in any way in relation to such work.

LawWorks strongly believes that coordination and collaboration are vital in order to maximise the efficient delivery of pro bono legal assistance and the support of employers, in enabling in-house lawyers access to pro bono opportunities, is key to this. Guidance Note (x) defines the 'part of the business of the employer' so broadly that it is unlikely that a pro bono case will not be in some way connected to the in-house lawyer's employer. Through our engagement in this field we see that a growing number of companies have strong Corporate Social Responsibility (CSR) programmes, and volunteering is seen as something the organisation supports. This is not necessarily core business, but it is something that the company facilitates staff involvement in and therefore would constitute part of the employer's business in the SRA's wide interpretation of the Act.

Prior to the introduction of the Act, LawWorks had an active and growing in-house membership and, whilst there is still active involvement by in-house teams, they are unduly limited in the advice they can provide to pro bono clients.

In-house groups are actively involved in the LawWorks Not-For-Profits Programme which provides casework brokerage for small not-for-profit organisations. Not-for-profit's casework provides a natural fit for in-house teams, requiring expertise in relevant areas of law and for the same purposes as their usual day-to-day clients. Whilst in-house lawyers and teams still volunteer with the Not-For-Profits

Programme there are significant limitations to the support they can provide, given the regulatory restrictions on reserved legal activity.

Since the enactment of section 15 in its current form, LawWorks has experienced hesitation on the part of in-house counsel to provide advice to charities where the case is likely to become contentious. In-house lawyers have to take a cautious approach when accepting cases, assessing not only whether the case is contentious, but also whether there is potential for the case to become contentious and thus risk falling within the scope of reserved legal activities. Indeed, LawWorks has ceased sending cases through to in-house teams that look like they may fall within the reserved legal areas, given the uncertain regulatory framework and cautious approach of in-house members, resulting in less pro bono opportunities for in-house teams. In our view, this is contrary to the Act's regulatory objective to promote competition in the provision of services in the legal sector.

By way of example, an in-house member would be unable to assist a charity seeking advice regarding an employee's conduct or performance, which may involve internal disciplinary processes. Another example would concern commercial agreements, where an initial request for advice in relation to the terms and conditions could be with a view to determining a litigious course of action.

In-house solicitors are also a valuable resource at free local legal advice clinics. LawWorks supports a network of over 200 clinics across the country offering initial legal advice and support to individuals who cannot afford to pay for assistance and who are not eligible for legal aid. At the moment, while an in-house lawyer may provide some initial advice at a clinic, they will need to hand the matter over to solicitor based in a law firm if it looks like the matter is contentious – or potentially contentious - in nature. As a result, if an in-house team wishes to volunteer at a clinic, the most practical scenario is to partner an in-house team with a law firm so that the law firm is available to cover any reserved matters that arise. These partnerships are a clear example of pro bono work adapting to the current regulatory parameters and, while these clinics still offer a valuable resource to vulnerable consumers, what results is a concentration of pro bono legal expertise in certain areas rather than expanding this expertise to areas where there is limited or no provision of pro bono legal advice.

LawWorks provides assistance in developing new clinics, matching firms and individual lawyers with front line advice agencies. LawWorks has been exploring innovative ways to enable better access to justice, including in so-called ‘advice deserts’, for example through the use of *Skype* and other technology. However, under the current regulatory framework, it is very difficult to secure the support of the in-house sector in these types of projects. In our view, the current regulatory framework is hindering, rather than enabling, some of the policy objectives in the Act, including the exploring of new and innovative ways to connect legal pro bono objectives with the needs of ‘consumers’.

In-house members and private practice firms have expressed concern about the in-house rules on pro bono, the general consensus being that the limits on advising on reserved legal matters are unduly restrictive and ambiguous. Lawyers take on pro bono cases voluntarily, often in their limited free time, therefore it needs to be as straightforward as possible to encourage participation. The more complicated it is for a solicitor to engage in pro bono work, the less likely it is that they will give up their time to get involved.

The overarching objectives of the Act, setting the broad policy framework for regulations, are positive, inspirational and understandable. However, we believe that the relevant regulations themselves are complex, technical and currently subject to different interpretations in practice. As a result, the current regulatory framework is acting as a barrier to in-house legal teams providing pro bono advice to vulnerable individuals and the charities that support them. It is for these reasons that the current restrictions on in-house counsel providing pro bono advice cannot be justified.

Question 2:

What, in your view, could be improved?

LawWorks believes that the current restrictions on pro bono work are an unintended consequence of the Act and we propose that section 15 of the Act is amended to permit the pro bono undertaking by in-house counsel of reserved legal activities. It is our contention that such a legislative change would not reduce the protection offered to consumers, but will be more consistent with the overarching regulatory objectives of the Act.

It is LawWorks' view that the Act needs to be clarified to permit in-house teams to undertake pro bono cases in reserved legal areas. The current wording has created a level of doubt as to whether pro bono activity lies sufficiently within the periphery of 'P's business' to have the unintended consequence of reducing key pro bono delivery in reserved legal areas entirely.

We believe that ambiguities in the Act have resulted in the SRA adopting a very restrictive approach to in-house pro bono work as reflected in the SRA Framework Rules. Rule 4.10 does allow in-house solicitors to provide pro bono advice for clients other than their employer. However, the restriction on reserved legal activities, unless the provision of advice does not constitute part of the wide definition of their employer's business, is acting as a huge deterrent to in-house teams getting involved in pro bono projects. In-house lawyers are highly unlikely to take on any reserved legal matters for pro bono clients because they feel that the work will be in some way connected to their employer and therefore be caught by the legislation.

In our view, the law needs to be made clear and unambiguous, expressly stating that in-house lawyers can provide pro bono advice to clients in reserved legal areas, whether the work can be seen to be connected to the employer or not.

Amending the legislation would significantly enable an increase in pro bono engagement by the in-house sector. Allowing in-house teams to provide advice to pro bono clients in reserved legal areas would increase the provision of pro bono legal advice and assistance to charities and individuals unable to afford to pay and not eligible for legal aid at a time of unprecedented need.

For in-house teams, increased access to pro bono programmes would help in the development of key legal skills; it can lead to better communication and teamwork with retained firms working in partnership in pro bono projects, and aid recruitment and retention of lawyers interested in pro bono work. In-house employers would also be able to more effectively deliver and contribute to CSR objectives; it can improve teamwork and cohesion across the organisation and the development of cross-sector relationships with the not-for-profit sector. Private law firms will also benefit, as the existence of greater pro bono partnerships will offer firms the opportunity to strengthen partnerships with in-house legal teams. A collective and effective pro bono contribution renders the legal profession more independent, strong, diverse

and more effective. Such an ethos also promotes the most fundamental professional principles of the legal profession.

Pro bono is one of few elements where different branches of the profession and different providers come together to protect and promote the best interests of the consumer. It is vital that this broader professional ethos is strengthened and not weakened. The rule of law is undermined without access to justice and the public interest is served by the coordinated provision of free legal advice, towards which pro bono can make an important contribution.

In supporting changes to the regulatory framework, we are not proposing that beneficiaries of legal pro bono should have less protection than other consumers of legal services. However, there should be an appropriate balance between regulations which protect the interests of consumers and those which unreasonably or unintentionally deny or inhibit access to legal services. Appropriate regulation – as protection for the consumer – should apply irrespective of whether or not services are paid for. It is important and relevant to emphasise that in-house lawyers volunteering with LawWorks projects are qualified, regulated and insured professionals. LawWorks provides insurance to cover potential liability arising from in-house solicitor's pro bono work. In our view, it is reasonable and consistent with the objectives of the Act, to make the provision of legal pro bono conditional on having appropriate insurance in place.

It is difficult to predict with any accuracy the number of in-house counsel who will undertake pro bono work in the event of the Act and the Rules being amended. However, clear evidence of deterrence collected so far suggests that a significant number of in-house teams would be prepared to commit to the provision of pro bono services if the law were clarified as we propose. 2015 marks GC100's Year of Pro Bono, which demonstrates a willingness and appetite from the profession to get more involved in pro bono work. However, the current regulatory framework provides a considerable barrier to this enthusiasm and momentum.

The regulatory objectives

Protecting and promoting the public interest

The hindrances which the current regulatory framework create for the provision of in-house legal pro bono are not consistent with protecting and promoting the public interest. For example, legal pro bono contributes to (and has greater potential for) enhancing public confidence in the legal professions and the legal system.

As we highlight above, the scope and application of restrictions on in-house lawyers are seen as ambiguous (and complex) and therefore do not meet the Legal Services Board's requirement for transparency. It is difficult to see how removing restrictions on in-house pro bono could in any way be inconsistent with this objective.

Supporting the principles of the rule of law

As we state above, legal pro bono is not an alternative to legal aid, but it makes a significant and potentially growing contribution to accessing justice. In restricting the provision and availability of in-house legal pro bono, the current regulations are not consistent with this objective. Nor are the current regulations accessible, intelligible and clear. It is, again, difficult to see how removing the restrictions on in-house pro bono could in any way be inconsistent with this objective.

Improving access to justice

The Legal Services Board has stated that the access to justice duty is a strong one. Arguably, it is the most relevant objective that is inconsistent with the restrictions on the provision of legal pro bono. We welcome the Legal Services Board's assertion that the providers of legal services 'should not only be free to innovate and develop new approaches to meeting and satisfying customer need/demand, but should have every incentive to do so...and that actual or potential barriers to such innovation should be removed'. The current restrictions hinder the objective to facilitate a market that improves access to justice by limiting the supply of legal pro bono, and the scope and ability for in-house layers to contribute to innovative ways of providing pro bono.

Protecting and promoting interests of consumers

Recipients of pro bono do not pay for the legal services they receive, but they are 'consumers' whose interests should be protected and promoted. The current restrictions are not consistent with this objective.

Encouraging an independent, strong, diverse and effective legal profession

Because lawyers providing pro bono do not charge for their services, they are clearly putting the interests of consumers over their own financial interests. Providing legal pro bono can bring *indirect* commercial and financial advantage for the in-house lawyer or their employer. It can, for example, contribute positively to a company's corporate social responsibility reputation and credentials; it may give a competitive edge by enabling employers to recruit staff attracted by the ability to provide pro bono; it can contribute to staff development, team building and staff retention. But these contribute to a virtuous circle to the benefit of consumers.

An important role for LawWorks is to evaluate the impact of pro bono and also to gather evidence about need, the impact of legal aid and other reforms, and to advocate for positive change. The removal of restrictions limiting the provision of pro bono advice would contribute to further enhancing the profession's 'voice' (in collaboration with organisations such as LawWorks), and be consistent with meeting the changing needs of consumers.

Increasing public understanding of citizen's rights and duties

The current restrictions are not consistent with this objective. The removal of restrictions on in-house pro bono will contribute to increasing the supply of legal pro bono, access to advice and information and thereby, for example, empower consumers to make informed choices (relevant to 'consumer capacity' and encouraging a better understanding of "rights and responsibilities").

Summary

LawWorks strongly believes that the current regulatory framework unjustifiably restricts involvement in pro bono by in-house solicitors. With over 25,000 in-house solicitors in the profession, the impact of this restriction is significant. The law around in-house lawyers providing pro bono advice needs to be made clear and unambiguous. In-house lawyers should be enabled to provide legal advice in reserved legal areas to pro bono clients, whether this can be seen to be connected to their employer or not. We believe that the current restrictions on pro bono are an unintended consequence of the Act and therefore should be rectified. This is a view that is shared with the in-house profession, not-for-profit organisations and private

practice firms alike. Such a change would allow in-house teams and individuals to make a valuable contribution to improving access to justice for individuals and the charities who support them. We believe that amending the legislation to allow in-house solicitors to provide pro bono advice in reserved areas would not reduce protections offered to consumers, but it would uphold the regulatory objectives of the Legal Service Act 2007 more effectively and extend the provision of quality pro bono advice to vulnerable consumers who currently have nowhere else to turn.

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