



VICTORIAN BAR

## PROTOCOL GOVERNING DIRECT PRO BONO REFERRAL SCHEME<sup>1</sup>

Between

THE SUPREME COURT OF VICTORIA

and

THE VICTORIAN BAR

### A. Purposes and overview of Scheme

1. This direct referral scheme for pro bono legal assistance (the **Scheme**) is a cooperative initiative of the Victorian Bar and the Supreme Court of Victoria.
2. In 2019, the Scheme is being piloted in the Supreme Court's Trial and Court of Appeal divisions to supersede the former "duty barrister" referral scheme.
3. The Scheme's main purpose is to assist self-represented litigants in the Court, where the Court determines that it is in the public interest for the due administration of justice to refer a request for pro bono assistance from a barrister.

### Pro bono assistance

4. The term *pro bono* is derived from the Latin *pro bono publico*, meaning "for the public good". Many litigants who cannot afford to pay for a lawyer do not qualify for legal aid or otherwise lack the capacity to obtain legal assistance themselves. The Scheme recognises that where a party is otherwise unrepresented, it may promote the interests of the due administration of justice for that party to be assisted by a pro bono lawyer where one is available. Alternatively, it may promote the interests of the due administration of justice for the Court to appoint an *amicus curiae* to assist the Court in its role.

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<sup>1</sup> This document is intended for use by members of the Victorian Bar, judicial officers and staff members of the Court only, to explain how the Scheme will operate.

5. The importance of pro bono legal assistance in the administration of justice and the generous support of the barristers of the Victorian Bar is gratefully acknowledged by the Supreme Court.

### **Volunteer Barristers**

6. All volunteer barristers participating in the Scheme are fully qualified independent lawyers and practising members of the Victorian Bar. They do not work for the courts or the government. They participate in the Scheme because they believe that all people have the right to legal representation and that the provision of legal assistance at the Court's request in a case where there is an unrepresented party serves the public interest in the due administration of justice, improves access to justice and promotes legal equality and the principle of the rule of law.

### **Fair administration and integrity of the Scheme**

7. This protocol identifies for members of the Bar, Judges and other judicial officers and Court staff the process by which pro bono services can be requested from the Bar by the Court. The protocol recognises that the success and sustainability of the Scheme requires that practitioners volunteering their professional services and time under it must be confident about its fair administration and integrity.
8. The eligibility criteria and referral mechanisms contained in this protocol are established to facilitate the process for referring requests for pro bono legal assistance to members of the Victorian Bar and to harness the goodwill and capacity of barristers to undertake pro bono work in the Court.
9. A person is not entitled to apply for a referral under this protocol on their own initiative. Entry into the Scheme is only by referral from the Court, once it has been ascertained by the Court that the unrepresented person is wishing to seek legal representation and is willing to receive the contemplated assistance.

### **B. Referral process and eligibility**

#### **Referral by Order or Direction and subject matter of referral**

10. On occasion the Court (constituted by a **Judicial Officer** (including a Judge, Associate Judge or Judicial Registrar) or a **Designated Court Officer**<sup>2</sup> may consider it to be in the interests of justice to refer a request for pro bono legal assistance in relation to a proceeding or a prospective proceeding.
11. The referral of a request for pro bono assistance from a barrister will be:

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<sup>2</sup> 'Designated Court Officer' means a registry lawyer or registry officer designated by the Chief Justice of the Supreme Court to perform the role under the Scheme.

- a. by order of a Judicial Officer if made in an existing proceeding; and
- b. by written direction of either a Judicial Officer or Designated Court Officer if made in relation to a prospective proceeding.

The order or direction will state:

- (a) where the referral is to act for a person, the specific assistance required – for example, providing advice on merits, assisting with the preparation of a document such as a pleading, affidavit or submission, helping a person to articulate grounds of claim, or representing a person in court or in a mediation; or
  - (b) where the referral is to provide assistance to the Court as *amicus curiae*, the specific question or issue in respect of which the Court seeks assistance (as to the role of *amicus curiae*, see section F below).
12. A request for pro bono legal assistance should be defined with maximum specificity to increase the likelihood of its being accepted by a pro bono barrister. This requirement recognises that legal assistance from a barrister can greatly assist a litigant in person to represent themselves more effectively, even where it may not be possible for a barrister to act in the whole case on a pro bono basis. In practice, having accepted a confined referral and after having met the litigant and gained familiarity with the case, a barrister may then be prepared to undertake additional pro bono work in the matter. In that event, it will be the barrister's responsibility to determine whether to seek a variation of the referral or to undertake additional pro-bono work by private arrangement with the litigant.

### **Referral criteria**

13. In deciding whether to refer a request for pro bono assistance, the Court may take into account any matter which it considers relevant in the administration of justice, including whether the litigant involved is a person subject to an order under the *Vexatious Proceedings Act 2014*; the financial means of a party; the capacity of the party to otherwise obtain legal assistance; the nature and complexity of the proceedings; whether it is appropriate for a barrister to act for the client on a direct access basis or whether an instructing solicitor would be required; or any other matter the Court considers appropriate.
14. The Court will not refer a request where, taking into consideration the aims and sustainability of the volunteer scheme, it would be unfair or impractical to ask a legal practitioner to act for or represent a litigant in a matter for free.

15. The Court will endeavor to ensure that it does not refer a request under this scheme where a request has already been made to the Victorian Bar and accepted by a pro bono barrister under the scheme operating in another jurisdiction (including without limitation the County Court of Victoria or Coroners Court of Victoria) in respect of the same proceeding or proposed proceeding and regarding the same specific assistance, question or issue.

#### **Referral to pool of volunteer barristers**

16. It is in the interests of the administration of justice and the efficient operation of the Scheme that referrals should be directed to barristers with appropriate experience and interest in practising in the Trial or Appeal Divisions of the Supreme Court. Referrals should also be fairly shared amongst available barristers and not unduly burdensome.
17. The Victorian Bar Office is in the process of establishing an online “Pro Bono Barrister Portal” to streamline the process for placing pro bono referrals. The new Portal will interface with information relevant to barristers’ practice areas on the Vicbar website and enable requests for assistance from the Court to be matched to a targeted pool of volunteers with specialist experience and/or interest in the practice area relevant to the referral.
18. Until the Portal is operational, a register of barristers willing to accept Court referred requests for pro bono legal assistance will be maintained by the Victorian Bar office. A barrister may request inclusion as a volunteer under the Scheme by completing the Expression of Interest Form attached as Annexure A.

#### **Placement of referral requests (until online Portal is in place)**

19. Referral requests will be forwarded to the Victorian Bar Office by the self-represented litigants coordinators (**SRL Coordinators**) operating in the Trial and Appeal Divisions of the Court.
20. When an order or direction referring a request for pro bono assistance has been made by a Judicial Officer, the SRL Coordinator will email the referral to the Victorian Bar Office, enclosing a copy of the order or direction. Generally the Court shall include the name of the person to whom pro bono legal assistance is to be provided (the **relevant person**), the subject matter of the referral, any critical deadlines including hearing or filing dates, and any opposing legal representative’s name and contact details (where applicable). Where the Court considers it desirable, the referral shall also identify whether the referral requires particular specialist expertise or a barrister of seniority.

21. The Victorian Bar Office will then arrange for the referral to be circulated to appropriately experienced volunteer barristers on the register of barristers in accordance with the referral.
22. In cases involving urgent referrals, the relevant SRL Coordinator will liaise with the Victorian Bar Pro Bono Scheme Coordinator (the **Pro Bono Scheme Coordinator**) to monitor the circulation of urgent referrals and responses. Where appropriate, the SRL Coordinator may be given the contact details of barristers listed on the register to enable them to contact those barristers directly to ascertain their availability to accept the referral.

**C. Acceptance of a referral by a pro bono barrister (until online Portal is in place)**

23. Until the Portal is in place a referral may be accepted by a barrister by email, telephone or in person to the Pro Bono Scheme Coordinator.
24. Once a referral has been accepted, the Pro Bono Scheme Coordinator will email the SRL Coordinator confirmation that the referral has been accepted and the contact details of the relevant barrister. As soon as possible, the SRL Coordinator will provide the barrister with the contact details of the relevant person, copies of any relevant Court documents and such other details about the matter as the Court may direct. The SRL Coordinator will then notify the relevant person that the referral has been accepted by a barrister and provide them with the barrister's contact details. Whenever practicable, the SRL Coordinator will also notify the Judicial Officer or Court Officer who made the referral that the referral has been accepted and the name of the relevant volunteer barrister.

**D. Point of contact between Barrister and the Court**

25. The Court's SRL Coordinators will be the primary point of contact for the pro bono barrister for all administrative and procedural matters that arise in relation to the conduct of the referral. Those matters may include:
  - (a) obtaining court documents, or contact details of any party;
  - (b) liaising with any party as required;
  - (c) assisting the pro bono barrister with administrative matters not falling within the scope of barristers' work (as to which, see Section E below); and
  - (d) if required at any time, arranging for the matter to come back before the referring judicial officer, in relation to the terms of the referral.
26. If, in the opinion of the pro bono barrister, an instructing solicitor may be necessary in the matter, the barrister should as soon as possible contact the SRL Coordinator

who will endeavour to facilitate this, including by making inquiries to Justice Connect.<sup>3</sup>

**E. Obligations of Counsel and matters relating to the conduct of the referral**

27. Barristers acting under the Scheme continue to be bound by the responsibilities and ethical obligations which otherwise apply to them under the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and at common law. In particular, barristers and the Court must be mindful of the prohibition on barristers on doing certain types of solicitor's work under rule 13 and the provisions of rule 101(k) of the Rules which provide that a barrister must refuse to accept or retain a brief where there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interest in accordance with the law.
28. Barristers must avoid any actual or potential conflict of interest in accepting, acting upon or continuing to act upon any referral as the case may be. If a conflict of interest arises during the course of acting under a referral, a barrister must immediately inform the SRL Coordinator by email of their inability to continue to act. The SRL Coordinator may then make a further request for assistance under the Scheme.
29. If the barrister, having accepted the referral, is no longer able for any other reason to undertake the referral, a request to be excused (with brief reasons) should be emailed to the relevant SRL Coordinator as soon as possible. The request should be copied to the relevant person wherever practicable. The request will be treated as confidential, will not be included or retained on the Court file or treated as part of the proceeding and will not be disclosed to any opposing party. A Judicial Officer or where appropriate a Designated Court Officer will determine the request to be excused without further notice to the barrister or any assisted party. At this point the Court may elect to re-start the referral process as provided for by this Scheme.
30. A barrister who has accepted a pro bono referral under the Scheme:
  - (a) must act on a "pro bono basis" (as that expression is defined in rule 63.34.1(2) of the *Supreme Court (General Civil Procedure) Rules 2015 (Rules)*);
  - (b) may ask a client to pay any disbursements reasonably incurred, or reasonably to be incurred, on behalf of the client in relation to the legal assistance.

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<sup>3</sup> Justice Connect administers the Victorian Bar's Pro Bono Scheme which operates under separate criteria. Justice Connect also administers the Law Institute of Victoria's Legal Assistance Scheme (LIVLAS). In cases that meet the referral criteria under the LIVLAS scheme, Justice Connect may be able to source an instructing solicitor.

31. An application for a "pro bono costs order" may be made under rule 63.34.2(1) of the Rules with respect to costs of the legal assistance the subject of a referral under this protocol.

**F. Amicus Curiae**

32. In accepting any referral under the Scheme to act as amicus curiae, without limiting the role of a barrister, the barrister may be required to:
- (a) appear at a hearing to test the content and sufficiency of the evidence relied on in relation to an issue in respect of which the court has appointed them to appear as amicus curiae;
  - (b) for the purpose of carrying out the above duties:
    - (i) ask questions of any person giving evidence; and
    - (ii) make submissions on the law or evidence;
  - (c) shall, in accordance with established principles, assist the Court to reach a correct determination of the issue;<sup>4</sup> including by:
    - (i) calling the Court's attention to reported and unreported decisions which might otherwise be overlooked;<sup>5</sup>
    - (ii) acting as an adviser to the Court and making suggestions as to matters appearing on the record or in matters of practice;<sup>6</sup> or
    - (iii) making submissions on important questions of law arising in proceedings.<sup>7</sup>

**G. Feedback**

33. The Court will keep a record of the referral requests made by the Court each quarter and of the number of referrals successfully placed. It will also maintain a record of appearances made by barristers under the Scheme.
34. For the purpose of monitoring the Scheme's success, the SRL Coordinator will seek feedback on the referral from the relevant judicial officer following closure of the referral. The Court also welcomes any feedback from barristers as to their experience of participating in the Scheme and suggestions for how the Scheme may be improved in the future. Any such feedback should be provided to the Pro Bono Scheme

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<sup>4</sup> See generally *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCA 54; (2011) 248 CLR 37, 39 [6]; *Levy v State of Victoria* [1997] HCA 31; (1997) 189 CLR 579, 604 (Brennan CJ); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 536 (Davies, Wilcox and Gummow JJ)

<sup>5</sup> *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 398–9.(Hutley JA) citing W Jowitt, *Jowitt's Dictionary of English Law* (Clifford Walsh, 1959) 114.

<sup>6</sup> *Ibid* 399.

<sup>7</sup> *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 539 (Davies, Wilcox and Gummow JJ); *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J).

Coordinator and/or the Bar Office, and/or to the Chair or Deputy Chair of the Victorian Bar Pro Bono Committee.

35. The Court will provide feedback to the Victorian Bar Office about the operation of the Scheme as may reasonably be requested.
36. Barristers appearing under the Scheme will be requested to answer a short survey for the Victorian Bar to assist in its assessment of the operation of the Scheme.

#### **H. Scheme Review**

37. At the conclusion of 12 months from the date of this Protocol, the Court and the Victorian Bar shall review the operation of the Scheme.
38. The review shall assess the success of the Scheme, its future viability and areas for improvement and any need for revision to this Protocol.

#### **I. Training/CPD**

39. The Victorian Bar will publicise the launch of the Scheme and provide interested barristers with an overview of its operation.
40. The CPD session/s will include representatives of the Court, barristers experienced in assisting self-represented litigants and/or solicitors. One objective of the CPD session/s is to expand the number of Counsel that may be able to assist under the Scheme.

#### **J. Contacts**

41. For the purposes of the day to day operation of the Scheme, any queries should be directed to:

##### **(a) Victorian Bar**

Pro Bono Scheme Coordinator  
The Victorian Bar  
205 William Street, Melbourne, VIC 3000  
T 03 9225 7111 | E [dbs.coordinator@vicbar.com.au](mailto:dbs.coordinator@vicbar.com.au)

##### **(b) Supreme Court of Victoria**

Self-Represented Litigants Coordinators  
Supreme Court of Victoria  
210 William Street, Melbourne, VIC 3000 | DX 290078 Melbourne  
T 03 8600 2031 | E [unrepresented@supcourt.vic.gov.au](mailto:unrepresented@supcourt.vic.gov.au)

**DATED:**

**2019**

**Chief Justice Anne Ferguson  
ON BEHALF OF THE SUPREME COURT OF VICTORIA**

**Dr Matt Collins QC  
Victorian Bar President  
ON BEHALF OF THE VICTORIAN BAR COUNCIL**

**Form 1**



**Expression of interest to participate in pro bono schemes**

Name: \_\_\_\_\_ (please print)

Year admitted: \_\_\_\_\_ Year signed Bar Roll: \_\_\_\_\_

List: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**VICTORIAN BAR PRO BONO SCHEME**

Administered by Justice Connect, the Scheme improves access to justice by connecting individuals and organisations with pro bono legal help from barristers. Justice Connect triages requests for assistance and provides barristers with referral memorandum in each referral.

- Agree to be contacted to provide assistance in the areas of practice listed on my profile on the Victorian Bar’s website

- In addition, I agree to be contacted to provide assistance in these areas of law:

\_\_\_\_\_

- Open to accepting referrals to represent clients in metropolitan courts and tribunals (please circle location of interest)

Broadmeadows    Dandenong    Frankston    Heidelberg  
Moorabbin       Ringwood     Sunshine     Werribee

- Open to accepting referrals to represent clients in regional courts and tribunals (please circle location of interest)

Ballarat            Bendigo       Geelong  
La Trobe Valley   Shepparton   Other: \_\_\_\_\_

**COURT-BASED PRO BONO SCHEMES**

Court-based pro bono schemes operate across Federal and State jurisdictions. These schemes provide access to justice for self-represented litigants and allows the courts to uphold effective administration of justice.

- Federal Court (pursuant to Federal Court Rule 4.12, formerly Order 80)
- Magistrates’ Court
- County Court (see appendix)
- Supreme Court trial division
- Court of Appeal
- Coroners Court
- Open Courts Act

Appendix:

Commercial Division (County Court)

- General Commercial
- Taxation
- Real Property
- Equity, Trusts
- Banking & Finance
- Contract
- Partnership
- Consumer Law
- Building & Construction
- Computers/IT
- Intellectual Property
- Employment
- Insurance
- Product Liability
- Professional Negligence
- Franchise/ Sale of Business

Common Law Division (County Court)

- WorkCover
- Transport Accident Compensation
- Defamation
- Medical Negligence
- Tort

Please return this form by email to The Victorian Bar Pro Bono Coordinator at [probono@vicbar.com.au](mailto:probono@vicbar.com.au) or at Level 5, 205 William Street Melbourne 3000.