



The County Court Pilot Protocol on Court Referral for Pro Bono Legal Assistance ¹

Between

COUNTY COURT (Commercial Division and Common Law Division)

and

THE VICTORIAN BAR

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A. Purposes and overview of Scheme

1. This Pro Bono Barrister Court Referral Scheme (“**the Scheme**”) is a cooperative initiative of the Victorian Bar and the County Court. In 2018, the Scheme is being

¹ 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 pilot referral Scheme will operate, commencing from 1 October 2018.

piloted in the County Court's Commercial Division and Common Law Division to supersede the former "duty barrister" referral scheme.

2. The Scheme's main purpose is to assist self represented litigants who have a case "in 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

3. 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.
4. The importance of pro bono legal assistance in the administration of justice and the generous support of the barristers of the Victorian Bar are gratefully acknowledged by the County Court.

Volunteer Barristers

5. 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

6. This protocol is designed by the Bar and the Court to give better visibility and clarity to members of the Bar, Judges and other judicial officers and Court staff about how 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.
7. 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 the Victorian Bar and to harness the goodwill and capacity of barristers to undertake pro bono work in the Court.

8. A party is not entitled to apply for a referral under this protocol.

B. Eligibility and mechanism for a referral request from the Court

9. On occasion the Court (constituted by a Judge or Judicial Registrar) may consider it to be in the interests of justice to refer a request for pro bono legal assistance in relation to a particular question, issue or application in a proceeding.

Court Order

10. The referral of a request for pro bono assistance from a barrister will be by Court order only. The order will state:
- (a) the specific² question, issue or application which is the subject of the referral (eg: to obtain advice in relation to a particular issue, to draw or amend a pleading or affidavit, to appear at an interlocutory application, or to make submissions in relation to a particular issue at trial);³ and
 - (b) whether the referral is to act for a litigant, or to provide assistance to the Court as *amicus curiae*⁴.
11. 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 vexatious litigant; 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. The Court will not refer a request where, taking into consideration the aims and sustainability of the volunteer scheme,

² Reflecting the practice of barristers, as self-employed practitioners, to undertake legal work based on a “brief”, this criteria recognises that it is important to define a referral request with clarity. Refining the referral request in turn increases the ability and likelihood of the brief being able to be accepted thereby improving the ability to access pro bono legal assistance. Having accepted a confined referral, in practice a barrister may then be prepared to undertake additional pro bono work in a matter, and accept an additional brief, after they have met the client and gained familiarity with the case. In that event, it will be the barrister’s responsibility to determine whether to seek a variation of the referral request Court order to accommodate that additional pro bono work or, alternatively, to do the additional pro-bono work by private arrangement with the client.

³ This criteria also recognises that a confined request for legal assistance from barristers skilled in litigation (such as to provide advice to a client on the merits or prepare a document such as a pleading or an affidavit, or help a client to articulate grounds of claim or prepare a submission), 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.

⁴ See Section F below for further discussion below about a referral for an *amicus curiae*.

it would be unfair or impractical to ask to a legal practitioner to act for or represent a client in a matter for free.

12. 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 Commercial or Common Law Division of the County Court. Referrals should also be fairly shared amongst available barristers and not unduly burdensome.

Referral request to pool of volunteers & online Portal

13. The Victorian Bar Office will identify barristers' areas of specialty and interest so that requests for assistance from the Court can be matched to a targeted pool of volunteers who may be prepared to accept a referral from the Court. The Victorian Bar Office is in the process of establishing an online "Pro Bono Barrister Portal"⁵ to streamline the process for placing pro bono referrals. The new Portal will interface with information on the Vicbar Website and its electronic data base.
14. Until the Portal is operational a register of barristers willing to accept Court referred requests for pro bono legal assistance will be established in consultation with the Victorian Bar Office, and an up to date list will be maintained by the County Court Self-Represented Litigants Case Managers ("**SRL Case Managers**"). The Court has prepared a list of areas of practice which may be the subject of referrals under the Scheme (as set out in the appendix to the Victorian Bar's pro bono Expression of Interest Form – see **Form 1** attached.) A barrister may request inclusion as a volunteer under the Scheme by emailing a completed Expression of Interest Form to the email address stated in Form 1 and the Victorian Bar Office will arrange for expressions of interest to be notified to the County Court's SRL Case Managers.

⁵ The key aims of the Pro Bono Barrister Portal will be:

- to assist both the Bar and the Courts to manage enquiries and requests for assistance in an efficient, accurate and timely manner by using technology and automation of processes that interface with the up to date information about barristers' profiles, expertise and years of practice published on the VicBar website;
- to streamline referral systems and increase the administrative efficiency of the various pro bono schemes promoted by the Bar, increase barrister participation rates in pro bono schemes and improve rates of acceptance of pro bono requests from courts;
- to increase the level of service to courts and to unrepresented litigants or witnesses before courts;
- to facilitate the keeping of accurate records and data as to the type, value and volume of pro bono assistance delivered by the Bar's members each year; and
- to enable people who have been identified by a court as requiring independent legal assistance to be advised as early as possible in advance of their court date, and as quickly and efficiently as possible, whether pro bono assistance is available pursuant to the court's request, in turn reducing delays in court in the conduct of the proceeding in court.

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

15. When an order referring a request for pro bono assistance has been made by a Judge or a Judicial Registrar, the SRL Case Managers will email the referral to the Victorian Bar Office, enclosing a copy of the Judge's or Judicial Registrar's order. Generally the Court shall include the parties' and opposing Counsels' names and any hearing date, time and estimate, copies of relevant court documents and/or such other details about the matter as the Judge or Judicial Registrar may direct.
16. 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.
17. In cases involving urgent referrals, SRL Case Managers may also telephone suitably experienced barristers listed on the register 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)

18. Until the Portal is in place a referral may be accepted by the barrister by email, telephone or in person to the SRL Case Managers, (srl@countycourt.vic.gov.au).
19. Once a referral has been accepted, the SRL Case Managers will email written confirmation that the referral has been accepted to the barrister and the Victorian Bar Office and, if applicable, provide the contact details of the person to be assisted (**the assisted party**). The SRL Case Managers will also inform the associate to the judicial officer who referred the request that the referral has been accepted by the barrister. The associate will then advise the parties that the referral has been accepted by the barrister.

D. Point of contact between Barrister and the Court

20. The Court's SRL Case Managers 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.

21. If, in the opinion of the pro bono barrister, an instructing solicitor may be necessary in the matter, the barrister should contact the SRL Case Managers, who will endeavour to facilitate this, including by making inquiries to Justice Connect.⁶

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

22. 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 and 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.
23. 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 Case Managers by email of their inability to continue to act. The SRL Case Managers may then make a further request for assistance under the Scheme.
24. 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 SRL Case Managers as soon as possible. The request should be copied to the assisted party, if applicable. 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 Registrar will determine the request to be excused without further notice to the barrister or any assisted party.
25. 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 63A.35.1(2));
 - (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.

⁶ 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.

26. An application for a "pro bono costs order" may be made under Rule 63A.35.2(1) with respect to costs of the legal assistance the subject of a referral under this protocol.

F. Amicus Curiae

27. 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 principle, assist the Court to reach a correct determination of the issue,⁷ including by:
 - (i) calling the Court's attention to reported and unreported decisions which might otherwise be overlooked⁸;
 - (ii) acting as an adviser to the Court and making suggestions as to matters appearing on the record or in matters of practice⁹; or
 - (iii) making submissions on important questions of law arising in proceedings.¹⁰

G. Feedback

28. 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.
29. For the purpose of monitoring the Scheme's success, the SRL Case Managers 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

⁷ See generally *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54; (2011) 284 ALR 222 at [6]; *Levy v State of Victoria* (1997) 189 CLR 579 at 604 per Brennan CJ; *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 536 (Davies, Wilcox and Gummow JJ)

⁸ *Jowitt's Dictionary of English Law*, p 114, cited by Hutley JA in *Corporate Affairs Commission v Bradley (Commonwealth Intervener)* [1974] 1 NSWLR 391, 398–9.

⁹ *Re Perry*, 148 NE Rep 163, 165 (1925), cited by Hutley JA in *Corporate Affairs Commission v Bradley (Commonwealth Intervener)* [1974] 1 NSWLR 391, 399.

¹⁰ *United States Tobacco Company 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).

be improved in the future. Any such feedback should be provided to the SRL Case Managers and the Victorian Bar Office.

30. The Court will provide feedback to the Victorian Bar Office about the operation of the Scheme as may reasonably be requested.
31. 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. Pilot Scheme Review

32. At the conclusion of 12 months the Court and the Victorian Bar shall review the operation of the pilot Scheme.
33. 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

34. The Victorian Bar will publicise the launch of the Scheme and provide interested barristers with an overview of its operation.
35. 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.
36. The Court will also give consideration to hosting an annual function for participating barristers with judges, judicial officers and relevant Court staff.

J. Contacts

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

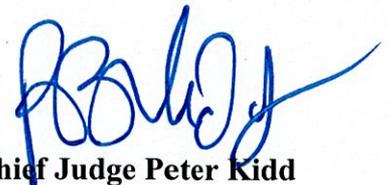
(a) Victorian Bar

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

(b) County Court of Victoria

The Self-Represented Litigants Case Managers
County Court of Victoria
250 William Street, Melbourne, VIC 3000 | DX 290078 Melbourne
T 03 8636 6528 | E srl@countycourt.vic.gov.au

DATED: 19 Sept. 2018



Chief Judge Peter Kidd

ON BEHALF OF THE COUNTY 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 or at Level 5, 205 William Street Melbourne 3000.