

**QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE
INCORPORATED**



**A proposal for “voluntary practising
certificates” in Queensland**

To

QUEENSLAND LAW SOCIETY

September 2006

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1. INTRODUCTION

This proposal aims to improve access by the community to low cost and free legal services by allowing government, inhouse, retired and other solicitors to practice law as volunteers of community legal centres (**CLCs**).

Participation in pro bono work by this group would:

- Increase the ability for CLC's to meet service demand
- Expand and extend legal skills of participants
- Provide opportunity for lawyers to give back to the community in a meaningful way.

To facilitate this scheme, amendment will need to be made to the Queensland Law Society Administration Rule:

- to create a new category of practising certificate, that is, the voluntary practising certificate
- to limit the cost of voluntary practising certificates and the contribution to the Fidelity Fund;
- to limit Continuing Professional Development requirements on voluntary practising certificate holders.

In this proposal:

LPA refers to the *Legal Profession Act 2004 (Qld)*

Administration Rule refers to the *Queensland Law Society Administration Rule 2005 v6*

2. WHY DO WE NEED A VOLUNTARY PRACTISING CERTIFICATE?

It is widely known that existing services provided by community legal centres and legal aid are unable to meet growing demand. With our rapidly expanding population coupled with decreases in civil law funding, there is an increasing need to find innovative ways to assist the marginalised and disadvantaged.

Accessing the good will and expertise of the growing number of government, inhouse and retired lawyers is one way to address this need and relieve pressure on CLCs. In return, volunteer lawyers would have access to administrative support, resources and training of the CLC with which they are involved and would be covered by the CLC's indemnity insurance.

In addition, a new "voluntary practising certificate" will clarify the status of CLC volunteers and ensure that all CLC legal volunteers are properly regulated to ensure that the high standard and reputation of the legal profession is maintained.

Government and inhouse lawyers

Many government and inhouse lawyers have come from many years experience in private practice, however, no longer hold current practising certificates and are therefore unable to engage in legal practice except within their organisation. There is also a question about the capacity of Legal Aid Queensland (**LAQ**) lawyers to volunteer at CLCs because of the endorsement on their certificates that requires them to undertake LAQ work only.

As the trend for inhouse counsel grows, we need to ensure that such lawyers are encouraged and able to participate in pro bono schemes, or else risk losing this vital component of free legal service in the future.

It is also a way for QLS to support and promote a culture that views pro bono as a fundamental part of legal practice.

Retired lawyers

Pro bono work is a good way for retired lawyers to find purpose in their retirement, keep skills up to date, maintain contacts within professional circles and create new contacts within the community. By removing barriers to retired lawyers acting on a pro bono basis, the QLS will also be providing support to long standing members of QLS and the legal profession, many of whom are keen to remain involved, but at a different level and without the cost.

Other lawyers

Practitioners who have stopped working to raise a family, academics and others who have pursued careers which do not require for them to have a practising certificate may also wish to volunteer their time and expertise but are currently prevented from doing so.

3. EXISTING BARRIERS

The current requirements for lawyers wishing to practice in Queensland are summarised as follows:

Practising Certificates

A person may only practice law in Queensland if the person holds a current practising certificate: s 24(1), LPA. Contravention of this provision may result in a maximum penalty of 300 penalty units or 2 years imprisonment.

This provision does not apply to a government legal officer engaging in government work: s 23(2). Exemptions also exist for:

- (a) a person who engages in legal practice, or in activities that constitute legal practice in this jurisdiction, under a law of this jurisdiction;
- (b) an incorporated legal practice engaged in legal practice as authorised under part 5;
- (c) an Australian-registered foreign lawyer engaged in the practice of foreign law as authorised under chapter 5;
- (d) a person preparing or assisting in the preparation of a will if it is prepared in the course of the person's employment with a trustee company;
- (e) a person preparing or assisting in the preparation of a contract if it is prepared by a real estate agent for another person;
- (f) a person engaged in activities that the person is authorised under a regulation for this section to engage in: s 24(2), LPA.

A practising certificate can either be "principal", entitling a person to engage in legal practice on his or her own account as a partner or sole practitioner, or "employee". It may come with a range of conditions, including whether the lawyer requires supervision to engage in legal practice. Failure to comply with a condition is capable of constituting unsatisfactory professional conduct or professional misconduct: s 61 LPA.

For the 2006-07 financial year, an employee practising certificate costs \$305 per annum. A principal practising certificate is \$610: r 19(1), Administration Rule.

Fidelity Fund Contribution

In applying for a practising certificate each year, the person must also make a contribution to the Fidelity Fund. In 2006-07, this was \$310: r 26, Administration Rule.

Rule 26(3) provides a discount of \$20 if a person has previously made 20 annual contributions to the Fidelity Fund.

Classes of legal practitioners may be made exempt to this rule by regulation: s156(4)(b), LPA. No regulations appear to have been made to date.

Insurance

Before a practising certificate will be issued, the QLS must be satisfied that the lawyer will, during the currency of the practising certificate, be covered by professional indemnity insurance that complies with the LPA: s 50(2)(c), LPA.

Continuing Professional Development (CPD)

During the year the practising certificate is held, a practitioner must complete at least 10 CPD units. Further, at least once every 3 years, a practitioner must include in their training 2 CPD units on legal ethics, 2 CPD units on risk management and 2 CPD units on trust accounts: r 48 Administration Rule. Failure to do so is a breach of the Administration Rule and may lead to cancellation or suspension of, further conditions placed upon or refusal to renew the person's practising certificate: r 52.

A practitioner may apply for an exemption on the ground that:

- the practitioner has been in practice for a period of over 40 years and holds a practising certificate other than a principal practising certificate; or
- because of geographical location, physical disability or any particular exigencies of the practitioner's practice, the practitioner experienced particular hardship or difficulty in complying with the requirements; or
- the CPD committee considers there are special circumstances: r 50, Administration Rule.

Clearly, these requirements create barriers for lawyers who wish to donate their time but are unable to commit \$615 annually for a practising certificate or attend 10 CPD units worth of training a year.

4. OTHER JURISDICTIONS

It is worth looking briefly at how other jurisdictions, both in Australia and overseas, have implemented Emeritus programs or otherwise accessed the pro bono contribution of the broader legal community.

Australia

Victoria is currently the only Australian jurisdiction which caters for lawyers who only want to engage in legal practice as a volunteer in a community legal centre.

The *Legal Profession Act 2004* (Vic) (proclaimed into force on 12 December 2005) creates a new "Voluntary Practising Certificate" which is issued without charge to practitioners who wish to only practice law as a volunteer at a community legal centre: ss 2.4.3(3) & 2.4.9(4A). Further conditions are that the lawyer cannot engage in private practice, cannot receive trust money, and cannot be the principal of a law practice or the supervising legal practitioner of a community legal centre.

Lawyers holding a Voluntary Practising Certificate do not have to pay a practising certificate fee or make a contribution to the fidelity fund, but are subject to the same CPD requirements as other practising certificate holders. These are largely similar to Queensland CPD requirements.

Since its inception in December 2005, 53 grants of voluntary practising certificates have been made under the new *Legal Profession Act 2004* (Vic).

Canada

Pro Bono Law Ontario have put to the Law Society of Upper Canada proposed Emeritus Rules for Retired Lawyers Performing Pro Bono Work.

Essentially, the proposed rules state:

- A proposed Emeritus member must be admitted to practice law in Ontario, is retired from active law practice, intends to provide at least 50 hours of pro bono work and has been actively practising law for a minimum of 10 out of 15 years immediately preceding the application to become a member;
- An Emeritus member can only provide legal services through an approved legal assistance organisation. These organisations have specific obligations such as ensuring that Emeritus lawyers are engaged in appropriate pro bono activities, that they are receiving appropriate support for their activities and provide appropriate case management systems and insurance.
- An Emeritus member can only engage in listed activities, which include representation before a court, prepare and sign pleadings, legal opinions and training.
- Emeritus members must be under the direct supervision of a pro bono program coordinator or the supervising lawyer of an approved legal assistance organisation.
- Membership is available upon payment of a one-off \$300 administrative fee.

A copy of the draft rules are at **Annexure A**.

United States

There are currently ten American States with active Emeritus rules: Arizona, California, Delaware, Florida, Georgia, Idaho, Oregon, South Carolina, Texas and Washington. These States with true Emeritus rules go further than merely waiving fees - they promote pro bono practice by retired lawyers.

A breakdown of basic rules and requirements as at July 2003 are:¹

¹ Taken from the American Bar Association, Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, "Emeritus Rules for Pro Bono", <http://www.abanet.org/legalservices/probono/emeritus.html>

Retired Lawyers' Panel Proposal

State	Minimum Age	Required years of practice	Admitted in state?	Bar dues waived?	MCLE waived? ²	Court or Bar Certification?
Arizona 17A A.R.S. Sup.Ct Rules, Rule 39	No	10 of last 15	No	Yes	Yes	Yes
California CA St. Bar Rules Art.1 §12	No	10; 3 of last 8 in California	Yes	Yes	No; fees waived	No
Delaware DE R S CT Rule 69	No; two levels – inactive or retired	Yes	I-reduced R-waived	Yes	Yes	No
Dist Columbia Ct App. Rule 49(c)(9)	No	No	No	Yes		Yes, case by case
Florida FL Bar Rule 12-1	No	10 of last 15	No	Yes	No	Yes
Georgia GA R Bar Rule 1-202	70	25	Yes	Yes	Yes	No; confirm status annually
Hawaii RSCH 20	No	15	Yes	Reduced	No MCLE	Yes
Idaho ID Bar Rule 223	No	10 of last 15	No	Reduced	Yes	No
Montana Rule adopted by Bar 4/12/02	No	10 of last 15	Yes?	Yes	No; fees waived	No
Oregon OSB BOG 15.7 BR 8.14; 3.2	No	Active Pro Bono 15; Active Emeritus 40, not Oregon	Yes?	Reduced	Yes	Active Pro Bono – 40 hours service per year
South Carolina SC R A CT Rule 415	No	10 of last 15	No	Yes	Yes	Yes; rules include form
Texas TX St. Bar Rules Art.13	No	5 of last 10	No	Yes	Yes	Yes
Utah UT Code II, Ch. 16 and USB Rules	No	No	Yes	Reduced	Yes	Yes
Washington WA R ADMIS APR 8(e)	No	5 of last 10; 10 of 15 out of state	No	Reduced	Yes; but a training course	Yes; one year status may be renewed

² MCLE stands for Mandatory Continuing Legal Education



5. RECOMMENDED MODEL

The model we suggest is a combination of the Victoria and Ontario experience. It can be implemented by amendment to the Administration Rule or by creation of new rules specifically dealing with volunteer legal practitioners.

Voluntary practising certificates

In addition to “principal” and “employee”, lawyers will be able to apply for “voluntary” practising certificates.

Eligibility criteria for voluntary practising certificates will need to be defined, with consideration of:

- **admitted in state** – about half the jurisdictions reviewed in this paper do not require the lawyer to have been admitted within the state. Victoria simply requires that the person be on a Roll of Legal Practitioners maintained by an Australian jurisdiction.
- **minimum age** - this has only been a requirement in the US state of Georgia as 70 years old.
- **years of practice** - generally speaking, emeritus rules in Canada and the US require lawyers to have actively practiced a minimum of 10 out of the last 15 years; Victoria has no such limitation, although lawyers on a voluntary practising certificate may still be subject to the condition that they only engage in supervised legal practice, depending on experience: s.2.4.18, *Legal Profession Act 2004* (Vic).
- **minimum commitment** – the proposed Ontario rules require Emeritus members to intend to provide at least 50 hours of pro bono work per year.
- **approved assistance organisations / certification** – the proposed Ontario rules provide that Emeritus members can only provide legal services through an approved legal assistance organisation. These organisations, in turn, have specific obligations to ensure Emeritus members provide high quality service. An approved legal assistance organisation must certify that the applicant for emeritus membership is currently associated with it.
- **disciplinary history** – the Law Society of Upper Canada must be satisfied that an emeritus member has a clear disciplinary record.
- **other criteria** – other criteria may be appropriate depending upon the scope of the new voluntary practising certificate. Will it be available to all admitted practitioners seeking to undertake voluntary work or will it be limited to the retired profession?

We propose that a person will be eligible for a voluntary practising certificate if he or she:

1. is on the Roll of Legal Practitioners (including rolls maintained in other Australian jurisdictions)
2. be entitled to engage in “unsupervised legal practice”³
3. has a clear disciplinary record.

Another consideration is whether a practising certificate, once granted, lapses each financial year (like in Victoria) or is ongoing (like in Ontario and some US states). We suggest that the Queensland model reflect other practising certificates issued. That is, voluntary practising certificates will be in force from the date specified until the end of the financial year in which it was granted, unless it is sooner suspended or cancelled.

³ See *Legal Profession Act 2004* (Qld), s 59 and the Queensland Law Society Administration Rule 2005, r 23

Cost

Application for a voluntary practising certificate should not attract a fee or require a contribution to the Fidelity Fund. However, we suggest that lawyers will need to reapply each financial year, just like a normal practising certificate.

Conditions on voluntary practising certificates

The proposed Ontario rules only allow emeritus members to engage in “listed activities”.

While we do not believe this is necessary, some conditions should be imposed upon lawyers on voluntary practising certificates such as he or she:

1. must only engage in legal practice as a volunteer of a community legal centre;
2. has no right of private practice;
3. cannot be the director of an incorporated practice, a partner in a law firm, a partner of a multidisciplinary partnership, a supervising legal practitioner at a community legal centre, or a sole practitioner;
4. cannot receive trust money;⁴
5. must be covered by professional indemnity insurance of the relevant CLC;
6. cannot represent themselves as practitioners able to engage in legal practice other than as a volunteer of the community legal centre;
7. cannot ask for nor receive any compensation of any kind, except for out-of-pocket expenses for legal services rendered.

CPD requirements

In order to balance the need for a high standard of legal practice against the desire to encourage pro bono work, we suggest lawyers on voluntary practising certificates be required to do the same number of CPD units expected of other practising certificate holders each CPD year, although they should be exempt from the requirement of 2 CPD units on trust accounts every 3 years.

Obligations on service providers

We do not want to increase the burden on already resource-poor CLCs in accessing the support of people on voluntary practising certificates.

We believe it is best left to the individual practitioner to ensure they are not breaching the conditions of their practising certificate and to the individual CLC as to how they manage their volunteers.

However, CLCs should be aware of the general conditions imposed on lawyers on voluntary practising certificates and ensure that they, like all CLC volunteers, are:

- appropriately managed and supervised;
- given access to office space, support staff and other resources that are appropriate to the services they are providing;
- given access to CLE programs related to the pro bono legal service they are providing;
- covered by professional indemnity insurance.

⁴ Conditions 1 to 4 mirror the conditions of the Victorian scheme

Transfer and suspension

A person on a voluntary practising certificate will be subject to the same cancellation, suspension and disciplinary rules as other practising certificate holders in so far as they are applicable.

Promotion of pro bono

This proposal would form part of an overall policy by Queensland Law Society to promote pro bono and voluntary work in Queensland.

To make it clear, we are not suggesting that all solicitors need a voluntary practicing certificate to volunteer at a CLC. This certificate is reserved for those who are not otherwise entitled to practice.