

**RECONSIDERING PRO BONO:  
A COMPARATIVE ANALYSIS OF PROTOCOLS IN  
AUSTRALIA, THE UNITED STATES,  
THE UNITED KINGDOM AND SINGAPORE**

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As of now, there is little evidence on the questions of whether pro bono services are effective, whether lawyer charity is a cheaper way to provide them (because it does cost money to do pro bono), or whether it would in fact be more efficient and effective if firms and attorneys stopped giving their time and instead donated money to the organizations already specializing in these clients and causes. Pro bono may or may not be an efficient way of doing socially important work; at this point, we simply do not know.<sup>1</sup>

## I INTRODUCTION

This article reconsiders the current definition and protocols of pro bono in Australia. Whilst there is no universally accepted definition of ‘pro bono’, there is increasing demand in many jurisdictions for the provision of free legal services, in part due to reductions in legal aid funding, along with reductions in government funding of the community legal sector. Discussion about whether lawyers should undertake pro bono work, if pro bono targets should be developed, and if the targets should be aspirational or mandatory are ongoing and important topics of debate and are explored in this article.<sup>2</sup> The authors of this article strongly believe that pro bono is a critical element of the professional legal identity and argue that pro bono should be defined broadly to include all types of time and financial commitments.

In practice, there is a growing level of sophistication and organisation in the offering of pro bono services. Examples of this include the establishment of company pro bono policies, the development of clearing houses to

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1 Scott L Cummings and Rebecca L Sandefurt, ‘Beyond the Numbers: What We Know – and Should Know – About American Pro Bono’ (2013) 7 *Harvard Law and Policy Review* 83, 91.

2 Ibid 104.

coordinate pro bono programs, and the expansion of partnerships between law firms and particular ‘causes’, such as community legal sector causes. Law schools in Australia are also increasingly exposing their students to the practice of pro bono through the expansion of clinical legal education placements for students.

In the absence of a strong evidence base to assure the legal profession of the effectiveness of current approaches to the provision of pro bono services, this article queries whether the traditional models, approaches and definitions are appropriate. This article argues that it is time to reconsider what is branded as ‘pro bono’. It advocates for recognition of a broader range of contributions beyond legal service provision, and for consideration of the role of financial contributions and the evolution of new partnership models. In Part II, the authors explore the various definitions of the notion of ‘pro bono’ work, look briefly at some of the history of that work, and outline the traditional key Australian approaches to the provision of pro bono services. In Part III, the authors look outside the Australian jurisdiction for alternative models and approaches, and consider pro bono rules, protocols and definitions in the United States (‘US’), the United Kingdom (‘UK’) and Singapore. Finally, in Part IV, the authors make some preliminary recommendations about how approaches to pro bono services might be reconsidered, refreshed and renewed for the contemporary Australian legal profession.

## II PRO BONO: HISTORY, DEFINITIONS, RULES AND PROTOCOLS

### A The Role and History of Pro Bono

Pro bono is part of the expression of a lawyer’s commitment to the rule of law and to access to justice; it is an ethic of service to the legal system, democracy and the ‘public good’.<sup>3</sup> One of the ethical bases of pro bono work can be said to be that it responds to a serious need in the community. This is a need to provide the citizenry, particularly those in the poor and middle classes, with access to affordable legal services. Certainly, lawyers should not have to individually bear the burden of the responsibility of fulfilling unmet legal needs in society.<sup>4</sup> However, pro bono work is a ‘gift that gives back’ in that there is much to be gained by lawyers through participation in pro bono work. For example, there are psychological benefits associated with volunteering, satisfying one’s social conscience, and engaging in lifelong

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3 Mary Eberts, ‘Pro Bono Publico: For the Public Good’ (2000) 15(2) *The Philanthropist* 45, 49.

4 Steven Lubet and Catherine Stewart, ‘A “Public Assets” Theory of Lawyers’ Pro Bono Obligations’ (1997) 145 *University of Pennsylvania Law Review* 1245, 1248.

learning and professional development.<sup>5</sup> Additional benefits associated with the 'business' of lawyering include the possibility of attracting fee paying clients, enhancing reputation,<sup>6</sup> increasing professional visibility,<sup>7</sup> and opening up opportunities to qualify to bid on tenders for legal work where the provision of pro bono services is a precondition to success in such tenders.

Perhaps the earliest example of the provision of benevolent legal services can be traced to the *synegoros* in Ancient Greece during the fourth and fifth centuries BC.<sup>8</sup> The *synegoros*, who acted as both advocate and character witness, would present the case of the principal if they believed in the cause and in the principal. Payment to the *synegoros* was illegal and their advocacy for the principal was seen as a civic duty.<sup>9</sup> A similar system existed under Roman law, through the appointment of *cognitores* and later *procuratores* who would represent the principal again without the expectation of payment. Payment was in fact legislatively prohibited. However, a system of homage also existed in Roman society under which the recipient in effect remained indebted to the advocate. Thus, altruism only went so far.<sup>10</sup> Jewish and Christian notions of morality also incorporated care for less fortunate members of society. In 451 AD, the Council of Chalcedon declared that the Chalcedon Fathers, whilst not able to provide general legal advice, should provide legal counsel to widows, orphans and other indigent members of society.<sup>11</sup>

In 1215, the Magna Carta enshrined the concept of the rule of law, incorporating a notion of access to justice. However, it did not advance any right to legal counsel.<sup>12</sup> Reliance on the Church for legal charity continued until about 1250 when the Church began to limit the types of cases they would take on. As a result, the obligation of providing such assistance was largely assumed by civil lawyers.<sup>13</sup> It has been argued that this activity

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5 Jane Allyn Piliavin and Erica Siegl, 'Health Benefits of Volunteering in the Wisconsin Longitudinal Study' (2007) 48 *Journal of Health and Social Behavior* 450, 456; Lorne Sossin, 'The Public Interest, Professionalism, and Pro Bono Publico' (2008) 46 *Osgoode Hall Law Journal* 131, 140; National Pro Bono Resource Centre, *The Australian Pro Bono Manual – A Practice Guide and Resource Kit for Law Firms* (Victoria Law Foundation and National Pro Bono Resource Centre, 2nd ed, 2005) 22–9.

6 Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 147; Scott L Cummings, 'The Politics of Pro Bono' (2004) 52 *UCLA Law Review* 1, 114.

7 Rhode, *Access to Justice*, above n 6.

8 Ysiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis, 5th ed, 2009) 20.

9 *Ibid.*

10 Donald Robertson, 'Pro Bono as a Professional Legacy' (2001) 19 *Law in Context* 97, 100.

11 James Brundage, 'Legal Aid for the Poor and the Professionalization of Law in the Middle Ages' (1988) 9 *Journal of Legal History* 169, 170.

12 Rhode, *Access to Justice*, above n 6, 47.

13 Justice J C Major, 'Lawyers' Obligation to Provide Legal Services' (1995) 33 *Alberta Law Review* 719, 721.

coincided with lawyers' self-identification as a profession.<sup>14</sup> As Brundage has said:

Like physicians, who likewise began in this period to identify themselves as professionals, rather than simply as practitioners, medieval lawyers regarded it as one mark of their superiority to other craftsmen that they furnished their specialised skills to economically and socially disadvantaged persons without compensation.<sup>15</sup>

In 1495, the British Parliament passed an Act entitled 'A Mean to Help and Speed Poor Persons in Their Suit'.<sup>16</sup> The obligations imposed on lawyers related to the provision of counsel and administrative assistance (for example, in relation to court fees) 'in order to provide "indifferent" (ie, impartial) justice to the poor'.<sup>17</sup> Counsel would be assigned to the poor without fee, and counsel was under an obligation to take such cases or risk being excluded from the bar. (It is noted that different rules applied in the case of criminal proceedings as the accused was generally not entitled to defence counsel until the end of the 17<sup>th</sup> century.) This system continued until 1883 when the legal aid system was established. However, the qualifying conditions were so onerous as to prevent access to the system for the majority. 'Poor Man's Lawyers' emerged in London as a response to this failure. They operated from legal centres which were established by social workers who were unable to help with legal issues.<sup>18</sup> This system of legal aid, community-based non-profit legal service providers, and the ad hoc provision of pro bono services by members of the legal profession was transposed to the Australian context and continues today.

The history of the development of approaches to pro bono in the legal profession explains, to some extent, the contemporary focus on the provision of free legal services as the key defining element. These services are offered in order to provide access to justice for less fortunate members of our society. The next Section considers the way in which pro bono is defined and practised in the contemporary Australian legal system.

## **B Definitions of 'Pro Bono' Work in Australia**

Definitions of 'pro bono' are important because pro bono is a term that generates a relatively high level of debate within the legal community.<sup>19</sup> Not

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<sup>14</sup> Brundage, above n 11, 175.

<sup>15</sup> Ibid.

<sup>16</sup> Major, above n 13, 722.

<sup>17</sup> Robertson, above n 10, 108.

<sup>18</sup> Ibid 112, 113, 118.

<sup>19</sup> See, eg, Daniel Grunfeld et al, 'Mandatory Pro Bono Is Not the Answer for Practitioners' on *Law360* (22 April 2014) <<http://www.law360.com/articles/530036/mandatory-pro-bono-is-not-the-answer-for-practitioners>>. See also Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (Federation Press, 2001); Cummings, above n 6, 4.

only is there a tension between traditional service ideals associated with pro bono and their relevance in the context of contemporary developments in society and legal practice,<sup>20</sup> there is also debate about whether the practice of pro bono is limited by preconceived ideas about its true nature. As Lardent has noted, ‘explicating *what* pro bono service means’ is a critical reflection on the professional and ethical values of the legal profession.<sup>21</sup>

*Pro bono publico* is a Latin term meaning ‘for the public good’.<sup>22</sup> Whilst it is certainly true that no universal definition of pro bono work currently exists, legal work ‘for the public good’ has generally been conceptualised as altruistic, ‘pro-social’ professional behaviour involving the provision of philanthropic legal services as a means of ensuring access to justice for disadvantaged and indigent members of society.<sup>23</sup> A possible plain English translation for *pro bono publico* is ‘law for free’.<sup>24</sup>

In 1998, the Law and Justice Foundation of New South Wales suggested a definition of pro bono in its report entitled *Future Directions for Pro Bono Legal Services in New South Wales*:

Pro bono legal services are services that involve the exercise of professional legal skills provided on a free or substantially reduced fee basis. They are services that are provided for:

- People who can demonstrate a need for legal assistance but cannot afford the full cost of a lawyer’s services at the market rate without financial hardship;
- Non-profit organizations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good; and

20 Grunfeld et al, above n 19; Arup and Laster (eds), above n 19. See also Christopher Arup, ‘Defining Pro Bono: Models and Considerations’ (Paper presented at the First National Pro Bono Conference: For the Public Good, Canberra, 4–5 August 2000).

21 Esther F Lardent, ‘Defining and Quantifying Pro Bono: The Pros and Cons’ (Paper presented at the Second National Pro Bono Conference: Transforming Access to Justice, Sydney, 20–1 October 2003) 2 (emphasis altered).

22 Ibid; National Pro Bono Resource Centre, *About Pro Bono* <<http://www.nationalprobono.org.au/page.asp?from=3&id=112>>; Christopher Arup and Kathy Laster, ‘Introduction’ in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (Federation Press, 2001) 7; Deborah L Rhode, *Pro Bono in Principle and Practice: Public Service and the Professions* (Stanford University Press, 2005).

23 Lardent, ‘Defining and Quantifying Pro Bono’, above n 21, 1–5; Rhode, *Access to Justice*, above n 6, 64–5.

24 In an effort to clarify the meaning of ‘pro bono’, Lord Chief Justice Woolf ran a competition in England to find a suitable plain English translation for *pro bono publico*, with the winning entry being ‘law for free’. However, one of the competition judges, Lord Phillips MR, and the senior civil judge commented that ‘[i]n most cases we ought to do away with Latin. But I do think the expression pro bono is rather a good one which is widely known throughout the world. I should be rather regretful if it is replaced by good plain English’: Audrey Woods, ‘Britain Seeks to Change Legal Speak’, *Associated Press* (online), 20 November 2002 <<http://www.apnewsarchive.com/2002/Britain-Seeks-to-Change-Legal-Speak/id-0188efbda80a2af61f5592751e18ab69>>. See also Jill Anderson and Gordon Renouf, ‘Legal Services “for the Public Good”’ (2003) 28 *Alternative Law Journal* 13, 17 n 2.

- Public interest matters, being matters of broad community concern which would not otherwise be pursued.<sup>25</sup>

This definition also reflects the Law Council of Australia's 1995 definition of *pro bono publico*,<sup>26</sup> and, indeed, encapsulates the general consensus about the core accepted meanings of pro bono in the Australian context.<sup>27</sup>

The three key elements of the notion of pro bono reflected in this definition focus on the provision of legal services – free legal advice/representation, contributions to law reform/legal education, and public interest/community service. The service theme in conceptions of pro bono is certainly one that consistently arises across a range of contexts. For example, the National Pro Bono Resource Centre defines pro bono legal work with a similar focus on the provision of legal services in its National Pro Bono Aspirational Target Statement of Principles and in its National Survey.<sup>28</sup> In addition, the Law Societies in each state and territory throughout Australia promote and facilitate pro bono work. The focus of pro bono in these organisations is also on the provision of legal services in the form of legal advice and/or representation without fee or at a reduced fee to indigent members of the community.<sup>29</sup> It also includes support of the work of community legal centres, contributions to law reform and the provision of community legal education.<sup>30</sup>

Governments, too, tend to see pro bono through the lens of service provision. The Commonwealth government, for example, has adopted a definition of pro bono which accords with that of the National Pro Bono Resource Centre, and has implemented a policy requiring approved legal providers to either subscribe to the National Pro Bono Resource Centre's Aspirational Target or nominate a target value of Pro Bono Work over a financial year.<sup>31</sup> Further, whilst pro bono appears to be defined more broadly by the Victorian government to include additional forms of pro bono support,

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25 Law and Justice Foundation of New South Wales, *Future Directions for Pro Bono Legal Services in New South Wales* (1998) 64.

26 Law Council of Australia, 'Pro Bono Publico – For the Public Good' (Policy Statement, 1995) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/ProBonoPublico.pdf>>. Note the resolution for the definition was first passed by the Law Council on 5 September 1992.

27 Ibid; National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007) 3.

28 National Pro Bono Resource Centre, *About Pro Bono*, above n 22.

29 See, eg, Queensland Law Society, *QLS Pro Bono Scheme* <[http://www.qls.com.au/Knowledge\\_centre/Access\\_to\\_justice/QLS\\_Pro\\_Bono\\_Scheme](http://www.qls.com.au/Knowledge_centre/Access_to_justice/QLS_Pro_Bono_Scheme)>; Queensland Public Interest Law Clearing House, *Legal Help* <<http://www.qpilch.org.au/cms/details.asp?ID=2>>.

30 See, eg, Law Society of New South Wales, *Pro Bono Policy* (26 June 2009) <<http://www.law.society.com.au/cs/groups/public/documents/internetcontent/026566.pdf>>.

31 Attorney-General's Department, Australian Government, *Legal Services Multi-Use List Deed: Part 1 – Important Information and Guidance for Applicants* <<http://www.ag.gov.au/LegalSystem/LegalServices/Coordination/Documents/OLSC-LSMUL-AFI-ImportantInformationandGuidanceforApplicants.pdf>> 16.

such as financial and in-kind assistance to community legal organisations,<sup>32</sup> the framework for the operation of the policy makes it clear that, in reality, the provision of financial assistance 'is rare' and firms which contribute in this way are advised to seek advice as to whether this type of contribution will meet the guidelines.<sup>33</sup>

Certainly, law is not the only profession to consider the provision of free professional services to be an ethical way to 'give back' to society for the privilege of membership of the profession.<sup>34</sup> Other professions, such as medicine and business, also incorporate notions of working for the public good through the volunteering of professional time and services.<sup>35</sup> However, for lawyers who aspire to enact the rule of law as a reality in society, pro bono work resonates with a positive sense of professional legal identity, and reflects an altruistic commitment to public service ideals associated with the practice of law and its development as a profession. As already noted, the provision of legal services to indigent members of the community also confers wellness and other ancillary benefits to lawyers individually and collectively. These benefits are a real and important by-product of the provision of pro bono legal services. However, the authors contend that the primary rationale for pro bono work stems from lawyers' unique position historically and today, not only as gatekeepers of the justice system, but also as members of a profession. In this capacity, they have an obligation to participate in providing access to justice to indigent members of the community. As Anderson and Renouf state, lawyers 'have long been concerned with the inability of significant numbers of people to afford the legal services necessary to assert or protect their rights and interests'.<sup>36</sup>

### C Contemporary Pro Bono Protocols in Australia

The National Pro Bono Resource Centre recognises that the contemporary practice of pro bono in the Australian legal profession continues to focus on the provision of legal services. This is acknowledged in both the National Pro Bono Aspirational Target Statement of Principles<sup>37</sup> and the

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32 Government Legal Services, *Pro Bono Fact Sheet* (October 2007) Department of Justice (Vic) <[http://www.communitylaw.org.au/cb\\_pages/images/Pro%20Bono%20Fact%20sheet%20-%20Government%20Legal%20Services%20Oct2007.doc](http://www.communitylaw.org.au/cb_pages/images/Pro%20Bono%20Fact%20sheet%20-%20Government%20Legal%20Services%20Oct2007.doc)> 5–6.

33 Ibid 3.

34 Cummings and Sandefurt, above n 1, 86.

35 See, eg, Eliot Friedson, *Professionalism Reborn: Theory, Prophecy, and Policy* (University of Chicago Press, 1994); Talcott Parsons, *Essays in Sociological Theory* (Free Press, 2nd ed, 1958) 34; Yoann Kassivivier, Jennifer Pawlowski and Carol Guttery, *Demonstrating the Business Value of Pro Bono Service* (2012) Taproot Foundation <<http://www.taprootfoundation.org/docs/Taproot-Business-Value-2012.pdf>>.

36 Anderson and Renouf, above n 24, 13.

37 National Pro Bono Resource Centre, *About Pro Bono*, above n 22.

Centre's National Survey.<sup>38</sup> An annual aspirational target has been set by the Centre at a minimum of 35 hours of legal services per lawyer.<sup>39</sup> As at 20 June 2013, 79 law firms and 25 individual barristers and solicitors had signed up to the target.<sup>40</sup> This represents 8763 full time equivalent lawyers which equates to 15 per cent of the legal profession.<sup>41</sup> Of the legal professionals who had signed up for the target, 99.7 per cent reported that they undertook 33.7 hours of pro bono work during the survey period, with longer term members reporting stronger performance than the newer signatories.<sup>42</sup> This perhaps indicates that targets can act as motivation for increasing pro bono activity.

Contemporary pro bono service provision manifests itself in a number of ways. Whilst, at its broadest level, pro bono work has generally been undertaken on a relatively ad hoc basis, the pro bono movement in more recent times has produced more institutionalised and systematic approaches to the provision of legal services for the public good. Cummings describes these approaches as 'collaboration in service delivery, efficiency as defined by reduced transaction costs and resource targeting, accountability measured in terms of negotiated benchmarks and institutional commitments, and adaptation to local context'.<sup>43</sup> There is even now software which automates the matching of lawyers with projects and causes; for example, 'Pro Bono Manager' launched by Pro Bono Net in the USA.<sup>44</sup> Indeed, much of the developing sophistication in the provision of pro bono work is being driven by both private and public sector clients of legal services who want to be able to say that their legal service provider is one that gives back to the community.<sup>45</sup>

A range of activities satisfy the definition of pro bono in the legal professional context. The most common pro bono practices include: the

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38 National Pro Bono Resource Centre, 'Sixth Annual Performance Report on the National Pro Bono Aspirational Target' (Annual Performance Report, 2013) <[https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/Sixth%20Annual%20Performance%20Report%20on%20the%20Aspirational%20Target%202013.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Sixth%20Annual%20Performance%20Report%20on%20the%20Aspirational%20Target%202013.pdf)>.

39 Ibid 2.

40 Ibid.

41 Ibid.

42 Ibid 2–3

43 Cummings, above n 6, 41 (emphasis altered).

44 The application also streamlines reporting, saves on information technology and administrative costs and aligns the pro bono programs with the firm's goals. Linklaters, Paul Weiss, Weil Gotshal, Kirkland & Ellis, and Manatt, Phelps & Phillips all use Pro Bono Manager: see Janice Mucalov, 'How to Successfully Build Pro Bono Work into Your Practice' on *Canadian Bar Association Practice Link* (December 2011) <[http://www.cba.org/CBA/practicelink/leadership\\_people/probono.aspx](http://www.cba.org/CBA/practicelink/leadership_people/probono.aspx)>.

45 Joanne O'Connor, 'Clients Put Pressure on Firms to Undertake Pro Bono Work', *The Lawyer* (online), 15 March 2004 <<http://www.thelawyer.com/clients-put-pressure-on-firms-to-undertake-pro-bono-work/109036.article>>.



development of a pro bono policy;<sup>46</sup> appointment of a pro bono coordinator within a firm; appointment of dedicated pro bono lawyers within a firm; secondment of staff to selected causes or organisations; formal partnerships with causes or organisations (which are also described as multi-tiered pro bono relationships);<sup>47</sup> the setting of a targeted number of hours (which may be required as a precondition to bid on outsourced legal work, for example, for government);<sup>48</sup> and the provision of legal research services. Many of these initiatives can be found in the well-established models of pro bono practice, which are described by the National Pro Bono Resource Centre as including: case referral, clinics, outreach, secondments, fellowships, co-counselling, secondary consult, technology based services (such as email, telephone, video conferencing), law reform and policy work, and community legal education.<sup>49</sup>

Clinical legal education first emerged in the 1970s in Australian universities.<sup>50</sup> Clinical legal education in Australia can be defined as ‘a learning methodology for law students that compels them, through a constant reality check, to integrate their learning of substantive law with the justice or otherwise of its practical operation’.<sup>51</sup> By the late 1980s/early 1990s, many law schools had begun to offer clinical legal education programs.<sup>52</sup> Subsequently, recommendations by the Australian Law Reform Commission identified that students could be more engaged with their ethical obligations by undertaking pro bono activity,<sup>53</sup> and clinical legal education

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46 National Pro Bono Resource Centre, *The Australian Pro Bono Manual*, above n 5, 126–52. For example, policies may include: definition of pro bono in the context of that firm; targeted areas/criteria for selection of pro bono work; the number of hours of pro bono work expected of each lawyer per year – either mandatory or aspirational; a process for the evaluation of pro bono commitments; guidelines as to the management of costs and disbursements; and requirements as to reporting of pro bono practice. It is notable that a US study indicated that firms who had a formal pro bono policy produced greater pro bono hours than those that did not, and firms that had a pro bono coordinator contributed greater pro bono hours: see Steven Allen Boutcher, *The Institutionalization of Pro Bono Publico in Large Law Firms: An Analysis of the Causes and Consequences of Large Firm Pro Bono Programs* (PhD Thesis, University of California, 2010) 112.

47 National Pro Bono Resource Centre, *Working Together: Multi-tiered Pro Bono Relationships between Law Firms and Community Legal Organisations* (June 2003) <[https://wic041u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/WorkingTogether.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/WorkingTogether.pdf)>.

48 Jon Robins, ‘Weil Gotshal's New Pro Bono Regime Sets Legal Benchmark’, *The Lawyer* (Online), 24 October 2005 <<http://www.thelawyer.com/weil-gotshals-new-pro-bono-regime-sets-legal-benchmark/117241.article>>.

49 National Pro Bono Resource Centre, *Pro Bono Partnerships and Models: A Practical Guide to What Works* (2013) 106–219, 230–4.

50 Jeff Giddings, ‘Clinical Legal Education in Australia: A Historical Perspective’ (2003) 3 *International Journal of Clinical Legal Education* 7, 8.

51 Adrian Evans et al, *Best Practices: Australian Clinical Legal Education: The Final Report of the Project Strengthening Australian Legal Education by Integrating Clinical Experiences: Identifying and Supporting Effective Practices* (Office for Learning and Teaching, 2013) 20.

52 Giddings, above n 50, 16.

53 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 308.

was recognised as one of the mechanisms by which law students could engage with a pro bono culture.<sup>54</sup> Clinical legal education gathered further momentum with the introduction of law school curriculum standards exhorting law schools to promote a pro bono ethic, and to provide clinical programs and pro bono opportunities where practicable.<sup>55</sup>

Whilst clinical legal education and pro bono are not synonymous, ‘both can awaken and sustain graduates’ civic consciousness once they are in practice’.<sup>56</sup> Undoubtedly, as the delivery of clinical legal education is often performed in partnership with pro bono community organisations, there is an inherent opportunity to enhance student pro bono ethos in the pursuit of access to justice. As such, whilst the objectives of pro bono and clinical legal education may be different, there are common elements between the two concepts.<sup>57</sup> Best practice guidelines have been developed and serve to promote a structured approach to the delivery of clinical legal education.<sup>58</sup> The recommendations involve seven key themes for consideration when designing and implementing clinical legal education programs: ‘Course Design’, ‘Law in Context in a Clinical Setting’, ‘Supervision’, ‘Reflective Student Learning’, ‘Assessment’, ‘Staff’ and ‘Infrastructure’.<sup>59</sup>

Twenty-five law schools in Australia now offer clinical legal education with each institution offering between 1 and 15 clinics.<sup>60</sup> This represents a 23 per cent increase in the number of clinics offered when compared to the 2011–12 period.<sup>61</sup> Most clinics are not mandatory, with the exception of

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54 National Pro Bono Task Force, *National Pro Bono Task Force: Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services* (Australian Law Reform Commission, 2001) 30–1.

55 Council of Australian Law Deans, *The CALD Standards for Australian Law Schools* (17 November 2009) [2.2.4], [2.3.3], [9.6.2] <<http://www.cald.asn.au/resources-2>>.

56 Evans et al, above n 51, 11.

57 Tracey Booth, ‘Student Pro Bono: Developing a Public Service Ethos in the Contemporary Australian Law School’ (2004) 29 *Alternative Law Journal* 280, 280.

58 Evans et al, above n 51.

59 Ibid 26.

60 Kingsford Legal Centre, *Clinical Legal Education Guide: Your Guide to CLE Courses Offered by Australian Universities in 2014* (2014) 3 <[http://issuu.com/unsu\\_p3design/docs/55386\\_clinical\\_legal\\_education\\_guide?e=9305792/7586890](http://issuu.com/unsu_p3design/docs/55386_clinical_legal_education_guide?e=9305792/7586890)>. The University of New South Wales is the only institution to offer 15 discrete clinics: at 35. Just under half of the institutions (48 per cent) offer one clinic: at 3.

61 Kingsford Legal Centre, *Clinical Legal Education Guide: Your Guide to CLE Courses offered by Australian Universities in 2011 and 2012* (2011) 3 <[http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE\\_GUIDE\\_2011\\_12.pdf](http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/eBulletins/CLE_GUIDE_2011_12.pdf)> (‘*Clinical Legal Education Guide: 2011 and 2012*’).

the legal internship clinic at the University of Wollongong.<sup>62</sup> The Australian Catholic University also requires that its students complete at least 240 hours of pro bono work as a precondition for graduation.<sup>63</sup> The imperative for these hours is not expressed as participation in a formal clinic but as the completion of pro bono community service emphasising the voluntary nature of the contribution without reward. Pro Bono Students Australia has a similar philosophy and seeks to provide legal services to the community without receiving academic credit.<sup>64</sup> Similar to the challenges identified in the US and UK, key considerations for the future of clinical legal education in Australia include the choice of models and the integration of these clinical models within the law curriculum.<sup>65</sup>

### III LESSONS FROM ABROAD: PRO BONO DEFINITIONS, RULES AND PROTOCOLS

In order to reconsider the Australian definition of pro bono, it is useful to look abroad to see how other jurisdictions formally define pro bono work and partnerships. There is surprisingly limited comparative analysis of pro bono work across various jurisdictions. Much of the published work comes from the North American region,<sup>66</sup> with very limited studies comparing pro

62 University of Wollongong, *Bachelor of Laws (Direct Entry)* (6 May 2014) <<https://www.uow.edu.au/handbook/yr2014/ug/H14006126.html>>. It is noted that the undergraduate law degree at Deakin University requires 30 days of professional experience as a condition of graduation, which may be in a legal clinic or law firm: Deakin University, *Bachelor of Laws: Course Summary for Local Students* <<http://www.deakin.edu.au/course/bachelor-of-laws-law>>. It is also noted the University of New South Wales offers on a voluntary basis a professional placement programme as part of its law degree which incorporates a significant clinical component: Kingsford Legal Centre, *Clinical Legal Education Guide: 2011 and 2012*, above n 61, 36.

63 Australian Catholic University, *Law Pro Bono Work Experience* (4 February 2014) <[http://www.acu.edu.au/about\\_acu/faculties\\_institutes\\_and\\_centres/law\\_and\\_business/school\\_of\\_law/law\\_pro\\_bono](http://www.acu.edu.au/about_acu/faculties_institutes_and_centres/law_and_business/school_of_law/law_pro_bono)>.

64 John Corker, National Pro Bono Resource Centre, 'How Does Pro Bono Students Australia (PBSA) Fit with Clinical Legal Education in Australia?' (Paper presented at 3rd International Journal of Clinical Legal Education Conference and 8th Australian Clinical Legal Education Conference, Melbourne, 13–15 July 2005). This paper includes a preliminary report on the trial of the PBSA program conducted at the University of Western Sydney.

65 Jeff Giddings, 'Contemplating the Future of Clinical Legal Education' (2008) 17 *Griffith Law Review* 1; Jeff Giddings, 'Why No Clinic Is an Island: The Merits and Challenges of Integrating Clinical Insights across the Law Curriculum' (2010) 34 *Washington University Journal of Law and Policy* 261; Evans et al, above n 51, 49.

66 Cummings and Sandefurt, above n 1, 83–111; Standing Committee on Pro Bono and Public Service, *Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers* (Report, American Bar Association, March 2013) <[http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/ls\\_pb\\_Supporting\\_Justice\\_III\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf)> ('*Supporting Justice III Study*'); Gary A Munneke and Eileen Eck, 'Re-defining Pro Bono: Professional Commitment to Public Service' (2008) 1 *Charlotte Law Review* 21; Cummings, above n 6, 1–149; Deborah Rhode, 'Access to Justice' (2001) 69 *Fordham Law Review* 1785.

bono practices across sovereign borders.<sup>67</sup> The main global study is a report prepared by Latham and Watkins which contains a survey of pro bono practices and opportunities in 71 jurisdictions.<sup>68</sup> This report is very useful in drawing together a range of different jurisdictional definitions. However, the scale of this project means that there is no comparative analysis made between the various states.

This article considers the US, the UK and Singapore for further comparative analysis. These jurisdictions were selected for closer analysis as they were identified as having innovative pro bono rules and protocols that Australia could learn from. Innovative pro bono rules and protocols in these jurisdictions that are of relevance to the reconsideration of pro bono in Australia include: the adoption of mandatory pro bono targets (either financial or hours), the establishment of effective pro bono partnerships to improve access to justice (including legal clinics), and the creation of new pro bono institutions or funding models. In selecting these case studies, the authors were cognisant of the tendency to often focus on other Western nations' perspectives when looking for innovative law reform or developments. Such comparative selection is often explained by suggesting that lessons from abroad are likely to have more relevance in jurisdictions with similar legal histories, structures and protocols. However, the purpose of this article was to focus on dynamic and innovative pro bono ideas and debates which could stimulate thought and discussion in our reconsideration of pro bono protocols in Australia. The US and UK are well recognised jurisdictions with robust pro bono cultures and, as such, were natural case study selections. The authors were particularly interested in including an Asian case study for comparison given the rapid economic and political developments in this region. Existing levels of unmet legal need in the Asian region are high,<sup>69</sup> which, coupled with increasing demands for recognition of civil and political rights, has renewed pro bono and access to justice debates in the region. Singapore was selected as the final case study due to the progression of lively pro bono debates culminating in legislative reform. The

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67 Francis Regan and Andrea Durbach, 'How and Why is Pro Bono Flourishing: A Comparison of Recent Developments in Sweden and China' (2001) 19 *Law in Context* 155–7; Committee to Study Community Legal Services Initiatives, 'Second Consultation Paper on Community Legal Services' (Consultation Paper, Singapore Academy of Law, 2013) 13–28 <<http://www.sal.org.sg/RegistrationForms/CORP%20COMMS/Second%20Consultation%20Paper%20for%20CLS%20200413%20%28Annex%20A%29.pdf>>.

68 Latham and Watkins LLP, 'A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions' (Memorandum, Pro Bono Institute, August 2012) <<http://www.probonoinst.org/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf>>.

69 Asian Pro Bono Conferences have been held in Laos in 2012, Vietnam in 2013, and Singapore in 2014, with one of the main aims of these events being to better understand the nature of unmet legal need in the region: see Law Society of Singapore, About the Conference (2014) <<http://www.lawsociety.org.sg/conference/3rdSEAAsiaPBC2014/Default.aspx>>.

authors would like to encourage further comparative analysis with Asian legal systems in the future, not only due to our geographical closeness, but also in recognition of the value of considering new perspectives and approaches when contemplating legal reform, and to promote greater understanding and awareness of legal culture in this burgeoning region.

## A Pro Bono in the US

### 1 Regulation of Pro Bono and Financial Contributions

The legal profession in the US is arguably a leader in the provision of pro bono services.<sup>70</sup> This, in part, stems from public sector funding for access to justice being one of the lowest per capita rates of any developed nation, coupled with a strong demand for low cost legal services.<sup>71</sup> Defendants in criminal and quasi-criminal proceedings generally gain access to legal counsel in the US. However, virtually all civil legal aid is provided on a pro bono basis. In the US, 73 per cent of lawyers complete pro bono work and most of this work is provided for free rather than at a reduced rate.<sup>72</sup> Despite other nations viewing the US pro bono practice as particularly robust, those inside the US see an ever increasing demand for pro bono services and a corresponding need to engage more practitioners in the delivery of initiatives to improve access to justice.<sup>73</sup>

The legal profession is governed by rules created at the state level resulting in varying state pro bono definitions and standards. The American Bar Association ('ABA') is a national organisation that provides model rules which can be adopted by individual states when developing law and policy.<sup>74</sup> While these model rules are not mandatory or legally binding, many state bars have adopted the ABA Model Rule on pro bono work ('Model Rule 6.1').<sup>75</sup> The Model Rule 6.1 defines pro bono work as: the provision of a minimum of 50 hours of legal services to persons/organisations representing persons of

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70 Many pro bono initiatives have emerged from the US, eg, aspirational or mandatory pro bono targets and the inclusion of pro bono financial contributions as an acceptable form of pro bono: Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *State-By-State Pro Bono Service Rules* (2 November 2010) American Bar Association <<http://apps.americanbar.org/legalservices/probono/stateethicsrules.html>>.

71 Legal Services Corporation, 'Report of the Pro Bono Task Force' (Report, October 2012) ii <[http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf)>.

72 Latham and Watkins LLP, above n 68, 350.

73 See, eg, Legal Services Corporation, above n 71, 1; H Thomas Wells Jr, 'Different Ways to Make a Difference: Lawyers Can Aid Access to Justice Through Pro Bono, Advocacy and Financial Support' (2009) 95 *American Bar Association Journal* 9, 9.

74 American Bar Association, *About the American Bar Association* (2014) <[http://www.americanbar.org/about\\_the\\_aba.html](http://www.americanbar.org/about_the_aba.html)>.

75 Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *State-By-State Pro Bono Service Rules*, above n 70.

limited means, contributions to law reform as well as voluntary financial contributions to organisations which support indigent members of society.<sup>76</sup>

The *Supporting Justice III Study* found that the average annual amount of pro bono service provided by attorneys in 2011 was 56.5 hours per year, with a median of 30 hours per year.<sup>77</sup> This data is based on the return of 2876 survey instruments, of the 379 755 initially dispatched, potentially suggesting that the high levels of pro bono reporting might be skewed as a result of only those who engaged in pro bono initiatives self-selecting to participate in the survey.<sup>78</sup> The five biggest barriers to pro bono work identified by the study were:

- lack of time;
- family commitments;
- competing billable hours, lack of skills/information/opportunities;
- lack of administrative support, lack of desire, lack of malpractice insurance; and
- employer discouragement.<sup>79</sup>

It is acknowledged that barriers will vary according to the nature of the legal practice, that is, private practice (small versus large), corporate or government. However, lack of time and family commitments were the overwhelming impediments reported by all three groups.<sup>80</sup> While overcoming some of these barriers requires cultural change within the legal profession, other barriers, such as a lack of skills or time, can be overcome by adopting a broader definition of pro bono that includes financial contributions in lieu of a time commitment. Model Rule 6.1 provides:

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, *there may be times* when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be

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76 Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *ABA Model Rule 6.1* (29 November 2006) American Bar Association <[http://www.americanbar.org/groups/probono\\_public\\_service/policy/aba\\_model\\_rule\\_6\\_1.html](http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html)>.

77 Standing Committee on Pro Bono and Public Service, above n 66.

78 Ibid 2.

79 Latham and Watkins LLP, above n 68, 351.

80 Standing Committee on Pro Bono and Public Service, above n 66, 26.

more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.<sup>81</sup>

Model Rule 6.1 is clearly oriented toward the delivery of pro bono legal services and the caveat 'there may be times' limits the acceptance of financial support as an ongoing form of pro bono in lieu of hours of legal service. However, some state bar associations within the US have specifically adopted a policy which provides for a financial contribution to be considered as pro bono in any circumstance. For example, the State Bar of Texas allows for a financial donation equivalent to the value of the aspirational 50 hour target.<sup>82</sup> The Michigan State Bar Association policy provides for 30 hours of pro bono work, three cases or a \$300 contribution to a legal aid fund or other non-profit organisation. The Access to Justice Fund created by the State Bar of Michigan and the Michigan State Bar Foundation provides a tax-deductible vehicle via which members of the legal community can make a financial commitment which directly fulfils the pro bono philosophy.<sup>83</sup> Twelve other bar associations also specifically provide for financial contributions as an acceptable means by which to discharge pro bono obligations.<sup>84</sup>

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81 Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *ABA Model Rule 6.1*, above n 67, [9] (emphasis added). See also:

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible: at [10].

82 State Bar of Texas, *Pro Bono Policy – FAQ* (2009) 1 <<http://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoPolicyFAQ2009.pdf>>.

83 Linda Rexer, 'Pro Bono Donations and the Access to Justice Fund' (2011) 90(10) *Michigan Bar Journal* 36, 37.

84 State Bar of New Mexico, *Rule 24-108. Pro Bono Publico Service* <<http://www.nmbar.org/Attorneys/ATJ/prpublicoservicerules.html>>; Virginia State Bar, *The Virginia State Bar Professional Guidelines: Rule 6.1 Voluntary Pro Bono Publico Service* (29 October 2009) <<http://www.vsb.org/pro-guidelines/index.php/rules/public-service/rule6-1/>>; Utah State Bar, *Rule 6.1. Voluntary Pro Bono Legal Service* <[http://www.utcourts.gov/resources/rules/ucja/ch13/6\\_1.htm](http://www.utcourts.gov/resources/rules/ucja/ch13/6_1.htm)>; Pro Bono Resource Center of Maryland, *Maryland Rules of Procedure* (10 September 2009) <<http://probonomd.org/about-us/md-pro-bono-rules/>>; Massachusetts Court System Rules of Professional Conduct *Rule 6.1: Voluntary Pro Bono Publico Services* (4 January 1999) Massachusetts Government <<http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc307-rule6-1.html>>; State Bar of South Dakota, *Rule 6.1. Voluntary Pro Bono Publico Service* <<http://www.sdbar.org/Rules/rules.shtm>>; District of Columbia Bar, *Rules of Professional Conduct: Rule 6.1 – Pro Bono Public Service* <<https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/rule6-01.cfm>>; Re Mississippi Rules of Professional Conduct (Miss, No 89-R-99018-SCT, 21 March 2005) slip op 2; Kentucky Bar Association, *Rules of the Supreme Court of Kentucky: SCR 3.130(6.1) Donated Legal Services* <[http://www.kybar.org/documents/scr/scr3/scr\\_3.130\\_\(6.1\).pdf](http://www.kybar.org/documents/scr/scr3/scr_3.130_(6.1).pdf)>; Florida Bar, *Rule 4-6.1 Pro Bono Public Service* (1 October 1998) <<http://www.florida-bar.org/divexe/rttfb.nsf/FV/BF60AF4C185D99D085256BBC00533761>>; Supreme Court of Nevada, *Nevada Rules of Professional Conduct* (2006) <<https://www.leg.state.nv.us/CourtRules/RPC.html>>; Supreme Court of the State of Hawai'i, *Hawai'i Rules of Professional Conduct* (25 June 2013) <[http://www.courts.state.hi.us/docs/court\\_rules/rules/hrpcond.htm](http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm)>.

Allowing for a financial contribution in lieu of time as an additional acceptable form of pro bono delivery provides greater flexibility by allowing for those who lack time or relevant experience to transfer funds to a specialist legal service with expertise in a relevant field (ie, family law, migration law, Indigenous law). This increases the efficiency of the provision of legal services as those specialised in that area of law deliver the service. Practitioners working in the areas of unmet legal need are also more experienced in assisting with the socio-legal issues that commonly accompany this type of casework. Decreasing levels of public sector funding for specialist community legal services and legal aid mean that such bodies need to explore new revenue streams. Pro bono financial contributions could be channelled to fill this public sector funding gap. This type of model also creates new partnership opportunities between law firms and non-profit legal organisations, which has the potential to evolve from simple donation relationships to ones of joint collaborative pro bono engagement in cases where the expertise of both the firm and the legal non-profit organisation are both of relevance and use.

## 2 *Mandatory Reporting*

Eight states within the US have adopted mandatory reporting requirements.<sup>85</sup> Ten states have adopted voluntary reporting requirements, and the remaining states have no pro bono reporting policies.<sup>86</sup> One of the leading pro bono advocates in the US, Esther Lardent, suggests that there is limited evidence to suggest that mandatory pro bono reporting leads to improved pro bono performance.<sup>87</sup> Reports from states which require mandatory reporting,<sup>88</sup> show only slightly limited increases of pro bono work following the introduction of mandatory reporting rules. Periods of stagnation in pro bono activity were reported after an initial increase.<sup>89</sup> Lardent warns that while mandatory reporting may be viewed as a tool to increase pro bono hours or contributions, it is first essential to ensure that the right type of information is being reported to avoid an unduly administrative process.<sup>90</sup> She argues that access to justice leaders should consider the following issues when considering whether to introduce mandatory reporting on pro bono contributions:

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85 Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *State Reporting Policies* (2 October 2014) American Bar Association <<http://apps.americanbar.org/legal services/probono/reporting/pbreporting.html>>.

86 Ibid.

87 Esther Lardent, 'Pro Bono: To Report or Not to Report' (2013) 213(4) *New Jersey Law Journal* 23.

88 Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *State Reporting Policies*, above n 85.

89 Lardent, 'Pro Bono', above n 87, 23.

90 Ibid.



- What are we tracking (hours invested, clients assisted, access to justice outcomes)?
- Are we asking the right questions to ensure that all pro bono activities are taken into account?
- What resources are required to support reporting efforts and provide the assistance needed to maximise pro bono service, and are we prepared to deploy those resources?
- Is this the best and most productive vehicle to increase pro bono service?<sup>91</sup>

### 3 *The Role of Law Schools*

Law schools in the US strongly encourage students to engage in pro bono learning experiences. The US is at the forefront in the area of clinical legal education, with early clinics being introduced in the late 1980s.<sup>92</sup> Tulane, Florida State and the University of Pennsylvania were amongst the first law schools to establish mandatory pro bono requirements as a precondition to graduation. In 1996, the ABA imposed a standard which required law schools to encourage students to engage in pro bono activities. In 2005, the ABA demonstrated their ongoing commitment to pro bono activities within law schools by implementing Accreditation Standard 302(b)(2) which provides that 'a law school shall offer substantial opportunities for ... student participation in pro bono activities'.<sup>93</sup>

Standard 302-10 provides flexibility in the types of pro bono offerings. For example, whilst the pro bono program should target people of limited means or those who represent relevant groups, the pro bono commitment can include non-law related initiatives and credit may be granted for a percentage of the pro bono work undertaken.<sup>94</sup> Whilst Accreditation Standard 302(b)(2) falls short of imposing any definitive parameters, the commitment by law schools to offering pro bono opportunities is demonstrated by figures from 27 June 2014, showing that of the 203 ABA approved law schools,<sup>95</sup> 42 require students to complete a mandatory minimum number of hours of pro bono or

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91 Pro Bono Institute, 'Letter from Esther: Pro Bono Reporting: Clearing the Air' on *The Pro Bono Wire* <<http://pbi.informz.net/admin31/content/template.asp?sid=38491&brandid=4063&uid=0&mi=4113152&mfqid=15609909&ptid=0&ps=38491>>.

92 Cynthia Adcock, 'Beyond Externships and Clinics: Integrating Access to Justice Education into the Curriculum' (2013) 62 *Journal of Legal Education* 566, 569–70.

93 American Bar Association, *2013–2014 ABA Standards for Approval of Law Schools* <[http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html)>.

94 Ibid.

95 American Bar Association, *ABA-Approved Law Schools* <[http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html)>.

public/community service as a condition of their graduation.<sup>96</sup> A further 124 law schools have formal voluntary pro bono programs.<sup>97</sup> New York State and the State Bar of California have gone further requiring aspiring legal practitioners to have completed 50 hours of pro bono work in order to be admitted to the Bar.<sup>98</sup>

Whilst pro bono practice is promoted by law schools and the legal profession, a limited number of studies have sought to evaluate the impact of pro bono curriculum exposure with future pro bono practitioner commitment.<sup>99</sup> The findings are not conclusive but suggest that mandatory legal clinic hours do not necessarily engender a greater commitment to future pro bono practice. These studies posit that true engagement with pro bono requires greater integration of pro bono activities across the law school curriculum.<sup>100</sup>

## B Pro Bono in the UK

### 1 *Pro Bono Definitions: Role of Public and Private Sectors*

The UK Pro Bono Protocol ('Protocol') was developed under the auspices of the Attorney-General's Pro Bono Coordinating Committee and has been endorsed by the Law Society of England and Wales, the Bar Council of England and Wales and the Chartered Institute of Legal Executives. The Protocol creates a framework to promote high standards of pro bono work. However, professional codes of conduct establish the legal standards for practitioners. The Protocol defines pro bono legal work as:

1.1. When we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public and alternative means of funding are not available.

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96 Standing Committee on Pro Bono and Public Service and the Centre for Pro Bono, *Directory of Law School Public Interest and Pro Bono Programs* (27 June 2014) American Bar Association <[http://apps.americanbar.org/legalservices/probono/lawschools/pb\\_programs\\_chart.html](http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html)>.

97 Ibid.

98 Standing Committee on Pro Bono and Public Service and the Centre for Pro Bono, *Bar Pre-admission Pro Bono*, American Bar Association <[http://www.americanbar.org/groups/probono\\_public\\_service/policy/bar\\_pre\\_admission\\_pro\\_bono.html](http://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono.html)>; Law360, 'Mandatory Pro Bono is Not the Answer for Practitioners' on *LexisNexis Legal Newsroom: Insurance Law* (22 April 2014) <<http://www.lexisnexis.com/legalnewsroom/insurance/b/newsheadlines/archive/2014/04/22/mandatory-pro-bono-is-not-the-answer-for-practitioners.aspx>>.

99 Robert Granfield, 'Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs' (2007) 54 *Buffalo Law Review* 1355; Deborah L Rhode, *Pro Bono in Principle and in Practice: Public Service and the Professions* (Stanford University Press, 2005) 154–64; Deborah Schmedemann, 'Priming for Pro Bono Publico: Inculcating a Norm of Public Service in New Lawyers' (William Mitchell Legal Studies Research Paper No 64, William Mitchell College of Law, March 2007).

100 Adcock, above n 92, 574; Granfield, above n 99, 1412.

1.2. Legal work is Pro Bono Legal Work only if it is free to the client, without payment to the lawyer or law firm (regardless of the outcome) and provided voluntarily either by the lawyer or his or her firm.

1.3. Pro Bono Legal Work is always only an adjunct to, and not a substitute for, a proper system of publicly funded legal services.<sup>101</sup>

The Protocol definition of pro bono legal work is quite limited by only including work that involves the provision of free legal advice. Article 3.1 of the Protocol recognises that lawyers might also use their legal knowledge or legal skills to assist with a legal literacy project or citizenship work, but these activities are not included within the Article 1 definition of pro bono legal work. Articles 1.2 and 1.3 were drafted with the aim of ensuring that the government remain primarily responsible for the provision of legal aid, thus making it clear that the private sector and its pro bono activities should only ever be supplementary to a publicly funded legal aid program.

The legal aid system in England and Wales is quite robust, is available for both civil and criminal matters and provided to people on low incomes, people receiving social security and other people who meet certain requirements.<sup>102</sup> Legal aid is only available to individuals, so any charity or community group requiring assistance must find pro bono assistance. Demand for civil legal aid has risen sharply following the global economic crisis, which has increased the demand for pro bono legal services. Furthermore, significant cuts to legal aid have been proposed, including a 17.5 per cent reduction (350 million pounds) in the 2013 budget,<sup>103</sup> which will increase the need for more pro bono activity in the UK.

## 2 *Innovative Funding Models and Partnerships*

The National Pro Bono Centre houses seven clearinghouses for pro bono legal work.<sup>104</sup> The Access to Justice Foundation is one of the legal charities affiliated with the National Pro Bono Centre providing financial assistance to voluntary and non-profit organisations involved in the provision of free legal assistance. This organisation has an innovative funding model comprising donations, costs awards from pro bono cases and unclaimed funds held by

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101 LawWorks, *Protocol Text: Joint Pro Bono Protocol for Legal Work* <[http://lawworks.org.uk/protocol\\_text](http://lawworks.org.uk/protocol_text)>.

102 Latham and Watkins LLP, above n 68, 66.

103 Rebecca Lowe, 'Lord Woolf: UK Legal Aid Cuts May Cause "Extreme" Psychological Damage' on *International Bar Association* (20 March 2013) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=FC020F7E-EA11-4895-8495-88D876D41C63>>.

104 These include the Bar Pro Bono Unit, LawWorks (Solicitors' Pro Bono Group), CILEx Pro Bono Trust (CILEx PBT), Access to Justice Foundation, London Legal Support Trust, Environmental Law Foundation and i-ProBono: National Pro Bono Centre, *About the Pro Bono Centre* <<http://www.nationalprobonocentre.org.uk/about-the-centre/>>.

legal practitioners.<sup>105</sup> Legislation was passed in 2007 to enable costs in pro bono cases to be paid directly to the Access to Justice Foundation.<sup>106</sup> This legislation accords with the definition of pro bono legal services provided for in the Protocol, which requires pro bono work to be undertaken without payment regardless of the outcome.<sup>107</sup> The application of costs from pro bono casework to fund further access to justice initiatives provides an innovative example of a new funding model.

Corporate social responsibility has been embraced within private firms in the UK and has been used to forge partnerships between law firms and the community.<sup>108</sup> Corporate social responsibility can be defined as a corporation taking responsibility for its decisions and the impact these decisions have on the community and the environment. This involves transparent and ethical behaviour that contributes to a sustainable society.<sup>109</sup> The Business in the Community Charity provides a positive example of private and public sector engagement: 'Business in the Community is working to shape a new contract between business and society, in order to secure a fairer society and a more sustainable future'.<sup>110</sup> This charity has approximately 850 member companies including many of London's top law firms.<sup>111</sup> A further 10 700 companies are engaged in the roll of the charity's programs and campaigns, thus exposing a great number of employees to the implementation and involvement of initiatives in the public interest.<sup>112</sup> Corporate social responsibility seems to provide an ideal vehicle to increase partnerships between the private sector and society more broadly. Law firms generally engage in these programs and campaigns by providing mentoring services, helping out in schools or community centres, or partaking in local urban regeneration programs (a far broader range of activities compared to the traditional pro bono definition). Corporate social responsibility programs have been recognised as providing organisations with a competitive edge when recruiting and motivating staff, and are thus being adopted for strategic as well as for professional

105 Access to Justice Foundation, *Pro Bono Costs* <<http://www.accesstojusticefoundation.org.uk/funds-in/pro-bono-costs>>.

106 *Legal Services Act 2007* (UK) c 29, s 194.

107 Canada has taken a different approach to costs allowing for firms to retain costs in pro bono cases as way of incentivising pro bono practice: see *1465778 Ontario Inc v 1122077 Ontario Ltd* (2006) 82 OR (3d) 757 (Ontario Court of Appeal); Sossin, above n 5, 144.

108 London Legal Support Trust, *From Pro Bono to Partnership* <<http://londonlegalsupporttrust.org.uk/get-involved/pro-bono-to-partnership>>.

109 Adapted from Australian Centre for Corporate Social Responsibility, *Defining Corporate Social Responsibility* <<http://www.accsr.com.au/html/definecsr.html>>, quoting International Organisation for Standardisation, 'Guidance on Social Responsibility' (Standard no ISO 26000, 2010).

110 Business in the Community, *It's Time for a New Contract Between Business and Society* (10 February 2014) <<http://www.bitc.org.uk/our-resources/report/its-time-new-contract-between-business-and-society>>.

111 Business in the Community, *Our Services* <<http://www.bitc.org.uk/services>>.

112 Latham and Watkins LLP, above n 68, 70.

responsibility reasons.<sup>113</sup> It would seem that corporate social responsibility initiatives include a broader range of pro bono activities in the UK, and as such any future reporting regime in the UK should consider both pro bono services (narrowly defined as free legal services), as well as other initiatives carried out by law firms under the corporate social responsibility banner.

### 3 *Role of Law Schools*

Law students in the UK are increasingly engaging in clinical legal education experiences, with a 33 per cent increase between 2006 and 2010.<sup>114</sup> Law schools in the UK have embraced clinical legal education as a way of offering a more holistic legal education by combining theory with practice, benefiting the student, universities and the wider community.<sup>115</sup> Students are placing an increasing value on the benefits of pro bono work with demand outweighing the opportunities available in almost half of law schools offering pro bono.<sup>116</sup> However, while the level of clinical legal education experience is growing, it is still limited by comparative standards,<sup>117</sup> and integration of curriculum content on pro bono responsibilities remains low.<sup>118</sup> The reduction in public funding for legal aid presents an opportunity for law schools to revisit clinical legal education delivery models and partnerships<sup>119</sup> to satisfy increasing unmet legal need along with increasing desire on the part of students to engage in pro bono clinical legal education programs.

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113 Lisa Glanakos, 'Corporate Social Responsibility Programs in Law Firms' (2011) 12(1) *Legal Solutions* <<https://info.legalsolutions.thomsonreuters.com/signup/newsletters/practice-innovations/2011-jan/article4.aspx>>.

114 LawWorks, 'LawWorks Student Pro Bono Report 2011' (Report, 30 March 2011) 4 <<http://lawworks.org.uk/index.php?cID=10&cType=news>>. Survey responses were received from 80 law schools. Of the students surveyed, 6258 reported as being actively involved in pro bono work in 2009–10.

115 Lord Chancellor's Advisory Committee on Legal Education and Conduct, 'First Report on Legal Education and Training' (Report, April 1996) 24–6; Law Society, 'Training Framework Review Consultation Paper' (Report, 2001); Cath Sylvester, 'Bridging the Gap: The Effect of Pro Bono Initiatives on Clinical Legal Education in the UK' (2003) 3 *International Journal of Clinical Legal Education* 29; Lydia Bleasdale-Hill and Paul Wragg, 'Models of Clinic and Their Value to Students, Universities and the Community in the Post-2012 Fees Era' (2013) 19 *International Journal of Clinical Legal Education* 257, 258.

116 LawWorks, 'LawWorks Student Pro Bono Report 2011', above n 114, 19.

117 Ibid 23. Of the law schools that responded to the 2006 survey, 46 per cent contributed funds to pro bono: at 4, 6, 10.

118 Jonny Hall and Kevin Kerrigan, 'Clinic and the Wider Law Curriculum' (2011) 16 *International Journal of Clinical Legal Education* 25, 31–7.

119 Ibid; Bleasdale-Hill and Wragg, above n 115, 260–1.

## C Pro Bono in Singapore

### 1 *Pro Bono Governance: Debate on Mandatory Pro Bono Hours and Reporting*

There has been significant public debate and support for increased pro bono programs and initiatives in Singapore. Support for increased pro bono works has come from the Chief Justice of Singapore, Sundaresh Menon,<sup>120</sup> the Singapore Academy of Law,<sup>121</sup> Singapore Institute of Legal Education,<sup>122</sup> and the Ministry of Law within the Singapore government.<sup>123</sup> One of the key drivers for increasing pro bono practices in Singapore was statistics indicating that a third of criminal cases in subordinate courts are unrepresented and more than 90 per cent of litigants in maintenance and family violence cases are unrepresented.<sup>124</sup> One proposal that has driven pro bono debate within the Singaporean legal fraternity is the potential introduction of mandatory pro bono reporting for all legal practitioners.

Lawyers' conduct is regulated by the *Legal Profession Act* which sets out some general legal professional conduct rules which are applicable to lawyers undertaking pro bono matters.<sup>125</sup> The *Constitution of Singapore* provides Singaporean and non-Singaporean citizens with the right 'to consult and be defended by' counsel upon their arrest.<sup>126</sup> This generous right has been limited in the criminal context by legislative amendment which has interpreted this obligation as only requiring the provision of protection once an accused person has been brought before a court, and as such not providing any rights to counsel before trial, such as during police questioning or pre-trial custody.<sup>127</sup> Furthermore, the High Court has ruled that there is no right to be informed of the existence of the right to legal counsel.<sup>128</sup> The Criminal Legal Aid Scheme is administered by the Pro Bono Service Unit within the

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120 Chief Justice Sundaresh Menon, 'Address by the Chief Justice' (Speech delivered at Law Week 2013 Opening Segment, Singapore Academy of Law, 22 July 2013) 9–12 <[http://www.sal.org.sg/Lists/Speeches/Attachments/115/Law%20week%20Opening%20Address%20by%20CJ%20Menon%20\(final\).pdf](http://www.sal.org.sg/Lists/Speeches/Attachments/115/Law%20week%20Opening%20Address%20by%20CJ%20Menon%20(final).pdf)>.

121 Singapore Academy of Law, 'Five-Day Event to Raise Public Awareness about Legal Rights' (News Release, 22 July 2013) <<http://www.sal.org.sg/Lists/NewsReleases/DispForm.aspx?ID=67>>.

122 Singapore Institute of Legal Education, *Pro Bono Programme* <<http://www.sile.edu.sg/pro-bono-programme>>.

123 Ministry of Law, 'Mandatory Reporting for Legal Pro Bono Work Done' (Press Release, 24 March 2014) <<https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/mandatory-reporting-for-legal-pro-bono-work-done.html>>.

124 Committee to Study Community Legal Services Initiatives, 'Second Consultation Paper on Community Legal Services', above n 67, 3.

125 *Legal Profession Act* (Singapore, cap 161, 2009 rev ed) ('*Legal Profession Act*').

126 *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) art 9(3).

127 *Criminal Procedure Code 2010* (Singapore, 2012 rev ed) s 236.

128 *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR 10.

Law Society and is funded by public fundraising events, government funding and donations from individual lawyers.<sup>129</sup>

Singapore legislation does not currently create a mandatory obligation to provide pro bono services. However, there has been a big push to try to increase pro bono practices through the introduction of mandatory pro bono hours or reporting obligations. The Singapore Academy of Law released a consultation paper in October 2012, seeking views on the introduction of a mandatory target of 16 hours of pro bono services per year in order for lawyers to retain their practicing certificate.<sup>130</sup> This mandatory target of 16 hours would replace the existing aspirational target of 25 hours. The concept of ‘community legal services’ was used as opposed to the term ‘pro bono’. Community legal services activities could include: criminal legal aid; civil legal aid; community mediation; legal clinics; voluntary service in subordinate courts; and legal advisory work to approved institutions and charities which provide assistance to the community. This proposal also suggested that lawyers could choose to give monetary contributions in lieu of a time commitment at a rate calculated in accordance with a predetermined hourly rate.<sup>131</sup> Revenue from these financial contributions would be then channelled back into the operational costs of the community legal services.<sup>132</sup>

Many in the Singaporean legal community were opposed to the introduction of a mandatory 16 hour pro bono target for the following arguments: that the spirit of voluntarism is inconsistent with mandatory pro bono work; lawyers may grow to resent pro bono work if it is mandatory; the issue of whether meaningful pro bono work could be completed in 16 hours (some files may take 16 hours to read); and the desire to participate in pro bono activities should emulate from the passion, values and conviction of the individual – not from a compulsory scheme.<sup>133</sup> The authors’ position is that many of these objections can be overcome by reconsidering the special role and responsibilities that legal professionals hold within society, and by allowing for financial commitments to be made rather than time commitments when the individual does not have the time or expertise to engage in the provision of pro bono activities.

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129 Latham and Watkins LLP, above n 68, 283.

130 Committee to Study Community Legal Services Initiatives, ‘Report of the Committee to Study Community Legal Service Initiatives’ (Report, 26 November 2013) 1 <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20B%20-%20Report%20of%20the%20Committee%20to%20Study%20Community%20Legal%20Services%20Initiative.pdf>>.

131 Ibid.

132 Ibid.

133 Denzel Chua, ‘Should Pro Bono Work Be Compulsory for Lawyers in Singapore?’ (2013) *Singapore Law Review* <<http://www.singaporelawreview.org/2013/01/should-pro-bono-work-be-compulsory-for-lawyers-in-singapore/>>.

The second Community Legal Services consultation paper released in April 2013 proposed that mandatory pro bono would be implemented in two discrete stages: (1) an aspirational target of pro bono hours and mandatory reporting of the number of pro bono hours completed each year; and (2) a mandatory minimum number of pro bono hours to be completed each year.<sup>134</sup> Feedback on the second consultation paper showed that many respondents remained concerned about any mandatory nature of community legal services with many citing the reason that the state should have the responsibility to help lower-income Singaporeans.<sup>135</sup> Ultimately, the Ministry of Law supported the recommendation to endorse mandatory reporting of pro bono work, but not to introduce a mandatory target for pro bono work. It is proposed to change the *Legal Profession Act* to require:

- a. Every advocate and solicitor applying for a practicing certificate will be required to report the time spent on pro bono work in the preceding year.
  - b. Reporting will be done on an individual basis, but firms may take the additional step of declaring on a firm-wide basis;
  - c. Pro Bono work will include:
    - i. Legal advisory/representation work for legal organisations and societies; and
    - ii. other law-related work (e.g committee work for the Law Society of Singapore, the Singapore Academy of Law, the Singapore Mediation Centre, the Singapore Institute of Legal Education, any Ministry in law reform project and sitting as a member of a Disciplinary Committee).
- Work will be considered as pro bono if no remuneration is received or only an honorarium is received.
- d. Lawyers will not be subject to sanctions or adverse consequences for a report of zero pro bono hours clocked.<sup>136</sup>

## 2 *Mandatory Pro Bono Engagement at Law School*

Law schools in Singapore now have mandatory pro bono course requirements for all law students matriculating from 2013 onwards. Chief Justice Chan Sek Keong stated in his opening address of 2012 that:

For many lawyers, pro bono as a social value does not come from nature, but from nurture. ... The Singapore Institute of Legal Education ('SILE') has proposed and our two law schools have agreed to establish a mandatory pro bono programme for LLB students from the academic year 2013.<sup>137</sup>

134 Committee to Study Community Legal Services Initiatives, 'Report of the Committee to Study Community Legal Service Initiatives', above n 130, 2.

135 Ibid.

136 Ministry of Law, above n 123.

137 Chief Justice Chan Sek Keong, 'Response of Chief Justice Chan Sek Keong' (Speech delivered at the Opening of the Legal Year 2012, Supreme Court of Singapore, 6 January 2012) 3 <<http://www.sal.org.sg/Lists/Speeches/Attachments/99/CJ%20OLY%20Speech%202012.pdf>>.



There are two universities offering legal education in Singapore: the National University of Singapore ('NUS') and Singapore Management University ('SMU'). From May 2014, law students at NUS are required to complete at least 20 hours of unpaid work over their second year of study,<sup>138</sup> while students at SMU are required to complete 80 hours of service and learning at a Voluntary Welfare Organisation or an organisation involved in pro bono and legal aid work.<sup>139</sup> SMU in addressing the purpose of mandatory pro bono work to students believes that it:

1. will develop conception of the practice of law as a service vocation by instilling in you a desire to serve the community, thereby making you more likely to continue doing pro bono work later in their professional lives;
2. experience how the law works in real life:
  - through interaction with the SILE Pro Bono Core Agencies, the lawyers offering pro bono work and the indigents;
  - by giving you an opportunity to apply what you have learnt in law school to real life situations, so as to enable you to appreciate the differences between theory and practice.
3. will develop the knowledge, skills, ethics and professionalism mo[u]lding you to become better lawyers by providing training and professional development opportunities ...<sup>140</sup>

Singapore should be applauded for the introduction of mandatory pro bono training for law graduates. This initiative has the potential to change the mindset of Singapore's future legal practitioners. Australian research suggests that one of the key benefits of pro bono engagement during the law degree is to instil a pro bono philosophy and encourage the practice of law in a way that promotes access to justice.<sup>141</sup> Nathan-Ganesh (the pro bono faculty advisor at SMU) argues that law schools are part of the justice system and, as such, have a responsibility to nurture a pro bono culture among law students.<sup>142</sup> She argues that law schools are best placed to incubate a pro bono consciousness in law students, and law schools have a responsibility to ensure that the teaching and learning of law encompasses an ethical dimension in which the attributes of professionalism are instilled.<sup>143</sup> This call is in line with the recommendations from the *Carnegie Report*,<sup>144</sup> which advocates for professional values to be embedded into all aspects of the law school

138 National University of Singapore, *Course Listing* (23 June 2014) <[http://law.nus.edu.sg/student\\_matters/course\\_listing/courses\\_desc.asp?MC=LC2009&Sem=2&MGC=1](http://law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LC2009&Sem=2&MGC=1)>.

139 Singapore Management University, *Pro Bono Centre* <<http://pbc.smu.edu.sg/>>.

140 Singapore Management University, *Pro Bono Centre: Quick Guide* <<http://centres.smu.edu.sg/pbc/quick-guide/>>.

141 National Pro Bono Resource Centre, *Pro Bono Partnerships and Models*, above n 49.

142 Rathna Nathan-Ganesh, 'Responsibility of Schools in Dispensing Equal Justice: A Singapore Case Study' (2011) 53 *Journal of the Indian Law Institute* 310, 311.

143 Ibid 316.

144 William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) 91 ('*Carnegie Report*').

curriculum. This recommendation aligns with the findings of Adcock<sup>145</sup> and Granfield,<sup>146</sup> which suggest that the building of a pro bono ethic needs to be embedded across a range of law school units, rather than relying on that ethic to be built solely by a student's involvement in a legal clinic unit.

## IV RECONSIDERING PRO BONO IN AUSTRALIA

### A Financial Contributions in Lieu of Practitioner Time and Service Commitments

The authors advocate for a reconsideration of pro bono work in Australia, and that the definition should be expanded to include financial contributions. Any such development is not aimed at replacing time contributions with financial contributions as it is acknowledged that there are a range of professional ethical responsibilities and wellness benefits that accrue from pro bono engagement. Rather, it is argued that greater flexibility in the definition of pro bono has the potential to improve the effectiveness and delivery of new pro bono protocols and partnerships. As discussed in Part III, accepting financial investment in established community legal services increases the flexibility of pro bono practice and has the potential to channel funds to institutions that are specialised in assisting those in need of pro bono assistance. Lessons from the US show that it is possible to draft a definition that prioritises time commitments, while still being flexible enough to include financial contributions. Model Rule 6.1 in the US favours pro bono delivery via no-fee legal services for indigent members of the community. Some states within the US are leading the way in respect of recognising financial contributions in lieu of requiring practitioner time commitment. While this approach is currently a form of pro bono on offer in various states within the US, Australia does not generally count such contributions towards pro bono practice. At present, any sort of financial contribution is viewed as a form of non-legal assistance adjunct to a firm's pro bono program.<sup>147</sup> The authors' position is that if a firm wants to give back to the community through their pro bono program by offering the work of non-legal staff or through the provision of financial or in kind assistance,<sup>148</sup> then this should 'count' as pro bono just as much as the provision of legal services currently does. Such

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145 Adcock, above n 92, 574.

146 Granfield, above n 99, 1412.

147 National Pro Bono Resource Centre, *Pro Bono Partnerships and Models*, above n 49, 235. The authors noted in Part II that the Victorian government's definition of pro bono includes additional forms of support such as financial and in kind support. The authors also noted that the framework for the operation of the policy makes it clear that in reality financial assistance 'is rare' and there is some doubt as to whether it meets the pro bono guidelines.

148 National Pro Bono Resource Centre, *About Pro Bono*, above n 22.

contributions should not be relegated to the category of ‘non-legal assistance’ which are not included within formal definitions of pro bono work.<sup>149</sup>

The question of boundaries in relation to the definition of pro bono work is a challenging one because it changes the conversation from ‘why should we do pro bono?’ to ‘how can we do pro bono more effectively?’. More effective delivery of pro bono services by specialised institutions may well increase both the efficiency and effectiveness of pro bono practices in Australia. Long-term trials, including financial contributions, as a valid way of discharging pro bono responsibilities are needed to assess how this type of pro bono commitment contributes to the mix of pro bono services provided. As noted in Part II, there are two competing and not necessarily compatible rationales for pro bono: the first, to meet the needs of indigent members of the community; and, the second, to confer wellness benefits on the lawyers that provide it. Whilst the authors contend the former rationale is of primary importance, the wellness benefits associated with pro bono practice remain important and it would be interesting to assess if wellness benefits can be retained when a financial commitment is made in lieu of a time investment. It may well be possible to design a system where the provider of the donation gets to engage in a limited capacity (for example, attendance at a particular event) in the delivery of the service, so that they can still feel connected to the practice of a pro bono ethic.

## **B Mandatory Pro Bono Curriculum Content for Law Students**

While many law schools currently offer legal clinic experiences for law students, including pro bono legal clinic placements, the scaling up of these programs to mandatory status requires a range of capacity<sup>150</sup> and assessment considerations.<sup>151</sup> It is essential to consider the impact of the introduction of mandatory pro bono engagement from the perspective of universities, students and the placement host (ie, community legal centres or placement organisations).

Universities see a range of benefits associated with clinical placements for students including: the opportunity to form stronger partnerships with the local community; creating partnerships with local service providers which might become potential graduate employers or sponsors; and enhancing graduates’ real world practical skills.<sup>152</sup> While many law schools are committed to increasing clinical legal education experiences for students,

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149 National Pro Bono Resource Centre, *Pro Bono Partnerships and Models*, above n 49, 235.

150 Judith McNamara et al, ‘Work Integrated Learning as a Component of the Capstone Experience in Undergraduate Law’ (2012) 13 *Asia-Pacific Journal of Cooperative Education* 1, 1.

151 See generally Judith McNamara, ‘The Challenge of Assessing Professional Competence in Work Integrated Learning’ (2013) 38 *Assessment and Evaluation in Higher Education* 183.

152 Bleasdale-Hill and Wragg, above n 115, 258.

this goal is often introduced in a phased approach, as opposed to a compulsory approach due to the resource intensive nature of staffing and running clinical placements.<sup>153</sup> There are a range of different legal clinic supervision models including:

- In-house live clinic – students are located at a service provider and work alongside practitioners;
- In-house live clinic approach with external funding – university provides funding to the service provider to host the students;
- Internship/placement model with a service provider – students assist provider with a broader range of tasks, as opposed to legal advice sessions;
- University hosted legal clinic – clinic established, funded and located on university grounds (students supervised by academics and/or practitioners);
- Non-casework clinic work carried out for service providers on university grounds such as legal research, law reform submissions, and organisation of legal education/community events (students supervised by academics and/or practitioners).<sup>154</sup>

Supervision of students by either practitioners or academics across any of these models has higher resource costs as the number of students involved in each clinic is generally smaller (around 5–8) than the number of students in the average tutorial (20–30). Law schools, therefore, have to find a way to develop efficiencies in other teaching areas in order to accommodate the increased costs associated with offering a clinical experience. Examples of efficiency measures may include moving to online delivery in appropriate circumstances, and reducing marking hours by changing assessment or reducing contact hours in later year elective units. These efficiency measures are likely to be controversial, and it is important that the introduction of clinical legal education initiatives do not unduly interfere with the development of other curriculum objectives and core learning outcomes. As such, balancing the budget to increase opportunities for student engagement in clinical education while ensuring that other threshold legal education learning outcomes are gained will remain challenging.

Assessing student performance in legal clinic units also requires careful consideration. Students may be assessed by staff from the placement organisation or by academics depending upon the legal clinic model adopted. Ensuring consistency in grading across various placement bodies can

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153 Ibid 259–61.

154 This list is modified from the work of Mary Anne Noone, ‘Time to Rework the Brand “Clinical Legal Education”’ (2013) 19 *International Journal of Clinical Legal Education* 341, 345.

raise challenges,<sup>155</sup> and the time required to assess students may act as a disincentive for placement organisations in continuing to participate in future placements. As legal clinics may involve a range of different tasks such as case-based or non-case work, designing an assessment regime to consider performance across a range of these different projects is also challenging. Competency-based assessment makes assessment more streamlined to administer across a range of projects. However, maintaining grade assessment means that students who really commit to the clinical experience are rewarded for their contributions. Assessment involving reflective exercises has been used as a means of maintaining grade-based assessment by assessing the learning of the students from the placement rather than the placement outcome itself.<sup>156</sup>

It is generally accepted that students gain practical skills from participation within legal clinics and that engagement in legal clinics improves professional networking opportunities.<sup>157</sup> Student expectations need to be carefully managed and they need to be informed about the importance of providing legal as well as non-legal assistance (for example, general administrative assistance) while in a clinic environment. As with the pro bono contributions by practitioners, a wide range of pro bono activities may be undertaken by students in legal clinic units. The opportunity for students to interview clients and draft legal documents will depend upon the complexity of the law involved. In some areas of law, students may be able to directly contribute to resolving legal issues. However, in complex areas of law (eg, Indigenous land rights claims, environmental matters) students may instead assist in legal research, law reform submissions, organising community legal education events, or assist with survey or data gathering work.<sup>158</sup>

It is really important to consider the resources and capacity of the placement host. Many legal clinic host organisations are community legal centres operating on very limited budgets. While supervision of students is embraced by most community legal centres as part of their legal professional duties, diverting limited staff time away from client matters to student supervision may raise issues in some institutions. Legal clinics that have been operating for some time may involve less practitioner supervision as resources may build up over time to assist students and greater experience of

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155 Victoria Murray and Tamsin Nelson, 'Assessment – Are Grade Descriptors the Way Forward?' (2009) 14 *International Journal of Clinical Legal Education* 48, 50, 53.

156 McNamara et al, above n 150, 183, 187, 189–90.

157 Ross Hyams, 'On Teaching Students to "Act Like a Lawyer": What Sort of Lawyer?' (2008) 13 *International Journal of Clinical Legal Education* 21, 24–5.

158 For an example of a non-casework legal clinic, see Evan Hamman, Rowena Maguire and Judith McNamara, 'Pro Bono Partnerships in Environmental Law: Enhancing Outcomes for Universities and CLCs' (2014) 39 *Alternative Law Journal* 115.

hosting students will mean that the organisation is better equipped to understand the types of contributions that students can make.

Consideration of the university, student and placement host perspectives suggest that it may be too early to move towards mandatory pro bono placements for all law graduates in Australia due to resource considerations. Law schools could perhaps adopt aspirational targets of providing a legal clinic to a certain percentage of graduates, which increases over time. Australia should carefully watch developments in Singapore and ensure that we gain from any lessons learnt in mandatory requirements for student pro bono engagement. As previously noted, clinical legal education on its own does not necessarily engender a pro bono ethic within students.<sup>159</sup>

Therefore, it is important to stress that instilling a pro bono ethic within law student populations needs to be embedded across the law curriculum and not just in clinical legal education units. Law in context and professional responsibility units are units particularly well suited to including content on the importance of professional duties and a pro bono ethic. The introduction of more specific content within these units would serve as the founding blocks of a law student's understanding of their professional responsibilities. Guest lecturers from the profession could be brought into the classroom to talk to the students about how their institutions value and engage in pro bono activities. Furthermore, these guest lecturers would act as role models for future law graduates by providing proof that it is possible to be a legal practitioner and committed to social justice. Presentations from inspirational practitioners can have a profound effect on the way in which a student views their role as a future legal practitioner.

### **C Evolving Partnerships and Building Relationships to Foster a Pro Bono Ethic**

In relation to the efficacy and success of all these models, relationships are said to be key. As a pro bono coordinator for a large law firm stated:

The most important factor in determining whether a project is going to work well is the strength of the relationships between the parties involved in the pro bono model. Both sides need to work at building and maintaining a relationship of trust, and not take the other partner for granted.<sup>160</sup>

Relationships take time to evolve and require investment by both sides to understand how to enhance service delivery and collaboration. However, the benefits that can arise from increased collaboration and new partnerships are significant. Pro bono practitioners in Australia need to consider new approaches to, and models of, partnerships to assist with promoting pro bono

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159 See discussion in above Part III about the role of law schools in the US. See also Rebecca Sandefur and Jeffrey Selbin, 'The Clinic Effect' (2009) 16 *Clinical Law Review* 57.

160 National Pro Bono Resource Centre, *Pro Bono Partnerships and Models*, above n 49, 26.

practice. This article makes three possible suggestions for enhancing partnerships in the pro bono arena including: corporate social responsibility programs as part of pro bono initiatives in order to increase engagement between firms and the community; increasing links between law firms and practitioners and community legal centres; and examining how practitioners can partner with universities to supervise students involved in clinical legal education.

The UK experience suggests that corporate social responsibility programs offer a pertinent alternative in a range of business contexts to extend the notion of ‘giving back’ to the ‘public good’, and of providing professional services ‘for free’. These programs include corporate sponsorships, direct provision of funds and financial assistance, and support with fundraising. Such approaches are not hindered or confined by restrictive definitions of ‘pro bono’ as being limited to the provision of services. Therefore, they arguably exemplify a more productive way in which to contribute to meeting the ethical duty of responding to the need for affordable legal services. The commitment from a wide range of firms to corporate social responsibility may result in increased partnerships between non-legal institutions assisting in the pro bono space (for example, the provision of assistance to individuals or groups in collecting evidence to be presented before a court). The inclusion of corporate social responsibility within a broader definition of pro bono means that legal institutions can give back in a wider variety of ways and build partnerships with a broader range of stakeholders.

Partnerships between law firms and community legal centres offer one way of including non-legal assistance in the range of work that counts as pro bono. Such partnerships offer an opportunity to open up the definition of pro bono and to make the definition more inclusive than exclusive as to what can be counted as ‘pro bono’. Rather than limiting the type of contributions to the provision of legal advice to clients and to organisations directly, more pioneering partnerships could include: the provision of legal research and contributions to law reform submissions; secondment of company staff; the provision of training, mentoring, and accounting services; contributions to community education material; office services such as photocopying; assistance with fundraising and strategic branding and marketing; and critically, in our view, the making of financial donations. Some law firms and community legal centres are already engaging in some of these more

inventive collaboration methods,<sup>161</sup> and we argue that this must increase in light of decreasing public sector funding for access to justice and pro bono.

Finally, new partnerships between universities and practitioners that promote pro bono practices should be encouraged. Many law academics do not renew practising certificates, making it difficult for them to supervise clinical legal education that involves the provision of legal advice. One option is to engage practitioners to supervise students involved in clinical legal education programs and to include this type of supervision within the definition of pro bono. This would also relieve community legal centre staff from some of the pressure in supervising students (who at present bear a much larger load of student development and supervision) and would allow practitioners to connect with the practitioners of tomorrow. Furthermore, this model would assist law schools in increasing pro bono placements and opportunities for law students, in light of the funding challenges discussed above. This model has the potential to multiply the benefits as the practitioner's expertise is used to supervise a number of students, rather than the work of the practitioner alone. In addition, this model provides a very practical method for reinforcing alumni links between the university and former students.

#### **D Mandatory Pro Bono Target or Reporting Requirements**

Lessons from the US suggest that the first step in deciding to either set a mandatory number of pro bono hours (or financial contribution equivalent) or mandatory reporting requirements requires careful consideration of the definition of pro bono. This article has advocated for a broader definition of pro bono practices that includes traditional legal advice, representation and law reform submissions, as well as contributions made under the corporate social responsibility banner, financial contributions and engagement with pro bono practices within universities.

Once a sufficiently broad definition of pro bono exists, one must then consider the goal of reporting. It is not really useful to only collect information on hours or financial investment alone, as this only provides a limited understanding of access to justice outcomes. Designing an appropriate metric will require careful consideration. Potential elements of a pro bono reporting metric could include: the number of lawyers participating in pro bono practice and some information on their place of employment (that is, large firm, government, small firm); the number of clients assisted; the time

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161 See, eg, Gadens Brisbane and Women's Legal Service Queensland: Gadens, *Gadens Takes Positive Steps in Fighting Domestic Violence* (20 August 2012) <<http://www.gadens.com/news/pages/gadens-takes-positive-steps-in-fighting-domestic-violence.aspx>>. See also Kingsford Legal Centre and Herbert Smith Freehills: National Pro Bono Resource Centre, 'Awards: Pro Bono Partnerships Highlighted' (2014) 76 *National Pro Bono News* <<http://www.nationalprobono.org.au/page.asp?from=4&id=318#1>>.



invested; the financial contribution; whether the service was provided for free or for a reduced fee; and some sort of component which reports upon the outcomes in a short and simple manner. Ideally, practitioners would log into an online system, which could collect and collate this information. It would be best for practitioners to log into this system each time they make a pro bono contribution. A simple app could perhaps be designed to make this easier. Access to this kind of data would really increase our understanding of pro bono practice and need.

The authors of this article believe that targets either aspirational or mandatory in nature are useful in encouraging pro bono practice. The setting of a target sends a message that pro bono practice is an expected and standard part of the legal professional practice. The Singaporean experience suggests that starting with an aspirational target might be the best way to bring the profession on board, with timelines set as to when this target will become mandatory. It is considered appropriate to move to mandatory targets, once a broad definition of pro bono is accepted, to ensure appropriate flexibility within the system. This approach prepares the profession for change and puts them on notice for a change in professional responsibilities. The next step in Australia is to start the debate about moving from an aspirational target to a mandatory target. Any move towards a mandatory hourly annual target must include sufficient flexibility and a broad definition of pro bono practice to ensure effectiveness and to engage the profession in a meaningful debate.

## V CONCLUSION

For the contemporary legal system, it is no longer a question of *whether* pro bono should play a key role. The importance of pro bono is self-evident. Rather, the important question is *what* role pro bono should fulfil in society and to what extent lawyers should be expected to do ‘law for free’.<sup>162</sup> Currently, strict boundaries are drawn around what ‘counts’ as pro bono work in Australia. This article argues that these boundaries need to be recalibrated to take account of international practices in pro bono and to broaden the scope and potential of pro bono work as it is practised in Australia, and makes three recommendations. First, financial contributions should count as pro bono contributions on the basis that this offers more flexibility and has the potential to increase efficiency. More consideration should be given to different ways of thinking about public/private partnerships in the access to justice debate. Partnerships formed in the UK that have a corporate social

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162 Cummings and Sandefurt, above n 1, 84; Chief Justice Robert French, ‘Pro Bono Publico – Cui Bono?’ (Speech delivered at the Law Summer School 2014, Perth, 21 February 2014) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21feb14.pdf>>.

responsibility framework provide some guidance on potential models to explore. In light of decreased public sector funding for access to justice, it is now necessary to start a national dialogue about novel public/private partnerships for access to justice and pro bono. The provision of financial contributions is worthy of consideration in this respect. The public sector has an important role to play in the provision of access to justice services and any reform in this area should not be undertaken with the purpose of decreasing governmental responsibility, but rather with the purpose of increasing effectiveness and reach of access to justice initiatives. Secondly, law schools need to explore ways to embed pro bono ethics and a commitment to social justice across the law curriculum, in both core and elective units. Law schools have a duty to develop ethically and professionally responsible graduates who understand the context of social and legal disadvantage and who leave law school with a firm understanding of their professional and ethical responsibilities for pro bono engagement. Finally, targets are a useful means for communicating to the profession information about expected pro bono contributions. Australia should follow the lead of Singapore and start a national dialogue about moving from an aspirational to a mandatory target. For any such move to be successful, the debate should include a broad definition of pro bono along with careful consideration of how to monitor and report upon such practices, taking into account lessons from the US regarding reporting.