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# Rethinking Pro Bono: Students Lending a Legal Hand

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*Sebastian De Brennan\**

## Introduction

This paper proposes a solution for law schools seeking to enhance access to justice in their communities, but with inadequate resources to divert towards fully-fledged clinical legal education (CLE) programs. The solution, it is suggested, is a student lead initiative based on a Canadian model entitled Pro Bono Students Canada (PBSC).<sup>1</sup> The author learnt of this initiative during a seven-month term at Osgoode Hall Law School in Toronto, Canada, a visit which triggered a realisation that Australia may not be meeting its potential when it comes to inculcating a vibrant pro bono culture in law school curricula. As the National Pro Bono Task Force of Australia stated in 2001, “very few Australian law schools have a considered or coherent policy in relation to developing a pro bono ethos in law students – although there are many scattered courses and programs”.<sup>2</sup>

Australia boasts a number of excellent programs which incorporate a pro bono ethic such as the Community Legal Centres (CLCs) which operate in conjunction with selected universities, including Monash University, Murdoch University, Newcastle University and the University of New South

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1 See generally S De Brennan, Pro Bono Special Report: Canadian Fix for Australian Pro Bono *Lawyers Weekly*, 16 April 2004 <http://www.lawyersweekly.com.au/articles/2F/0C01F02F.asp?Type=56&Category=849> (accessed 6 January 2006).

2 Australian Law Reform Commission (ALRC), *Report of the National Pro Bono Task Force to the Commonwealth Attorney-General* (Canberra: ALRC, 2001), at 31.

Wales.<sup>3</sup> However, these are extremely resource intensive<sup>4</sup> and often beyond the reach of law schools grappling with reduced government funding and other budgetary constraints. Because of the level of supervision required, clinical programs of this nature can often involve only a select number of law students, typically 5-12 in any one program. Finally, omitted in the vast majority of conventional CLE paradigms, is a whole host of other organisations, such as Non-Government Organisations (NGO's) and charities, which are often in desperate need of additional legal assistance.<sup>5</sup>

These issues are of concern when one considers the decline in legal aid funding and the well-documented strain being placed on community legal centres. Confronted with similar resource constraints, Canada has not only recognised the benefits of involving students in access to justice initiatives, but has also taken steps to strategically align university students to its overall pro bono objectives.

It is argued that the creation of a *Pro Bono Students Australia* – a highly visible and formulated pro bono program – would allow both lawyers and law students alike to put the ideals of justice, equity and accessibility into practice.

Part A of this paper explores pro bono in the Australian context, and the historical ambivalence towards involving law students at a national and concerted level. Part B looks at PBSC as a useful example of what can be achieved when law students are strategically involved in the delivery of pro bono legal services, as well as some of the practical issues associated with the Canadian program. Part C turns to the important issue of whether or not the Canadian program could be applied in the Australian context, acknowledging the contentious issues of supervision, liability concerns and jurisdictional idiosyncrasy. Finally, Part D of the paper provides conclusions, canvassing ongoing research and potential avenues for launching a Pro Bono Students Australia (PBSA).

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3 For an excellent outline of the great diversity of student orientated clinical programs see: Kingsford Legal Centre, *Clinical Legal Education Guide – Your Guide to CLE course Offered by Australian Universities in 2003 and 2004* [http://www.law.unsw.edu.au/centres/klc/Clinical\\_Legal\\_Education\\_Guides.asp](http://www.law.unsw.edu.au/centres/klc/Clinical_Legal_Education_Guides.asp) (accessed 6 January 2006).

4 L McCrimmon, Mandating a Culture of Service: Pro-Bono in the Law School Curriculum (2003-04) 14 (1) *Legal Education Review* 71.

5 There are myriad student programs of excellence operating out of Australian law schools, but these tend to be confined to the more traditional organisations such as Community Legal Centres (CLCs), Public Interest Information Access Centre (PIAC), Public Interest Law Clearing House (PILCH).

## PART A – PRO BONO IN AUSTRALIA

### The Problem of Definition

Arriving at a precise definition for pro bono work is an exercise that has bedeviled the profession for some time.<sup>6</sup> In 1998, the Law Foundation of New South Wales supported a comprehensive study that, amongst other things, provided a clear definition of pro bono services.<sup>7</sup> That definition, which has remained fairly robust, is as follows:

Pro bono legal services are services that involve the exercise of professional legal skills, and are services 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 organisations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good;
- public interest matters, being matters of broad community concern which would not otherwise be pursued; and
- the improvement of the laws or legal system in a manner which will benefit marginalised or disadvantaged individuals or groups.<sup>8</sup>

This paper takes a pragmatic and utilitarian view that the more people who are legally assisted – the better. Whilst there is a great deal to be said for those firms that go about their pro bono responsibilities according to their ability and with minimal fanfare, it would be misguided to think that all pro bono work is grounded in altruism. Rather than getting caught up in the definitional debate the author simply concurs with Gawler who notes that “pro bono is not usually a matter of choice; rather it is done on a daily basis”.<sup>9</sup> Thus, the above

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6 For an interesting discussion regarding the strengths and weaknesses of various definitions see: 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 Marriott Hotel, 20-21 October 2003.

7 Law and Justice Foundation of New South Wales, *Future direction for pro bono legal services in New South Wales* (Sydney: Law and Justice Foundation of New South Wales, 1998, reprinted 2002).

8 This final criterion was not included in the 1998 Report, but was added on by the Law Society in 2002 as part of its Pro Bono Policy, see Law Society Report, *New pro bono policy spells out commitment and strategies* (2002) 40 (1) *Law Society Journal* 37.

9 M Gawler, *Pro Bono in the Suburbs and Country*, paper presented to the First National Pro Bono Law Conference, Canberra, August 2000.

definition, for all its conceivable deficiencies, will suffice. The real objective of this paper is to demonstrate how Australian law students could help meet the “legal needs” of ordinary Australians through the creation of a pro bono student body based on the Canadian model.

In doing so, the paper proceeds from the vantage point that the distinction between student pro bono projects (supposedly rooted in ideas of benevolence) and clinical legal education or CLE programs (which, irrespective of notions of professional responsibility, can stand alone as an altruistically neutral academic/learning experience) is an arid one. This means that both concepts can, if channelled effectively, lead to material enhancements in access to justice.

### Pro Bono in Australia – a Potted History

The provision of free legal assistance to those who cannot afford it has a long history in Australia and elsewhere.<sup>10</sup> Pro bono has become a bit of a buzzword today, although, as recently as 1994 the Access to Justice Task Force, chaired by Justice Ronald Sackville, contained no explicit discussion of the possible role of pro bono legal services in increasing access to justice.<sup>11</sup>

It was around about that time, however, that greater attention was afforded to the existing and potential pro bono contribution of the legal profession. In 1992, the Law Council of Australia was prompted to publish a definition of pro bono, and 1993 saw the establishment of the NSW Public Interest Law Clearing House (PILCH).<sup>12</sup> In the following years, bodies such as the NSW Law Society, NSW Law Foundation and Victoria Law Foundation prepared reports or established pro bono projects and a significant number of additional pro bono referral agencies have since been established.

Pro bono legal work received renewed attention when the Federal Attorney General hosted “For the Public Good: First National Pro Bono Law Conference” on 4-5 August 2000 at the National Convention Centre, Canberra (“The Conference”) which brought together key stakeholders involved in the delivery of pro bono services throughout Australia. The Conference delegates considered the difficulties encountered

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10 D Robertson, *Pro Bono as a Professional Legacy*, in C Arup & K Laster eds, *For the Public Good: Pro Bono and the Legal Profession in Australia* (Sydney: Federation Press, 2001).

11 National Pro Bono Resource Centre (NPBRC), *Director’s Report: 2003 Annual Report*.

12 *Id.*

by disadvantaged persons in accessing pro bono services in the light of the government level of funding for Legal Aid. The Federal Attorney-General underlined the need for improved communications and co-ordination to match client needs with the available services. Existing institutions were encouraged to form partnerships between businesses, professional associations and Community Legal Centres in order to meet this need. A National Taskforce was convened to examine issues arising out of the Conference as well as research, promotion of pro bono best practice and quality assurance guidelines and mechanisms. Importantly, their Report recommended the establishment of a National Pro Bono Resource Centre (NPBRC).<sup>13</sup>

The reduction of Commonwealth funds for legal aid has resulted in increased numbers of people seeking assistance from CLCs and the private profession in areas traditionally covered by Legal Aid.<sup>14</sup> In a position that is staunchly supported by the author, the professional associations and their representatives have all put forward the view that pro bono work should not be used by Government to avoid its legal aid responsibilities.

At the state level, similar pressures prompted the NSW Legal Profession to conduct a comprehensive review into its provision of pro bono legal services. This culminated in the publication of a discussion paper, which would serve as a foundation for current developments.<sup>15</sup> In 2002, the Victorian government indicated that it would only accept tenders (for its approximately \$35 million worth of legal services) from those law firms performing a prescribed amount of pro bono work.<sup>16</sup> This development illuminated once again, the issue of

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13 See generally Law Society of New South Wales (LSNSW), *Pro Bono Work Promoting Cultural Change: Discussion Paper on the Review of Pro Bono Services by the NSW Legal Profession* (Sydney: Law and Justice Foundation of New South Wales, 2001).

14 See L Schetzer & J Henderson, *Access to Justice and Legal Needs – A project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (Sydney: Law and Justice Foundation of New South Wales, 2003) 33; Combined Community Legal Centres' Group (NSW) Inc, *On the Record*, Spring (2003) 52; *Newsletter of the NSW Community Legal Centres* 16; Demand Soars for Public Interest Help *Herald Sun* 9 July 2002, at 21; M Camilleri, Will the Real Pro Bono Please Stand Up?, paper presented at the National Community Legal Centre Conference, Melbourne, 2-4 September 2002.

15 LSNSW, *supra* note 13.

16 Victoria Law Foundation, *Future of Pro Bono in Victoria* (Melbourne: Victoria Law Foundation, 2001); K Towers, Victoria Forces Law Firms to Toe New Guidelines *Australian Financial Review* 22 March 2002, at 58. See also Hulls Reveals Legal Aid Scheme *The Age* 6 December 2001, at 6.

whether government should implement mandatory pro bono targets for the legal profession.<sup>17</sup> Further, conflict of interest issues quickly arose as lawyers became concerned that any pro bono work performed contrary to government agendas might prejudice them from securing lucrative government work.<sup>18</sup>

Research to date demonstrates that the demand for pro bono services is a demand that falls unequally on the legal profession. Whilst private practitioners in small firms spend more time on pro bono matters than their larger counterparts, they are often in a worse financial position to take on non-paying work.<sup>19</sup> Moreover, the large law firms that can best afford it generally specialise in areas least called upon for pro bono work, notably commercial and corporate law. The historically haphazard nature of pro bono legal services has done little to assuage the problems arising from this mismatch.

Although developments such as Law Access,<sup>20</sup> Public Interest Law Clearing House (PILCH), and the NPBRC have gone some way in alleviating problems of coordination, it would seem that many diverse pro bono services are offered by a large number of groups and organisations, without clear lines of communications or referral networks. Most schemes operate independently, and must at times present a confusing

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17 See Australian Law Reform Commission (ALRC), *Review of the Federal Civil Justice System: Discussion Paper 62* (Sydney: ALRC, 1999); D Hillard, Establishing a Voluntary Minimum Pro Bono Target for Australian Lawyers, paper presented to the Second National Pro Bono Conference: Transforming Access to Justice, Sydney Marriott Hotel, 20-21 October 2003 [http://www.nationalprobono.org.au/conference/pdf/2003\\_papers/3a\\_hillard.pdf](http://www.nationalprobono.org.au/conference/pdf/2003_papers/3a_hillard.pdf) (accessed 6 January 2006).

18 This concern was not unfounded. In September 2001, the Howard government decided to pursue costs (of nearly \$500,000) against the civil liberties group that took the *Tampa* case to the Federal court. Not surprisingly, prominent lawyers described this as “an attempt to intimidate people out of taking cases in the public interest”. See Making Law Group Pay Costs Deters Public Interest Cases *Sydney Morning Herald* 22 September 2001, at 6. See also M Priest, Law Firms Wary about Pro Bono Work *Australian Financial Review* 11 March 2004, at 3. More recently, the NPBRC has a Draft Protocol to address this issue which it is lobbying to see ratified at a state and federal level <http://www.nationalprobono.org.au/publications/index.html#protocol> (accessed 6 January 2006).

19 The Australian Bureau of Statistics (ABS), *2001-02 Legal Practices Australia Report* indicates that lawyers located outside capital cities undertake, on average, more than twice the amount of pro bono work than lawyers in capital cities; and lawyers in small practices, particularly those with only one principal, did significantly more pro bono than lawyers in practices with 10 or more principals/partners. See also Gawler, *supra* note 9.

20 Law Access NSW was established in 2002 and provides free telephone advice, referral services and legal information. A single point of access, it merges the services formerly provided by the Legal Aid Commission HelpLine and the Law Society of New South Wales Community Assistance Department.

array for members of the public who need to access essential pro bono services.<sup>21</sup> As the Law Society's 2001 Discussion Paper concluded: "Given the large number of groups and organisations, the delivery appears to be somewhat disorganised and disparate".<sup>22</sup> *Inter alia*, there was disturbing evidence given to the National Pro Bono Task Force in 2001 to suggest that, despite the high level of unmet legal need, and all the controversy over the level of legal aid funding, there were nevertheless some large firms which were unable to *spend* their annual pro bono budgets (because of insufficient referrals).<sup>23</sup> Against this history of adhocery,<sup>24</sup> calls for greater centralisation have been widespread.

Callings for greater centralisation on the pro bono plain (in terms of a "one stop shop" or clearing house) are undoubtedly persuasive, but one cannot underestimate the political issues implicit in that process. It is hard to imagine any of the multifarious pro bono and public interest providers divesting themselves of the status and resources they have fought so hard to get. By no means exhaustive, rationalisation of any kind will likely inflame issues of job security, location and travel, maintaining community connections and disenfranchisement. Already groups with vested interests have opposed models championing greater efficiency and effectiveness. For instance, in 1999 the NSW Bar Association was accused of protecting its own interests by the Law Foundation of NSW on the grounds that it had opposed the latter's "central clearing house" model.<sup>25</sup> An attempt to stratify the provision of pro bono services in South Australia was similarly unsuccessful.<sup>26</sup> Some have made no pretences about it asserting that any attempt to provide an umbrella organisation for pro bono services is neither "realistic nor effective".<sup>27</sup>

There is little doubt that the many organisations currently providing pro bono services throughout Australia share a

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21 LSNSW, *supra* note 13, at 10.

22 Schetzer & Henderson, *supra* note 14, at 39.

23 ALRC, *supra* note 2, at Appendix C.

24 This is a word coined by renowned management strategist Professor Henry Mintzberg. It describes a business strategy that is the converse to bureaucracy. In truth, adhocery is almost an oxymoron inasmuch as it is a structural configuration that denies structure. See generally S De Brennan, *Bureaucracy versus other organisational forms – The dinosaurs are back* (forthcoming) *Journal of Business Ethics*.

25 J Breusch, *Pro Bono Model Row Australian Financial Review* 26 November 1999, at 35.

26 H Rossi, *Lawyers Provide \$4m Free Work Sunday Mail* 1 October 2000, at 30.

27 *Reform Essential for Family Court Courier Mail* 19 February 2000, at 22.

desire to increase access to justice within their communities; however, the way in which these groups go about achieving this is often varied, if not idiosyncratic. Importantly, ad hoc pro bono arrangements are not always inefficient. CLCs, for example, perceive not disorderliness in their operations, but an ability to tailor services to community needs:

No two community legal centres are identical. Each centre has arisen due to perceived community needs, and is managed by community members. Generalist CLCs in particular are a product of the communities in which they are located.<sup>28</sup>

Of course, there is always room for improvement. “Rethinking pro bono” is not only necessary to ensure that the pro bono efforts of the legal profession are recognised by the community at large, but also to ensure that those in need of pro bono assistance get the most effective assistance possible.

### What About Law Students?

It is interesting to note that despite the obvious talents and abilities of law students, there have been few concerted efforts to align the law student to the overall provision of justice in Australia.<sup>29</sup> Even today, aside from the *Report of the National Pro Bono Task Force* in 2001, it is worth noting that very few reports dealing with access to justice advert to the possibility of making greater use of law students vis-a-vis meeting legal needs.<sup>30</sup> In 2001, the National Pro Bono Task Force made apparent: “Very few Australian law schools have a considered or coherent policy in relation to developing pro bono ethos in law students – although there are many scattered courses and programs”.<sup>31</sup> Given that law is one of the most competitive Australian courses in terms of entry requirements, this ambivalence is surprising.

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28 B Mitchell, *Some Reflections on Connections and Directions – Shared Visions for Clinic Law*, paper presented to the National Association of Community Legal Centres Conference, Hobart, September 2003.

29 De Brennan, *supra* note 1.

30 For example LSNSW *supra* note 13; Schetzer & J Henderson, *supra* note 14, say nothing at all of the law student. Even in Melville’s comprehensive study of CLCs, although students are said to comprise 21% of all CLC volunteers, very little attention is devoted to this group. See R Melville, *My Time is not a Gift to the Government: An Explanatory Study of NSW Community Legal Centre Volunteers* (University of Wollongong: Combined Community Legal Centres’ Group (NSW) Inc., 2002).

31 ALRC, *supra* note 2, at 31.

CLE type courses are offered in just over half of Australia's universities, and even when offered, are only available to a relatively small proportion of students. For example, Sydney University generally only has the capacity to place twenty students as part of its "external placement program" (which runs twice per year). Further, the innovative CLE developments that have taken place seem to involve pairing with CLCs, Legal Aid, PIAC or what one might refer to as mainstream legal providers. There are comparatively few CLE models in Australia which incorporate a number of other "legally needy" organisations. One only has to think of some of the larger charitable organisations, many of which have solicitors "in-house", and could very well benefit from using pro bono law students for various legal tasks and matters.

This is not to criticise the many innovative student centred programs that have been adopted by universities and the legal profession alike,<sup>32</sup> merely it is suggested that there are sound reasons for establishing a highly visible and formalised pro bono program in Australia.

For some time now it has been acknowledged that "law school is as much a professional socialisation experience as it is a skills building exercise"<sup>33</sup> It is now well recognised, that crucial to that socialisation process, should be the formal integration of professional values and ethics, as well as a public service ethos in conjunction with "black letter law". Relevantly, the New South Wales Law Reform Commission has noted:

It is inadequate to teach ethics and professional responsibility as if these are matters of etiquette which must simply be transmitted, committed to memory and recalled on the appropriate occasions (such as the examination). Rather, these are matters which are bound up in the fundamental nature and essence of lawyering and legal professional practice, which necessitates a process or problem-solving approach to the project. Ideally, this involves a clinical approach, and certainly the opportunity for reflection and discussion, but in any event we regard the "large lecture" as an unsuitable pedagogical technique (and the large lecture hall an unsuitable venue) for creating a professional

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32 Kingsford Legal Centre, *supra* note 3; J Dickson, 25 Years of Clinical Legal Education (2004) 29 (1) *Alternative Law Journal* 42; High Noon at the Nunnery *The Age* 9 December 2000, at 5; K Olsson, Interview with lawyer Mark Bucknall *Courier Mail* 29 March 2003, at L16.

33 J Baillie & J Bernstein-Baker, In The Spirit of The Public Service (1994) 51 *Law and Inequality* 667, at 668.

sensibility and developing a thoughtful and lasting commitment to ethical conduct.<sup>34</sup>

In the *Report of the National Pro Bono Task Force 2001* there was virtual unanimity about the crucial importance/central role of legal education in fostering a “pro bono culture”.<sup>35</sup> The suggested means for promoting this culture, as recommended by the Task Force, include:

- The need to start early – inculcating the ethos from the first day at law school,<sup>36</sup>
- Reflective courses on the role of law and lawyers in society;
- Well structured and well supervised programs of experiential learning; clinical legal education programs; placements with community legal centres; internships/externships with a public interest focus;
- Choosing graduate speakers who represent/emphasise this ethos; and
- Ensuring that career fairs for students include representation from the pro bono/public interest/legal aid/CLC sector.

We must be careful not to expect too much from these strategies. The challenge is to arrive at a model that is not too demanding in terms of resources; has a greater reach than traditional CLE models; assists in the endeavour to bring greater centralisation to the pro bono plain; mitigates liability, professional insurance and supervision issues (a point which will receive attention in Part C of this paper); will be politically attainable insofar as it does not require other public interest organisations/clearing houses to surrender their “turf”; and finally, a model that will align itself to the legal needs of its immediate community.

In short, one is charged with discovering a model of panacean proportions. It is unlikely that any model “can be all things to all people” but clearly some frameworks handle the tensions better than others. It is submitted, that a model premised on

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34 New South Wales Law Reform Commission (NSWLRC), *Scrutiny of the Legal Profession: Complaints Against Lawyers, Report No 70* (Sydney: NSWLRC, 1993).

35 ALRC, *supra* note 2, at Appendix C.

36 It has long been acknowledged that the best way to get people involved in volunteering is through personal contact. That is, people are either asked by someone they know, or contact is made through an organisation in which they are already affiliated, or through a family member or friend. Indeed, one of the main reasons people do not get involved is because “no one has ever asked them”. See Melville, *supra* note 30, at 30.

PBSC is one that has enormous appeal for universities seeking to enhance access to justice in their communities, but without the resources to establish or maintain large-scale public service orientated CLE programs.

## PART B – PRO BONO STUDENTS CANADA ("Not a panacea but a good alternative")

PBSC is a national network of law schools and community organisations that matches law students who want to perform pro bono work with public interest and non-governmental organisations, government agencies, tribunals and legal clinics during the academic year and university break.<sup>37</sup> As part of the program, a lawyer is required to supervise participating students. As the incomplete PBSC website quickly makes apparent:

A lawyer supervisor is critical to the project. A lawyer who volunteers for this role only has to commit from 5 to 10 hours a year on the project.<sup>38</sup>

The first PBSC program commenced in 1996 and involved some 50 students and a handful of organisations at one law school. After the success of the first phase of the program, the founders of PBSC set about expanding this innovative program across the province, and later throughout the country. Today the program is in every Ontario law school and in 17 law faculties across Canada.<sup>39</sup>

Since its inception, the program has involved approximately 5,000 students. Currently, more than 1,000 students participate each year – which does not include the many students who attend events and learn about the importance and values of pro bono service through the presence of the program and its impact on law school culture over the past seven years. These numbers increase annually. According to the PBSC website, each year PBSC sends a new wave of lawyers committed to pro bono into the profession.

The "Placement Program" is PBSC's foundation program. Through this, PBSC matches law students with community groups, public interest organisations, and lawyers performing pro bono work. PBSC has extended its reach to more than 500 organisations in a diverse range of communities. The students in this program conduct legal research, engage in

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<sup>37</sup> See generally [www.law.utoronto.ca/probono/](http://www.law.utoronto.ca/probono/) (accessed 6 January 2006).

<sup>38</sup> *Id.*

<sup>39</sup> The other provinces have been more dormant than Ontario, but this appears to be changing.

legal drafting, provide public legal education, and advocate on behalf of communities in need. Among other tasks, the students research; pending legislation, legal issues and current policy questions; draft policies for organisations and manuals for their clients; and help organisations provide legal information and assistance to their clients. Through this program, thousands of Ontario law students have assisted hundreds of community groups and tens of thousands of people with legal needs throughout the province,<sup>40</sup> whilst simultaneously enhancing their own legal education.

More recently, PBSC has piloted a number of additional programs, including a very successful “Court Program” to assist litigants in person in family law cases under the supervision of duty and advice counsel.<sup>41</sup> In addition, the “Pro Bono Awareness & Education Program”, which engages

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40 Sample organisations assisted by PBSC include: West Coast Domestic Workers Association, the BC Tenant Rights Action Coalition, Sierra Legal Defence Fund, AIDS Calgary Awareness, Children’s Legal and Education Resource Centre (Calgary), Nova Scotia Human Rights Commission, Halifax Refugee Clinic, Association Cooperative d’économie Familiale de Quebec, Heritage Winnipeg, B’Nai Brith (Montreal), Black Youth in Action (Montreal), Centre de Prevention de la Violence Familiale de Kent (Moncton), New Brunswick Environmental Network, Refugee Law Office (Toronto), Toronto Child Abuse Centre, Urban Alliance on Race Relations, Centre for Equality Rights in Accommodation, Democracy Watch (Ottawa), Alzheimer Society of Saskatchewan, Breast Cancer Action Saskatchewan.

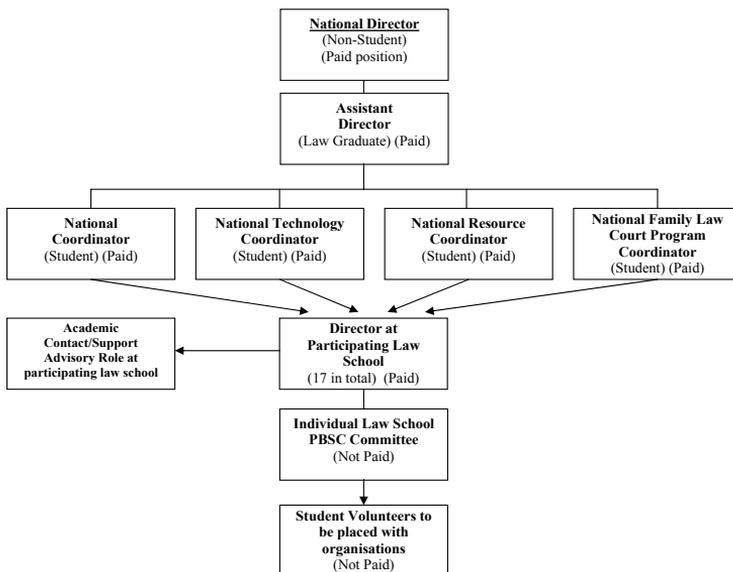
41 The Family Law Project (FLP) is a joint project of Pro-Bono Students Canada (PBSC), Osgoode Hall Law School, and the University of Toronto Faculty of Law and may also be amenable to replication in the Australian context. It began in 1997 as the result of a speech given by the Honourable Justice Harvey Brownstone to University of Toronto law (U of T) students. In his speech Justice Brownstone revealed that as many as 70% of family court litigants lack legal representation. In response law students from U of T and Osgoode Hall collaborated and formed the Family Law Project. FLP volunteers work directly in the 311 Jarvis Street Family Court in downtown Toronto. Students assist people who do not have a lawyer by helping them complete the necessary court forms and by answering questions about the court system and process. Without legal representation or student help, people in family court may be left to draft court documents and navigate the court system on their own. The FLP aims to alleviate the stress and uncertainty facing parties who cannot afford a lawyer in family court. It also aims to assist the court system with the problem of unrepresented litigants by ensuring that forms are filled in effectively and concisely. For law students the FLP provides the opportunity to gain practical legal skills in drafting and interviewing and to learn about court processes and family law issues. Since 1997 over 200 students from Toronto’s two law schools have assisted over 3,000 unrepresented people at the 311 Jarvis Family Court. In the summer of 2003 the FLP expanded for the first time to the Family Court in Scarborough at 1911 Eglinton Avenue. The Family Law Project now operates out of law schools throughout Ontario as well as Dalhousie University in Halifax <http://www.law.utoronto.ca/probono/specialprograms.htm> (accessed 1 June 2005).

a broader audience who may not be able to commit to a placement, but are interested in some of the other events put on by PBSC (such as talks from prominent speakers, fundraisers etc).

### The Mechanics of the “Placement Program”

PBSC is lead by a National Director and an Assistant Director. The central office consists of a director and the following positions: program coordinator, technology coordinator, resources coordinator, and court program – family law project coordinator. Depending on student availability, sometimes the positions are split between two students. From the outset, the director is nominated to run the program on a student leadership model. Accordingly, the director acts as the only non-student personality. Thus, law students are hired by the director to assist in overseeing the program and fill the various other positions.<sup>42</sup> This also makes the program more cost-effective. At each law school there is a faculty or staff member who is designated as an on-site contact person for the program, and who provides support when and where necessary. Figure 1 illustrates the governance structure of PBSC:

Figure 1 – PBSC Governance



<sup>42</sup> As the coordinating role at each participating law school, the nominated Coordinator (who is often also a law student) is a paid position. Given the amount of logistical work this entails, to not pay this person would be unjust.

The Canadian experience is that the above structure works quite effectively. At times the director of the participating law school has been overwhelmed, prompting the appointment of an additional student to assist with peak demand. Although the creation of the “individual school pro bono committee” is not considered mandatory, PBSC “strongly encourages” these. Specifically, the central governance board suggests that the committee be comprised of students with proven leadership capacity and, where possible, a demonstrated commitment to the program.

In the absence of a compelling reason(s) to depart from the above model of governance, it is submitted that a similar model should be adopted for PBSA. Certainly, the importance of implementing an effective organisational structure should not be underestimated. Evidence shows how volunteers quickly become disillusioned in poorly managed organisations.<sup>43</sup>

As can be seen universities, whilst critical to the project, should not attempt to monopolise what is essentially a student driven program. This is important in ensuring impartiality. If universities were to acquire a stranglehold on the program then volunteer students could become susceptible to the institutional desires of the officiating university or, potentially worse, have to perform pro bono work that is politically imposed by the government of the day. This is not to hold the student run organisation beyond reproach. Legitimising bodies, such as universities and government, have every entitlement to see that the community needs are being attended to. However, subject to appropriate accountability mechanisms, by keeping the management of PBSA in the hands of capable students, PBSA’s first priority becomes the community it purports to serve. Finally, by having some degree of autonomy from funding bodies the student initiative is less likely to be plagued by the bureaucratic processes that frequently characterise universities and government departments. In this way the notion of responding to discrete community needs becomes more than idle rhetoric, as students determine what pressing access to justice projects exist in their localities.

### How Do Organisations Qualify for Pro Bono Law Students?

To qualify for participation, an organisation must be an incorporated, non-profit organisation that offers public interest programs to the community or deals with issues of

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<sup>43</sup> Melville, *supra* note 30, at 30.

public interest in some other capacity. PBSC students may also work with lawyers that are doing pro bono work. Students can also work with various government agencies that are doing public interest work. Membership in PBSC is available at no cost to qualifying organisations that want to participate. Of course, projects have to be substantially legal in nature to qualify for a PBSC placement. Importantly, it is the role of the law school director to ensure that requests for volunteer law students do in fact meet the public interest and are not simply shams aimed at obtaining “free labour”.<sup>44</sup>

If an organisation determines that they meet the PBSC criteria the next step is to fill out an organisation profile form, develop a project proposal, and submit it to the student coordinator at the member law school closest to the organisation’s location. Organisations may submit multiple project proposals depending on the number of legal problems for which they require assistance. Efforts are then made to match students with appropriate skills, interests and experience to that organisation.

Once a project proposal is approved by PBSC and students are placed with the organisation, the organisation must complete a release from liability form acknowledging that PBSC can only provide legal information and not legal advice or opinion. This form also outlines the circumstances under which PBSC cannot be held legally liable for information provided or work done for participating organisations, agencies and so forth. PBSC is very clear about this requirement often including in its documentation the following caveat:

It should be noted that legal information differs from legal advice and PBSC students are incapable of providing any form of legal advice to organizations, programs, individuals, or their clients or counsel.

For an Australian institution contemplating adoption of the Canadian model, delineating between legal information and legal advice may seem somewhat arbitrary. There is, of course, the notion that we can unbundle the provision of legal services, but even if we do so, can we really assert that there is a universally accepted juncture at which legal information

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44 For example, the coordinator at Osgoode Hall spoke of dubious academic requests where research assistance was required for projects that appeared to be largely “personal in nature” and would struggle to meet many definitions of pro bono work. This once again raises the problem of definition in relation to pro bono. Rather than relying on a precise definition, PBSC have decided to assess this on a case-by-case basis. Again, it is submitted that this approach should not be disturbed.

enters into the realms of legal advice? Unfortunately, the author cannot proffer any solutions to this problem other than to say that the best way to ensure that students do not exceed their delegated authority is for their lawyer supervisor to be extra judicious in monitoring and “signing off” their work. Activities that could be perceived as precarious should also be highlighted during training and induction sessions.

This is consistent with the Canadian model which requires students to undergo a comprehensive training session, and the signing of an agreement indicating that they understand, and will not contravene, the professional responsibility issues germane to the PBSC placement.

### What is Required of Member/Host Organisations?

An organisation wishing to be matched with a law student volunteer is required to provide the student with substantive work (with a sufficiently descriptive outline of the work required) and supervision for the duration of the placement. There should be an onsite supervisor and a lawyer supervisor, or, where relevant, the same person may acquit this duty. Again, lawyer supervision is not a matter for debate; and if an organisation has a lawyer on staff or on its board of directors then this is an ideal candidate for PBSC placement supervision. A lawyer who volunteers for this role has to commit a minimum of five to ten hours a year on the project.

Placements are generally conducted on a fairly flexible basis and most Canadian law schools request that student volunteers be granted special dispensation during exam/assessment periods. Students are available to contribute a minimum of three hours per week to work on their placement and a maximum of ten hours. Organisations are required to meet with their student volunteers periodically over the course of the placement to ensure that the students’ work is conforming to the needs of the organisations as outlined in the project description. In addition, organisations are sporadically asked to fill out an evaluation form on students, assessing the quality of their work as well as the organisations’ overall satisfaction with the PBSC’s matching process.

### What is Required of Students?

Once a match is made students are required to attend a training session at the beginning of the academic year and sign agreements that they will act professionally in respect of the project. During the academic year students will be required

to meet with the PBSC Coordinator. The PBSC office will also ask students to fill out evaluation forms during the year to see how placements are going and what support the PBSC office can provide.

Other requirements of students might be described as “housekeeping” and include: if the student is unable to meet a deadline or attend a scheduled meeting they must clearly inform the affected organisation so that alternative arrangements can be made. Beyond that, students are required to act professionally, enjoy themselves and to try to learn as much as they can while working with their designated organisation.

Such an approach would appear to be desirable. Like their Canadian counterparts, Australian students must be careful not to participate in their pro bono projects to the detriment of their academic standing. Petersons’, for example, has shown through his study of more than 1600 Australian students how, as the hours of their work increased, their GPA’s (Grade Point Averages) deteriorated.<sup>45</sup>

## Examples of PBSC Projects

There are myriad projects that have been completed through PBSC. For instance, the author took a considerable interest in the work of two Osgoode Hall Law School students. The first worked for the Office of the Minister of Labour in Ontario while the other provided paralegal assistance at the Ontario Rental Housing Tribunal. Both students stressed not only the value of their placements in terms of situating their legal studies, but also indicated that they had thoroughly enjoyed themselves. Aside from these specific projects, other common projects include:

- Researching legal issues relevant to the organisation or their clients.
- Contributing to advocacy work on behalf of the organisation.
- Producing reports and policy papers.
- Assisting counsel in legal proceedings.
- Re-drafting board policy and manuals.

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<sup>45</sup> M Petersons, All work and no play changes university life *Across Campus*, see generally <http://www.pr.mq.edu.au/macnews/previous.asp?Edition=112005> (accessed 6 January 2006).

- Performing legal education such as writing brochures or presenting workshops.

There are of course a number of other possibilities available to Australian law schools, but it would make sense to consider aligning Australian law students with disadvantaged legal groups.

In the recently released *Access to Justice and Legal Needs Report*,<sup>46</sup> it was illustrated how those from culturally and linguistically diverse backgrounds (CALD) are often disadvantaged when it comes to asserting their legal rights. Specific problems included: difficulties with the availability of interpreters; lack of cultural sensitivity with diversionary programs and mediation/conciliation; lack of rights in relation to migration matters; and the fact that many legal information websites are not available in other languages. Provided there were appropriate checks and balances in place, the author can see no reason why law students could not assist with interpretation services and culturally sensitive matters. Professor Altobelli has said of the heterogeneous makeup of Australian law schools:

The multicultural diversity of modern Australian law schools is rarely fully appreciated and gives an interesting insight into the diversity in which lawyers will practice.<sup>47</sup>

The Professor proceeds to describe an activity in which he asked students at the University of Western Sydney (UWS) to indicate the country of birth of their mother and father (an exercise that was undertaken over 1996, 1997, and 1998). The results are intriguing and indeed worthy of further investigation. Over half of the law students came from a non-English speaking background. As Dr Altobelli concludes:

If law students are so multiculturally diverse in their backgrounds how much moreso is the community in which they will practice? Whatever the results, the implications are explored and will need to be applied in the reality of practicing in a multicultural society. Will students who have a multicultural background be better able to practice law in a multicultural society?<sup>48</sup>

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46 Schetzer & Henderson, *supra* note 14.

47 T Altobelli, *Family Law Theory meets Practice* (Sydney: Butterworths, 1999) 25.

48 *Id.*

There are also other potential areas of involvement for students. Once again in the *Access to Justice and Legal Needs Report* it was duly noted “most solicitors lack skills in dealing with children and young people”. It is envisaged that law students could also act as an intermediary between these two groups.

Although the ALRC has noted for some time now, the utility of the Internet for providing legal information – and as far as other possibilities are concerned – one only has to visit the web pages of a number of CLCs to realise that many of them contain little more than basic contact details. The absence of comprehensive legal information on their websites probably arises due to resource constraints but, again, this is an area in which the law student could contribute. Most CLCs produce comprehensive pamphlets on common legal topics for their communities. Law students with combined IT degrees or with web design competencies could upload these publications on CLC websites with minimal ordeal. We should not forget that today’s students are often proficient in online legal resources which may be completely alien to older lawyers. The usefulness of databases such as LexisNexis, Quicklaw and others, should not be overlooked and it is quite possible that the technological savvy law student may be able to teach the older practitioner “a thing or two” where legal research is concerned.<sup>49</sup>

Also research related, the role that libraries can play in increasing access to justice has been well documented.<sup>50</sup> A worthwhile program might be to use final year law students as assistant librarians to guide people through available legal information at their local libraries.

Finally, a PBSA corpus might wish to go beyond the Canadian model by providing a legitimate outlet for youth wishing to participate in law reform and public policy. Moreover, the organisation may wish to recruit students in contiguous fields (such as journalism, media, criminology, social work and counselling). In this regard PBSA could assess legal needs in a more holistic way. But any plans for diversification will ultimately be contingent upon the success

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49 For examples of historically marginalised groups using the internet to bring attention to their plights with a newfound immediacy see: S De Brennan, Critique, Culture and Commitment: The Dangerous and Counterproductive Paths of International Legal Discourse (2004) 2 *Law, Social Justice & Global Development Journal* [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004\\_2/debrennan/](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/debrennan/) (accessed 6 January 2006).

50 Schetzer & Henderson, *supra* note 14, at 243.

of the flagship program – that being the student placement program mentioned above.

These are just a few of the areas in which the law student could be used. The scope for integrating the student in a whole range of areas raises some exciting possibilities.

## Benefits and Outcomes

The PBSC website indicates that students participating in its program may expect to:

- Learn how to bridge theory and practice.
- Develop practical legal skills through working with international, national and community organisations.
- Enhance employment prospects.
- Be exposed to a variety of legal issues and career options.
- Network with members of legal and public interest communities.

To this list the author would add:

- Gain an appreciation that, for all one's troubles, there are people out there who are significantly "worse off". That is, an ability to empathise – an attribute which in the author's opinion is far too often absent in legal practice today.
- Involvement in work that is intrinsically satisfying and consistent with the true ideals of justice. High Court Justice Michael Kirby put this well when he remarked:

The pro bono shift in Australian firms affords a variety of challenges to the highly talented young lawyers who need occasional rotation from a six trolley commercial dispute. It reminds them of the imperative demand for justice that may have originally sparked their interest in the profession of law.<sup>51</sup>

## Benefits for the Host Organisation

Obviously there are a number of benefits for host organisations as well:

First, and again according to the PBSC website, the Program gives organisations access to highly skilled and committed volunteers and provides underrepresented and disadvantaged communities with pro bono legal services.

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51 A Crossland, Let Me Give You A Little Bit of Free Advice *Australian Financial Review* 14 November 2002, at 3.

Second, there are purely selfish reasons why law firms should be performing pro bono services. One of the most comprehensive Australian surveys of its kind, *Passion People*, attracted more than 1100 respondents and concluded that firms who provide pro bono opportunities/have a sense of social responsibility are more likely to attract quality graduates.<sup>52</sup>

Third, not only is there a sound business case for lawyers and law firms to engage in further pro bono work (in terms of recruitment, morale, securing lucrative government work etc.) but it may also assist in securing some of the privileges afforded to the legal profession as a whole, namely the right to self-regulate.

### Wider Benefits

It would also seem that PSBC has made a profound impact in promoting a pro bono culture. The National Director of the program, Ms Pam Shine, has summed this up well:

The difference this program has made in the perception of lawyers in the community is impossible to overstate. Our member organisations now depend on law student pro bono service. It is regularly the case that important projects that affect marginalised communities are accomplished only through the work of pro bono students. The program has significantly enhanced the profile of law schools in their communities and the impression of the profession in society as a whole. As a result of the work of PBSC, many times the first contact a community group or disadvantaged person has with the profession is through a pro bono student – an experience that never fails to undermine popular notions about lawyers and the values of the profession, and replace them with a new, positive set of images of lawyers...The level of participation in the program is inspiring. Those involved have made and continue to make a remarkable contribution to the disadvantaged and the organisations that represent them. As the program has developed roots in the law schools, there has been a cultural shift, first in the schools and now, increasingly, in the profession. It is not infrequent for PBSC students to ask about pro bono commitment in law firm interviews and envision their careers based on their experience and knowledge of pro bono.<sup>53</sup>

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52 See Cavill + Co, *Passion People*, 2004 <http://cavill.com.au/pages.asp?area=13&page=72> (accessed 6 January 2006).

53 P Shine, speech delivered at the University of Toronto, 30 December 2003.

His Honour Justice Robert Armstrong of the Ontario Court of Appeal has captured this cultural shift:

The establishment of PBSC has also changed the nature of legal education in Canada, ensuring that the next generation of lawyers is entering the profession with not only an appreciation of the importance of pro bono work, but also significant experience doing pro bono work throughout law school.

The impressive level of participation in these programs by lawyers, law students, community groups, and law schools signifies a noteworthy shift in the culture of the profession with respect to the importance of public service. PBSC has become a fundamental and widely applauded initiative in great demand across the province and country. The program has significantly increased the amount of public service provided by the profession to the community, and in particular to marginalized communities.<sup>54</sup>

It is hoped that many of these benefits would also materialise in the Australian context. The Institute of Chartered Accountant's partnership with Pro Bono Australia provides a good case in point. In an approach not dissimilar to the Canadian template, those bodies joined forces in early 2001 to put members in touch with community groups in need of professional accounting assistance (via a database).<sup>55</sup> By late 2001, it had already attracted some 100 members. Discussions with the manager of the program reveal that the organisation now has over 1,000 registered professionals on its books and more than 1,500 not-for profit users of pro bono accounting services.<sup>56</sup>

## PART C: TRANSFERABILITY AND THE ISSUE OF LIABILITY

Although this paper argues for the adoption of a Canadian based model, it is duly acknowledged that no foreign model is readily transferable. Before any foreign model is mooted it is important to assess the similarities and differences between community based legal providers in Canada and Australia respectively. On a purely general level, it is worth noting that Australian volunteers are less inclined to get involved in

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54 Excerpt from a December 2001 letter to the Law Foundation of Ontario (supplied by P Shine, National Director PBSC).

55 C Nader, CA's Get Communal Urge *The Age* 10 September 2001, at 5.

56 Email from K Burr, Communications Manager: Mahlab Group and Pro Bono Australia to author, 18 May 2004.

community organisations and other kinds of “associations” than their Canadian counterparts. Put differently, research suggests that Australians are less likely to be “joiners” than those in the United States and Canada.<sup>57</sup>

This paper juxtaposes the province of Ontario, Canada (the birthplace of PBSC and undoubtedly the most active PBSC arm) with New South Wales, Australia (the proposed site for an Australian equivalent of the Canadian program).

An appropriate starting point in any analysis is to compare the populations of the two states/provinces of interest. As of the 1 October 2003, Ontario had a population of 12,280,007.<sup>58</sup> According to the 2001 National Census, the state of New South Wales (NSW) had approximately half that population at 6,371,745.<sup>59</sup>

Professor Flemming has noted the significant “comparability” concerning legal aid management in Australia and Canada in his comprehensive study for the Department of Justice Canada.<sup>60</sup> In terms of what one might call community legal clinics, Ontario has 79 clinics throughout the province; NSW, on the other hand, has 41.<sup>61</sup> Importantly, there is no National Association of Law Clinics in Canada. This may be because Ontario is the only province with a developed poverty law system.<sup>62</sup> Currently Legal Aid Ontario provides approximately \$52 million to 79 clinics.<sup>63</sup> Crude calculations equate to an average of \$658,227 per organisation, which

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57 M Pusey, *Middle Australians in the grip of economic reform...Will they volunteer?* in J Warburton & M Oppenheimer eds, *Volunteers and Volunteering* (Sydney: The Federation Press, 2000). This also became apparent after spending some time at a Canadian law school where legal fraternities and sororities were commonplace.

58 See Government of Ontario webpage for population and density statistics <http://www.gov.on.ca/MBS/english/about/index.html> (accessed 6 January 2006).

59 See <http://www.abs.gov.au/Ausstats/abs@.nsf/0e5fa1cc95cd093c4a2568110007852b/6949409dc8b8fb92ca256bc60001b3d1!OpenDocument> (accessed 6 January 2006).

60 D Fleming, *The Purchaser-Supplier Approach in Legal Aid*, Legal Aid Research Series (Ottawa: Department of Justice Canada, 2002).

61 See *Combined Community Legal Centres Group (NSW)* <http://www.nswclc.org.au/clcs.html> (accessed 6 January 2006).

62 In 1998, the Ontario government enacted the *Legal Aid Services Act (The Act)* in which the province renewed and strengthened its commitment to legal aid. The *Act* established Legal Aid Ontario (LAO), an independent but publicly funded and publicly accountable non-profit corporation, to administer the province's legal aid program. See Mitchell *supra* note 28, at 5-7.

63 See Legal Aid Ontario <http://www.legalaid.on.ca/en/area.asp> (accessed 6 January 2006).

seems roughly equivalent to the funding received by larger Australian CLCs. Crudely, the Canadian province of Ontario has nearly double the legal clinics to meet the needs for a population which is double the size. Based on even this rather vacuous looking data, it could be said that just as there was scope for an Ontario based student organisation to supplement the work of legal aid, so too may NSW be a suitable site for a similar student corpus. As alluring as this conclusion may be, one must note, in some detail, the main points of difference in the two jurisdictions.

Firstly, of relevance is the difference in the theoretical or philosophical underpinnings of the two systems. In Canada, neighbourhood law offices and clinics have developed as a specific response to poverty, whereas in Australia, centres developed in response to concepts of access, need, equity and equality.<sup>64</sup>

Secondly, in Ontario the private Bar tends to do most of the "certificate" work in criminal and family law. Clinics may undertake criminal law and family law where there is no other service provider. This stands in dire contrast to Australia where family law constitutes as much as one third of all legal work. In the Ontario system, family law is not generally viewed as part of poverty law practice (although this is starting to change). The reasons for this have been given and include: (1) There is an established private Bar in most communities that does family law and does it well;<sup>65</sup> (2) Legal Aid provides certificates for many family law issues; and (3) Family law practice can become overwhelming, thus "crowding out" other work.<sup>66</sup>

Accordingly the principal areas of practice are somewhat different:

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<sup>64</sup> Mitchell, *supra* note 28, at 8.

<sup>65</sup> One important aspect of poverty law practice in Ontario is that the model is entrenched in statute and therefore formally recognised as the sole province of the clinic. One clear benefit of the practical distinction between clinic law and other areas is that there is minimal competition between the community sector and the private Bar for legal aid based client funding. Indeed, the relationship between the private bar and clinics is quite good and this separation of work probably helps maintain the goodwill between these distinct legal providers.

<sup>66</sup> Mitchell, *supra* note 28, at 22.

**Table 1: The provision of poverty/community law in Canada and Australia<sup>67</sup>**

Canada		Australia	
Income security	62%	Family law	20%
Housing	21%	Credit and debt	10%
Administrative	10%	Criminal charges	8%
Other	7%	Consumer issues	8%
		Tenancy and housing	8%
		Motor vehicle accidents	6%
		Personal injuries	5%
		Employment	5%

Ontario has nineteen specialist clinics, whereas Australia covers 17 main areas or “networks”. Again the main point of divergence is evident in Ontario’s lack of involvement in family and domestic violence related matters.<sup>68</sup> Further, the Ontario speciality clinics have moved with greater rapidity into areas such as legal education clinics, injured workers clinics and fully fledged centres around ethnic, cultural or linguistic groups.

Mitchell has argued that the Australian system emphasises “cost effectiveness” more than its Canadian counterpart. For him, the Australian system is more “like a franchise deal” operating “on the basis of efficiency rather than satisfaction of recognised critical characteristics”. He goes on to state:

This might be called the “fields of dream” mentality – build it (the centre) and they (the clients) will come as opposed to build it because they (the clients) have asked for it and need it.<sup>69</sup>

This may be changing. Professor Fleming has demonstrated how Canada and Australia alike have increasingly embraced a form of public administration known as New Public Management (NPM). NPM emphasises clear policy objectives, measurable outcomes and economic efficiency in contract like relationships between the funders (government) and the providers of services (legal aid and CLCs).<sup>70</sup>

<sup>67</sup> See Legal Aid Ontario, *2000 Annual Report*, cited in Mitchell, *supra* note 38, at 21-24.

<sup>68</sup> This is not to say that there is not need in these areas. The fact that Pro Bono Students Canada has established a Family Law Project (FLP) to assist litigants in person in the family courts would suggest that family law is becoming more of an issue than these figures reflect.

<sup>69</sup> Mitchell, *supra* note 28, at 35.

<sup>70</sup> Fleming, *supra* note 60, at 40.

Therefore, the two jurisdictions, while idiosyncratic, are by no means incommensurable. Of relevance are the conclusions of Mitchell:

Contextual complexity will always be a barrier to detailed analytical comparisons...Despite this, there are some obvious connections between the models (of poverty law in Australia and Canada). The essential quality of community-based legal aid service providers is shared, even if divergent in some ways. Divergences tend to be around types of work undertaken. By definition, whichever one chooses, community based legal aid service providers seem to be the same sort of creature with same sort of commitments and objectives...This means that community based legal aid service providers continue to experience shared issues around resourcing, infrastructure and management... Ultimately, continuing to share information and ideas will equip community-based legal aid service providers in all jurisdictions with the wherewithal to face all challenges, whether internal or external.<sup>71</sup>

Of no less importance to the discussion of commonality, are the profound cultural similarities between Canada and Australia. Ross and Mundy have captured this confluence admirably stating that Canada and Australia share many common ecological factors, societal norms, and societal consequences.<sup>72</sup> In terms of ecological factors, both Canada and Australia are immigrant based, self-governing federal democracies following the Westminster form of government. Each country has a market free economy with remarkable similarities in terms of natural resources, agriculture and financial sectors. Both have longstanding indigenous cultures. Both began their contemporary existence as British colonies. Each country is highly advanced in technological capacity, and both nations could be characterised as highly urbanised with vast expanses of sparsely populated territory. Social norms are also very similar in both countries – it is hard to imagine typical Canadian social behaviour being viewed as abnormal in Australia or vice versa. Finally, both Canada and Australia have born the same social consequences with similar religious, educational, and judicial institutions, similar family patterns, similar expectations for men and women within their society, similar electoral representation with their federal

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<sup>71</sup> Mitchell, *supra* note 28, at 43.

<sup>72</sup> D Ross & J Mundy, *Enabling Australian-Canadian Business Alliances: A Research Agenda* (2003) 21 (2) *Australian Canadian Studies* 107.

systems, and similar legislation – even to the point where legislative frameworks and case law are often deemed to be highly persuasive in determining matters of a legal nature.<sup>73</sup> Taken collectively, it is opined that the legal and cultural similarities between Canada and Australia make the prospect of transplanting PBSC even more attractive.

It is worth noting that Canada adopted the basic precepts of the model from the United States.<sup>74</sup> The American model operates through a database called “PSLawNet”, the Public Service Law Network Worldwide. In short, this is a network of nearly 130 member law schools across the country and more than 12,000 law-related public interest organisations around the world.<sup>75</sup> More recently, England and Wales have developed a similar prototype through the Solicitors Pro Bono Group.<sup>76</sup> Although all systems share similar attributes, the author’s preference for the Canadian model would appear to be well founded. The United States model is probably too large to emulate with some 130 law schools and 12,000 linkages to law related public interest organisations (although admittedly many of these are informal). In contrast, the British model is probably still too embryonic to serve as a satisfactory benchmark. Finally – and perhaps less of a justification – is the author’s familiarity with the Canadian model. It was this “first hand” experience that spurred the researcher to investigate the possibility of bringing the initiative “back” to Australia.

This is not to say that a Canadian model be adopted to the exclusion of all other permutations of student pro bono. There may well be innovations from other jurisdictions that are worth incorporating into an Australia model. Nevertheless, it is submitted that, as a guiding framework, PBSC is probably more appropriate than most.

From a law school’s perspective one of the great attractions of the PBSC model is that the risk is effectively “outsourced”.

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73 Id.

74 In the United States there are a number of general virtual clearing houses for volunteers. Renowned is VounteerMatch <http://www.volunteermatch.org/index.jsp> (accessed 6 January 2006).

75 <http://www.megalaw.com/top/probono.php> (accessed 6 January 2006) for links to Pro Bono Students America and Pro Bono Students Canada; [http://www.abanet.org/legalservices/probono/lawschools/definitions.html#pb\\_student\\_programs](http://www.abanet.org/legalservices/probono/lawschools/definitions.html#pb_student_programs) (accessed 6 January 2006).

76 The Solicitors Pro Bono Group (SPBG) is a small independent charity with a mission to support, promote and encourage a commitment to pro bono across the solicitor’s profession across England and Wales <http://www.probonogroup.org.uk/> (accessed 6 January 2006).

77 Discussion on 21 May 2004 with a partner of a large Sydney law firm.

If an organisation seeks to utilise a student pro bono, then it does so on the proviso that the student can only provide “legal information” and that the university is not responsible for any liability issues that may arise. Understandably, this aspect of the program has caused some discomfort for some Australian lawyers.

### Liability Alarms – Real or Illusory?

In preparing this paper every person briefed agreed that the Canadian initiative was a good one. Invariably, however, concerns arose in respect of liability issues surrounding the scheme. Certain individuals expressed anxiety about having to sign a Release from Liability Form, the practical effect of which would make the supervising solicitor (and his/her organisation) responsible for any liability incurred. One individual summed up the situation well:

These days lawyers have to be careful about covering their own tracks let alone accepting responsibility for a student as well.<sup>77</sup>

In an age where professional insurance premiums have been vastly unpredictable (if not outright expensive) this was to be expected. But the inference that employing a law student to perform pro bono work might lead to an onslaught of professional negligence claims is, in the author’s view, simply unsustainable. In contrast to this view – and after seeing the Canadian program work very effectively – it is the author’s submission that *the use of law students would not result in legal outcomes of a discernibly inferior quality*. With appropriate guidance, it is posited that law students are more than capable of making a significant legal contribution to their local communities. Thus, discussions with four Western Sydney CLCs who rely heavily on law student involvement would serve to substantiate this view.<sup>78</sup> Specifically, the four CLCs were asked the following three questions:

- Have you had any problems with the students or volunteers that you have taken on?
- Are these problems common?
- Have there been any serious problems?

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<sup>78</sup> These interviews were conducted as part of a longer term research project/grant led by the author. See for example, S De Brennan, Prophets or Whingers: The Case of Four Western Sydney CLCs (2005) 30 (3) *Alternative Law Review* 132; S De Brennan, Pro Bono, Access To Justice and the University Of Western Sydney – Where To Now? – An Exploratory Study (2005) *Newcastle Law Review* (in press).

All respondents indicated that they had not experienced any major problems. One respondent said “there had been one or two instances” where someone had to speak to the law student about “phone etiquette” or in relation to “courtesy and protocol issues”.<sup>79</sup> In sum, the consensus was that law students were not only proficient in their tasks, but a pleasure to have around.

Arguments couched in terms of liability issues, also gloss over the verity that today most of Australia’s larger law firms offer “summer clerkships” as part of their recruitment programs. As part of this process, law students are typically employed during their penultimate year of study. Subject to the student’s performance in the clerkship, he or she is asked back as a graduate solicitor in the following year. During the clerkship phase it is not uncommon for summer clerks to work on quite substantial matters – a considerable responsibility for students one year out from graduation and yet to embark upon their Practical Legal Training (PLT) courses. One cannot imagine the large law firms consciously implementing recruitment strategies which promote risk, especially in a business environment where high profile corporate collapses have brought into question the ethical probity of various law firms.<sup>80</sup> In real terms – and as someone who has participated in the clerkship process – all it meant was that the supervising lawyer had to be extra judicious when “signing off” work. In truth, this boils down to prudent management. Prudent management ensures there are appropriate quality controls within the firm for all organisational members, whether that is for a partner or summer clerk.

Further, the author’s investigations reveal that the Canadian experience with respect to complaints and liability, is non-existent. In its eight years of operation, and the involvement of over 5,000 students, there had not been a single complaint lodged against the PBSC corpus.<sup>81</sup> A truly impeccable record, the author formed the view that misgivings over liability

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79 In the instance that there had been issues of the more serious kind than law students as unpaid volunteers would have been covered by CLC insurance. CLCs in Australia belong to National Indemnity Insurance (PII) Scheme, and are covered by a Master Insurance Policy, which indemnifies them against claims of negligence and defamation. The policy covers all CLC workers, paid and unpaid, solicitors and non solicitors, and management committee members.

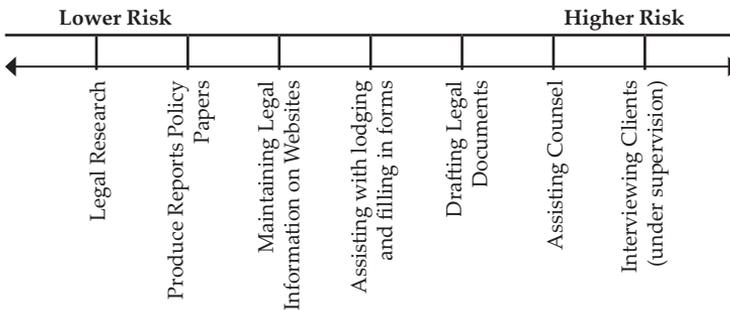
80 See for example M Simmons, Justice Inc. *The Age* 4 August 2002, at 1.

81 After researching the issue, the National Director of PBSC indicates that no complaints have ever been lodged through the formal process since the inception of the program (although there have been many feedback/evaluation reports praising students).

were not so much *real* but rather ones of *perception*. However, discussions with the National Director revealed that it was not merely coincidence that there had been no major “hiccups” to date. To this end, various safeguards have been implemented to insulate from liability. These include: a governance structure that promotes flexibility whilst preserving accountability (see Figure 1),<sup>82</sup> a requirement that all host/participating organisations sign a release from liability form; a requirement that students sign a “student agreement form” and associated correspondence enumerating expectations and duties under the program for students and organisations alike; training and additional support mechanisms for participating students and organisations; and finally, the requirement that students and supervising solicitors complete a report/evaluation form at the conclusion of each project.

The suggestion that involving law students is inherently a risky exercise also needs to be tempered in light of the great diversity of work that a student can perform under the supervision of a lawyer. If we were to conceptualise lawyer supervised pro bono work as operating on a continuum, you might have a number of low risk pro bono activities operating on the left hand side and higher risk activities on the right hand side. Figure 2 shows how allocated tasks may be seen as operating on a gradated basis:

**Figure 2: Lawyer supervised tasks and the level of risk involved**



Lower risk activities might include such activities as preparing pamphlet information, drafting and answering “frequently asked questions lists”, preparing and maintaining

<sup>82</sup> Also law school co-ordinators are, at the end of each month, required to complete a semi-structured progress report. The questions therein encourage feedback, aimed at permitting continual innovation and improvement.

legal information websites, legal translation/language services, preparing videos which outline the court process/educational videos, analysing legislation, performing data collection and legal surveys, assist in lodging and/or filling out documents and so forth. At the other end of the continuum, you may indeed have matters that could be described as intrinsically risky such as: giving pro bono clients complex legal information, interviewing clients under legal supervision and drafting legal documents. As the student acquires additional skills and expertise, and provided appropriate checks and balances are in place, there is no reason why he or she cannot be entrusted with tasks on the right hand side of the continuum.

To argue for the replication of the PBSC model is not an announcement for lawyers to start sending student volunteers off to the Supreme Court to handle complex litigation. Law students are, at best, an addendum and are highly reliant on the leadership and guidance of their supervising solicitors. But in an age where increasing numbers of law firms are moving beyond pro bono case work for their clients to include submission-writing, advocacy and law reform on behalf of those clients or in their own right,<sup>83</sup> there is no shortage of lower risk tasks that students could perform. As his Honour Justice Sackville concluded in a recent Access to Justice Keynote Address:

...it would seem that the time has come to recognise that many of the most promising pathways to justice be outside the court and tribunal system. In particular, they are to be found in... programs designed to empower people to make effective choices about legal issues. Perhaps access to justice has got much less to do with lawyers and courts than most of us have realised.<sup>84</sup>

## PART D: CONCLUSIONS AND ONGOING RESEARCH

So that no reader is mistaken, the author believes that the best strategy for meeting legal needs is one that increases the size of the legal aid funding pool. The author is not so naive to expect that unlimited public funds could be devoted to legal aid,

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83 Public Interest Law Clearing House, *PILCH Matters* (May 2004) Issue 6 at 12.

84 Justice Ronald Sackville, *Access to Justice Assumptions and Reality Checks, Access to Justice Roundtable Proceedings of a Workshop*, July 2002, (Sydney: Law and Justice Foundation of NSW, April 2003) at 31.

for clearly, economic realities militate against this. However, it was expected that the government might have committed more than it has in the 2004/05 Federal Budget. An increase in government funding for access to justice initiatives would act as a powerful sign to the many lawyers performing pro bono work that the government is not simply interested in the area as a means of defraying some of the load on Legal Aid and CLCs.

Also affected by reductions in government funding, this paper has sought to present PBSC as a worthwhile project for those law schools unable to fund fully fledged (and public service orientated) clinical legal education programs but at the same time wishing to enhance access to justice in their communities. The benefits of the Canadian model have been canvassed and include:

- 1 it inculcates a pro bono ethos in the law student even before he or she goes out to practice;
- 2 it is not overly demanding in terms of resources (in that it is based on students acting pro bono);
- 3 it potentially involves many more students than “mainstream” CLE models;
- 4 it assists in resolving the anecdotally reported dilemma that certain CLCs receive more student volunteers than they can actually absorb;
- 5 it brings a greater amount of centralisation to what has been described as a “disparate” pro bono landscape;
- 6 it has a greater reach than traditional CLE models by incorporating charities and other social justice organisations;
- 7 it is politically attainable inasmuch as it does not require other public interest organisations to surrender their “turf”;
- 8 it preserves community responsiveness by operating out of law schools which are situated throughout the nation; and
- 9 it “outsources” any risk away from the university towards the host organisation seeking to use pro bono law students.

It is this final benefit of “outsourcing the risk away from the university” that has also caused the greatest amount of unease with respect to launching a PBSA. It is submitted, once again, that these fears are misapprehended. The Canadian experience demonstrates that the risk associated with PBSC is negligible, or more precisely, non-existent. It has also been shown how pro bono and legal matters generally can be “unbundled” so as

to include a number of low risk activities that students might perform. As part of another research project being conducted by the author, a survey has been distributed to 300 law firms in the Macarthur, Parramatta and Southern-Highlands areas (those being the principal areas serviced by the UWS' two law schools). The survey aims to explore in greater detail:

- The general receptivity of firms in the area to the launch of a PBSA in the region of Western Sydney.
- Exactly how real (or illusory) is the issue of liability for lawyers in Western Sydney (who will ultimately be cornerstone to the success of a Pro Bono Students Australia in that region)?<sup>85</sup>
- Whether the concerns in relation to liability are sufficient to thwart the success of a PBSA in the region?
- What are the current workloads of law firms in the area and how might these be aligned with students and academics at the UWS?
- How the UWS might better share its resources with local firms (and vice versa)?

It is hoped that such questions will provide an empirical basis for the strategies of a University committed to regional engagement.

Finally, it will be interesting to see how the impending increases to university fees will impact on the willingness of law students and law graduates to devote their time to pro bono causes. Of relevance here are the words of Matt Price:

The Government demands graduates, who tend to earn more money than others, pay extra for the privilege. This doesn't merely ignore the wider contribution educated people make to their community; it cements a culture of selfishness. Having forked out extra money for their degrees, why should doctors feel inclined to bulk-bill or lawyers perform pro bono work?<sup>86</sup>

These are powerful questions and perhaps even more potent given that a significant proportion of cabinet members

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85 By raising the issue of liability in the questionnaire the researcher also risked raising a 'red flag' and making an issue where there might not have been one otherwise. Accordingly, a delicate balance had to be struck. The questionnaire would need to allude to liability issues whilst simultaneously not emphasising them. Most importantly, all of this would need to be achieved within the ethical guidelines prescribed by the author's university.

86 M Price, *Some Educated Advice for Latham* *The Australian* 20 December 2003, at 24.

moseyed their way through university at taxpayers' expense.<sup>87</sup> In this regard it is all the more critical that a culture of pro bono and service to the less fortunate is instilled as a matter of urgency. By targeting future lawyers from their first day at law school the Canadian initiative is worthy of emulation. As Her Excellency, Professor Marie Bashir, stated at the Legal Aid/Law Society Specialist Accreditation Conference on 5 July 2002 "One organisation alone cannot do it all".<sup>88</sup> But we can, if we make further use of eager law students, do considerably better.

## POSTSCRIPT

As it turns out, shortly after the author made contact with the Director of PBSC with a view to replicating the Canadian initiative, so too had various staff from the NPBRC in Australia. Apparently, transplanting PBSC had been one of the NPBRC's strategic priorities for some time. Thus, while the author and NPBRC shared a common desire to see the dream of a PBSA come to fruition, they were for a few months at "cross purposes". Upon this realisation, the NPBRC and the author have been in regular contact and to the delight of all parties keen to see the birth an Australian program. In late 2004, the Head of the School of Law at the UWS – with the substantial support of NPBRC – launched a trial Pro Bono Students Australia (PBSA).

The PBSA project being trialled at UWS now has webpages with precedent agreements (prepared by the NPBRC) that are available for public perusal.<sup>89</sup> In a seminal document, the NPBRC has also produced an "Information Paper" detailing all clinical legal education and pro bono programs at each of the 28 Australian law schools as of August 2004. This document provides a valuable and timely resource for law schools and law students contemplating the establishment/refinement of a pro bono program.<sup>90</sup>

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87 On related issues see S De Brennan, *Flawed Youth Allowance Scheme*, Radio National's Perspective Program (Sydney 576AM) <http://www.abc.net.au/rn/talks/perspective/stories/s1393888.htm> (accessed 6 January 2006).

88 Quoted in R Funston, *Access to Justice Proceedings of a Workshop* (Law and Justice Foundation of New South Wales, July 2002) <http://www.lawfoundation.net.au/publications/reports/ajr/ajr4.html> (accessed 6 January 2006).

89 See generally <http://www.uws.edu.au/about/acadorg/clb/sl/probono> (accessed 6 January 2006).

90 NPBRC, *Pro Bono & clinical legal education programs in Australian law schools: Information Paper* (Sydney: National Pro Bono Resource Centre, 2004) <http://www.nationalprobono.org.au/publications/index.html> (accessed 6 January 2006).

In terms of the UWS Pro Bono Students Australia pilot, “student pro bono” is defined as follows:

Where students, without fee, reward or academic credit, provide or assist in the provision of services that will provide or enhance access to justice for low income and disadvantaged people or for non-profit organisations that work on behalf of members of the community who are disadvantaged or marginalised, or that work for the public good.

Under this program, volunteer UWS law students interested in doing pro bono work are matched with public interest and community organisations that need law-related services, or with lawyers who require support doing pro bono work. Students do not receive academic credit for participation in the program.

The goals of Pro Bono Students Australia at UWS have been enumerated as follows:

- 1 Improve access to justice for the needy and disadvantaged in our community by providing organisations with access to highly skilled and committed volunteers;
- 2 Foster the ethic of public service in UWS law students and produce law graduates who are mindful of their public service obligations and committed to fulfilling those duties; and
- 3 Provide UWS law students with opportunities to participate in internships/outreach programs with a pro bono focus.

If the UWS trial is successful, the NPBRC will encourage the other 28 law schools of Australia to initiate their own branches.