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Voices from the front line: exploring what pro bono means to lawyers in England and Wales?

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Abstract

Pro bono is seen as an important aspect of the working lives of many legal professionals. The withdrawal of legal aid for most civil law claims has led to a greater need for pro bono legal services. This article describes and analyses the findings of an empirical study with solicitors¹ to explore their views on pro bono. It seeks to understand perceptions of pro bono work and examine the reasons why individuals choose to give their time for free to help those who have unmet legal needs. Following an analysis of interview data, the article argues that there is a significant commitment to pro bono within the legal profession, but there are tensions associated with the delivery of pro bono legal services. This study builds on the work of academics in the US and Australia to add to the literature on our understanding of pro bono within the context of England and Wales.

Key words: pro bono, altruism, legal aid, lawyers, prosocial

Introduction

The phrase pro bono derives from *pro bono publico* – ‘for the public good’. Key stakeholders within the legal profession have agreed a definition of pro bono as set out in the *Joint Pro Bono Protocol for Legal Work* (LawWorks, n.d.)². A commitment to access to justice is an

¹ For this study, solicitors were interviewed, the Solicitors Regulation Authority (SRA) define a solicitor as a lawyer who has been admitted as a solicitor by the SRA and whose name appears on the roll of solicitors: <https://www.sra.org.uk/consumers/find-use-instruct-solicitor/>. In England and Wales unlike many other jurisdictions there is no single legal professional as these findings are applicable across jurisdictions, thereafter we will use the generic term to describe all legal professionals, lawyers.

² At section 1.1 of the *Joint Pro Bono Protocol for Legal Work* available [online] at <https://www.lawworks.org.uk/why-pro-bono/what-pro-bono/pro-bono-protocol>

integral part of being a legal professional and an intrinsic part of legal culture (Hansford, 2014). The question is to what is this true or does it form part of the rhetoric Mcleay, (2008 at p.1) describes as the “legal profession’s beautiful myth” around pro bono.

Given recent cuts in public funding for legal aid, pro bono work has become an increasingly important part of the legal landscape (Amnesty International, 2016). In April 2013, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO, 2012) removed public funding for many areas of civil law meaning that fewer people have access to legal advice and representation. Many organisations have argued a crisis exists in how to meet a deficit in the provision of legal services created by the withdrawal of legal aid (Amnesty International, 2016).

The legal profession has a long tradition of providing pro bono legal services (Granfield, 2007). The *Joint Pro Bono Protocol for Legal Work*³ sets out an agreed framework on how pro bono work should be conducted; it refers to pro bono as a core value of being part of the legal profession.⁴ Promoting a professional culture that encourages altruistic behaviour as a core value can have a positive impact on professional legal identity (Menkel-Meadow, 1992). Tensions exist on the capacity of lawyers to respond to the challenges created by the failure to properly fund the legal aid system.

Background

Participation in pro bono is characterised as part of being a legal professional demonstrating a commitment to the rule of law and furtherance of access to justice (Sossin, 2008). Rhode, (1999) argues the rationale for pro bono work is that access to justice is a primary need and lawyers share a responsibility in the facilitation of access to justice through the provision of legal services. Fundamental to the rule of law is the premise of equality before the law without access to legal services the ability to exercise rights is meaningless (O’Donnell,

³ The *Joint Pro Bono Protocol for Legal Work* is endorsed by the Law Society of England and Wales, Bar Council of England and Wales and Chartered Institute of Legal Executives.

⁴ The Law Society through the ‘Pro bono Charter’ is clear that pro bono can never be a replacement for a properly funded legally system: <https://www.lawsociety.org.uk/support-services/practice-management/pro-bono/pro-bono-charter/>

2004), but as Sommerlad (2008)⁵ highlights neo-liberal policies⁶ have led to the erosion of access to justice. The link between lawyers and their reasons for engaging in pro bono work has become more significant as the demise of legal aid reconfigures the relationship between pro bono and access to justice.

Menkel-Meadow (1992) suggests that encouraging lawyers to undertake pro bono work fosters a professional culture that promotes altruistic behaviour that has a positive impact on professional legal identity. Perhaps it is more realistic to conceptualise lawyers' engagement in pro bono work as prosocial behaviour, recognising the altruistic behaviours but acknowledging it can also include motivations of self-interest (Lay and Hoppmann, 2015). Eisenberg and Miller (1987 at p.92) suggest that "prosocial behaviour generally has been defined as voluntary, intentional behaviour that results in benefits for another, the motive is unspecified and may be positive, negative or both". Prosocial behaviour offers insights into why lawyers engage in pro bono work, which are important to our understanding of the rationale and justification for pro bono work.

Within academic research in England and Wales, there is little recent qualitative research available on the reasons why lawyers engage in pro bono work. There have been a number of quantitative surveys carried out within the UK to gauge the extent of pro bono work amongst solicitors including a 2015 survey conducted by The Law Society of England and Wales, which found that an average of 19 hours of pro bono work was undertaken annually by the 1,502 participants (The Law Society, 2015). A study that focused solely on Scotland, included some qualitative data on reasons for undertaking this work, indicating that the key motivation was to give something back to society (The Law Society of Scotland, 2015).

There has been some international work carried out including the annual Index of Pro Bono (TrustLaw, 2016) which contains quantitative data on motivations. However, this spans 64,500 lawyers in 75 countries and therefore provides relatively little country-specific data

⁵ Although Sommerlad's research was prior to LASPO 2012 the impact of neo-liberal policies on social justice was already being felt through the reductions in the availability of legal aid justified by arguments of the lack of affordability of the state.

⁶ Neoliberalism is a complex ideology impacting on our world today, it incorporates policies that favour deregulation, austerity and reductions in government spending- for an in-depth discussion see Saad-Filho and Johnston (2004). It is relevant to this discussion as it is argued neo-liberal policies have led to the reduction in spending on legal aid impacting on access to justice and pro bono.

on this issue. The most detailed qualitative report is the Australian Pro Bono Values Project (UQ Pro Bono Centre, 2016) that explored the motivation of lawyers within the State of Queensland and found the three most important factors for undertaking pro bono work were a sense of moral obligation, a professional obligation and a desire to support access to justice (UQ Pro Bono Centre, 2016, at p. 10).

Methodology

Participants

This study employed a qualitative research strategy. The sampling was undertaken in two parts. To identify solicitors currently involved in pro bono work, a snowball technique of sampling was used. To identify solicitors not currently involved in pro bono work, a stratified, purposive sampling technique was used. 60 potential participants were identified from a range of types of practice areas and invited to participate in the research. Invitations were sent via email, resulting in 22 agreeing to participate in the interviews. Ethics approval was obtained, participants were provided with an information sheet and consent was obtained.

Table 1: Survey participants

Characteristic	Percentage
Post Qualification Experience (PQE)	
Trainee	3 (14%)
Less than 5 years qualified	3 (14%)
6 to 10 years PQE	4 (18%)
11 to 20 years PQE	5 (23%)
21 years plus PQE	7 (32%)
Total	22 (100%)
Currently participating in pro bono	

Yes	15 (68%)
No	7 (32%)
Type of firm ⁷	
City firm	7 (32%)
Large regional firm	9 (41%)
Small to medium sized firm	4 (18%)
Not for profit	2 (9%)
Codes	
P- participant and given a number 9-30	
C- City	
LR- Large regional	
S/M- Small to medium	
NP- Not for profit	

Interviews

Semi-structured interviews were conducted face to face or by Skype, recorded and transcribed for analysis. The discussions explored the legal professional's background, area of work, their views on their individual motivation but to place that in the context of the workplace setting to ascertain their views on whether their context supported pro bono and what, if any, barriers were encountered to doing pro bono work. Interview questions drew upon the participants previous experience and or knowledge of pro bono work and this was used as a prompt to explore their opinions about the wider questions such as whether pro

⁷ Participants self- identified the type of firm they worked for.

bono should be mandatory and how far participation in pro bono is an ethical dimension of professional practice.

Analysis

NVivo a qualitative data analysis software was used to code the interview data to ensure all the information remained confidential. The data was analysed using an inductive approach to grounded theory (Charmaz, 2019). This method was chosen because it is participant led ensuring the theory is grounded in the data through an inductive and constructive approach and the analysis is based on the data (Charmaz, 2019).

Findings and discussion

Prosocial behaviour or altruism?

Traditionally the case has been made that lawyers engaging in pro bono demonstrate altruistic attitudes and behaviours (Webley, 2010). What emerged from the interview data was examples of both altruistic and prosocial behaviours. Participants said their ethical and moral drivers for undertaking pro bono were closely connected with the personal satisfaction gained from doing pro bono work. The findings here have much in common with the Australian research where moral drivers were found to be of central importance to lawyers' personal morality and professional obligation (Bartlett and Taylor, 2016).

Participants reported how it was part of their moral beliefs :

I can give something back, which might help an individual or an organisation.... I think we have a moral obligation to do that. (P13LR)

From a moralistic point of view, obviously it's a good thing to do because you go to sleep knowing that you have done something good. (P28SM)

Participants discussed the impact of their volunteering, describing it as personal, noting the value of giving their time and how it shaped their perceptions of the world:

I feel it is really enjoyable from the sense of, that you are giving something, you're giving time to really help a client.....it does a lot of good. (P21C)

I want to give something back, I think. You, you, generally feel better about yourself about the world we live in. (P12C).

Where participants identified 'giving something back' and 'just being thankful for that' (P13LR), those are actions done to help others rather than to promote self-interest (Thomas, 2008). But participants also talked about a sense of duty "I think you got a duty to give something back" (P17C), "I feel it's a duty on all lawyers" (P23LR) and "a duty that lawyers have to give back to their community" (P18NP) to what extent does doing ones duty fit with the concept of altruism. If altruism is tied up with the notions of self-sacrifice then on a narrower interpretation a person needs to go beyond a requirement of duty (McBride et al, 2003). In a sense it would appear that an altruistic act requires more than just discharging our obligations. Nagel (1970) argues that altruism is a desire to act in the interests of others with no ulterior motive; many participants described the importance of "giving something back"(P13LR) "giving back to the community" (P16NP) "I think it's important to try to give something back"(P26LR). Through their engagement in pro bono work, participants sacrificed their time motivated only by a desire to support their community.

Some participants identified the complexities of conceptualising their engagement as altruistic:

There is always a question as to whether a voluntary act is, is an act of you know, self- fulfilment necessarily selfish. But I think there is a mixture of the two kind of genuinely wanting to make a difference and also this is actually something that benefits me." (P17C)

Some participants derived a sense of pleasure or reward from helping others, "from a selfish perspective, it's a really nice thing to do" (P18NP) and "it is a reward in terms of finding fulfilment (P20C). The interviews strongly suggest that the participants were committed to helping others irrespective of their own personal fulfilment, but there were benefits that went beyond the intention of helping others without regard for oneself.

How lawyers conceptualize their motivations for undertaking pro bono work is important because pro bono work can have a critical impact on their professional life. McLeay (2008) argues the mythical force surrounding pro bono work is a way of encouraging altruism in lawyers, but the danger of adopting that approach is it creates unrealistic expectations of lawyers. It suggests that lawyers are required to view their motivation for engaging in pro bono as self-sacrifice, such a view, offers a very unappealing vision of pro bono (McBride, 2003). Conceptualising engagement in pro bono work as prosocial behaviour has a greater capacity to support lawyers' growth and development (Lay and Hoppmann, 2015). Understanding motivation more broadly as prosocial rather than altruistic is potentially a more powerful way of justifying, encouraging and sustaining pro bono work because it recognises the multifaceted nature of lawyers' motivations. It legitimately allows for behaviour that is both altruistic and self-interested. Furthermore, as Lay et al (2015) posits, motivations of prosocial behaviour change over the course of a career. Increased engagement in pro bono work may be fostered if it is recognised that motivations, beliefs and values change over the course of a professional life.

Pro bono: career development and the quality of the service

Participants identified wider benefits of pro bono work, personal rewards came from volunteering and helping others. But that raises questions about the impact on the quality of pro bono legal services. Many participants were afforded opportunities for legal skills development and exposure to experiences that were not normally available to them in their existing practice.

Whilst you are sort of helping other people, it does give you a lot of experiences in a way that sort of train and develop you. (P15LR)

The rewards were greater for trainee and newly qualified lawyers:

If you are a young lawyer or a trainee and you're doing it, you may have the opportunity to work on a case that you would never normally have with complexity and with issues that you would never be allowed to do in private practice because of the regulatory reasons, so you get lots of experience and opportunities that might

present are, you know the things around you being able to kind of give really cogent and impressive answers on a CV or job application. (P23LR)

The data highlights the capacity of pro bono work to enhance skills development that can have a positive impact on career prospects. Participants particularly noted the benefits for trainee and recently qualified lawyers as a way of helping develop legal skills and provide exposure to more complex cases.

I think the reason that juniors tend to do it [pro bono] is you have great opportunities for developing your skills. (P12C)

Although the benefits of legal skills development may be secondary to the decision to undertake pro bono work, the potential rewards cannot be ignored. Schor, (1991) postulates Western culture encourages behaviour that is strongly influenced by extrinsic motivating factors such as reward, lawyers can benefit from pro bono work to achieving career goals (Sansone and Harackiewicz, 2000).

Questions arise as to the legitimacy of promoting pro bono work as an opportunity to develop professional skills development. Participants said not only did it:

Broaden your perspectives, both your social perspectives but also your skill set, so, it is a fantastic way to broaden your legal skill set.(P18NP)

But for some it went beyond that:

It's a great opportunity to develop legal skills and to improve client care and take on probably more responsibility than you would do in a formal legal environment for paying clients.(P21LR)

Participants articulated a business case for pro bono suggesting it offers a cost effective solution to support professional skills development and it has the potential to be used as a way to supplement the training of lawyers (Sommerlad, 2008). An increasingly fractured and competitive legal market may be responsible for influencing and shaping decisions to undertake pro bono work. Arguably the economic environment may encourage lawyers to take a more strategic approach to pro bono (Cummings and Sandefur, 2013).

*It could increase your profile you know if you are known for doing pro bono work.
(P19SM)*

I actually got head-hunted because pro bono was mentioned on my CV (P10C)

Clearly, this is not without risk, if pro bono activity is conducted as a means of improving legal skills the quality of the pro bono service may suffer.

Currently very little empirical evidence exists on the quality of pro bono work (Cummings and Sandefur, 2013). Participants were asked about whether pro bono was delivered at an equivalent standard to fee paying work in their firm:

I wouldn't ever differentiate between the two because that wouldn't be doing a service to the pro bono client, ... the only difference is obviously they are not paying our fees, but the work they produce is no different (P9C)

We implement the same systems of supervision... we don't cut corners, you know, the client is treated in exactly the same way as a fully fee- paying client. (P14LR).

The data revealed nothing to suggest that the quality of representation differed between pro bono and fee- paying clients, but some concerns were raised by participants when they were advising in areas outside their practice experience:

So, there's always that kind of in the back of your mind, like, have we got this, have we missed something that is really obvious. You know none of us are experts on ... those kind of things (P15LR)

You know, you are always a bit, hmm, okay am I going to get this right. (P29LR)

Constructing a narrative around the potential of pro bono work to achieve enhanced practice skills risks impacting on the quality of representation. The *Joint Pro Bono Protocol* states that a lawyer has to be adequately trained and should have the same experience as if the work was paid. Furthermore, if lawyers don't feel competent to act it may undermine a long term commitment to participate in pro bono work (Rhode, 1999). It highlights a

tension in how to legitimately advocate for increased pro bono participation, in order to attract greater participation from law firms and the profession (Webley, 2000).

Barriers to pro bono: targets and firm culture

Rhode (1999) findings that pro bono is impeded by billable hours, and profit targets continues to be reflected in this data:

I have my chargeable hours target and anything I do pro bono is outside of that, any time I spend on pro bono work I have to make up at other times during the day or night.”(P12C)

People are quite target driven and interested in getting their you know, chargeable work, client work done.” (P15LR).

The chargeable hours culture has a negative effect on participation in pro bono work. Aside from very large firms, participants said that there was no allocation for pro bono work within their chargeable hours target. Achieving a work life balance is challenging, the long-hours culture is often a familiar description of law firms (Finkelstien, 2009; Thornton, 2016). There is a growing literature on the negative impact of law firm culture on the well-being of lawyers (Collier, 2016). The pressures to ensure that chargeable hours targets are met often affords little time for participation in pro bono work.

People have targets to meet, they can be difficult targets to meet sometimes, and if you are under a target to hit a certain number of billable hours, then naturally you are not going to want to spend your time doing non billable work until you have hit your billable hours target and that can take you a long time to do, you are not left much time in the day to put in pro bono work (P26SM)

Work constraints remain a barrier for many lawyers:

The main challenges are the pressure of private practice and the amount of time that you actually have left to do it. (P23LR)

You are under pressure to meet targets, whether it is billable hours or billable in terms of fees, the less time and energy you have for things that aren't going to help towards that (P30LR)

While it is true that law firms are businesses many large corporate firms appear particularly focused on profit-making (Thornton, 2016). The requirement to make profit can restrict participation in pro bono work. The organisational and economic constraints impact on the delivery of pro bono work.

....I try and pressure the firm to, incentivise a bit more [to get] more people involved, but it's rather difficult because, you know like any law firm, the main priorities of partnership, is profit and revenue and [although] pro bono work reputationally it works well, it doesn't necessarily lead to profit. (P9C)

The main challenge is, fitting [pro bono work in] we have to be able to do all the chargeable work as well as be able, to afford, it, if you like, to do the amount of pro bono work that we do. (P14LR)

The problem is more acutely felt in small firms where the impact of cuts to legal aid has resulted in many firms losing public funded work (Organ and Sigafos, 2018).

I think there are real challenges for small firms, for resources and for time to allocate people to do it [pro bono] (P19SM)

Participants discussed the struggles of small firms:

....small firms and the pressures they are under and you know I have met lots of small firms that are, where the equity partners are really scratching a living (P26SM)

A lot of small firms don't have the resources, so it's to a large extent reliant on middle tier of firms....I think larger firms almost it's a publicity, not stunt but a... you know it's something they, they are showing off how good they are... (P28SM).

The cuts in funding have led to small firms providing pro bono legal services as part of their paying work.

Sometimes I do a lot of work for nothing, knowing that I'm doing it for nothing... since LASPO I have done more pro bono work because the need for legal advice and assistance hasn't waned. (P28SM)

Pro bono work is being done to bridge the gap between the legal aid shortfall and clients' receiving the proper levels of advice and assistance. Small firms are marginalised in an environment where they are simply trying to maintain a legal practice. They gain none of the reputational advantages enjoyed by large firms who have the resources to promote and benefit from their pro bono work. The Australian study found a similar sense of frustration of the often lack of recognition small firms receive for the amount of free work they perform in comparison with the institutionalised pro bono programmes offered by large law firms (Bartlett and Taylor, 2016).

This research found that although large law firms recognise the importance of making a commitment to pro bono work, it is also an integral part of creating a positive organisational image:

I think organisations like ourselves you know, we're a large international law firm, I think there would be no excuse for there not to be some funds available to be able to continue to provide, pro bono work. (P13LR)

I think it's good from a law firm perspective if they're doing pro bono work, it's very good for their corporate and social responsibility. (P9C)

While large firms have the resources to provide pro bono work, they are commercial firms and lack the expertise to deliver advice in areas such as welfare benefits and immigration law (Boon and Abbey, 1997). The model of pro bono offered by large law firms is often part of a programme undertaken in conjunction with a pro bono organisation⁸. Boutcher, (2010) suggests that many large law firms have institutionalised pro bono practices recognising the

⁸ The *Joint Pro Bono Protocol for Legal Work* states where practical, lawyers able to undertake pro bono work are encouraged to do so through a pro bono organisation, through the not-for-profit sector, or through both. The model of pro bono in large law firms is more aligned with the joint statement compared with small/medium firms where pro bono supplements legal aid work.

reputational value of encouraging volunteering (Granfield, 2007)⁹. Sound commercial and public relations reasons exist for an international law firm to be promoting and supporting a policy on pro bono (Boutcher, 2010). Institutionalism of pro bono originated with US law firms, (Cummings and Sandefur, 2013) but has become part of a worldwide trend (Bartlett and Taylor, 2016). This is reflected in this study, participants from large city law firms explained the embedded structure of pro bono, with pro bono departments headed up by directors or co-ordinators. This has been described as the normalisation of pro bono as it becomes another established feature of practice in large city firms (Rhode, 2008; Bartlett and Taylor, 2016). It maybe that institutionalised forms of pro bono activity are also influenced by policy and this was reflected in one of the views of the participants:

You know big firms don't wanna do it. Well the reason, the motivation for doing some of them, I am not saying all, but some of them, is because they have to do it to, you know make the Law Society happy (P28SM)

Institutionalising pro bono has the potential to impose additional demands on lawyers. The long hours culture already exists within many law firms and the reality for many lawyers is that they are already under significant amounts of pressure to increase productivity and meet fee-earning targets (Collier, 2016; Thornton, 2016). Creating further expectations around participation in pro bono work may have a further damaging impact on their wellbeing and result in some lawyers choosing not to undertake pro bono. The interview data highlights the impact of economic forces on the delivery of legal services that represent a significant barrier to the ability of the legal professions to engage in pro bono work.

Limitations to this study

This is a small-scale study; 22 interviews from solicitors only provides a snapshot of the legal profession. It is different from other studies as it includes both lawyers participating and not participating in pro bono work. It is acknowledged that there is a stronger representation of solicitors who are currently actively involved in pro bono work. It is important to note that the views reported by these participants are not indicative of the held views of all solicitors

⁹ See Granfield (2007) for a further discussion on the reasons why law firms have institutionalised pro bono. Institutionalising refers to formalisation of pro bono within a law firm, through incorporation within the structures of the firm.

working in these areas or types of practice. However, the interviews do provide an important source of data about the participants' reasons for and their perceptions of the barriers to doing pro bono work.

The data reveals some similarity in the findings to those in the US and Australia. The institutionalist perspective may have influenced some of the participants views on pro bono (Granfield, 2007). Although, participants articulated a sense of personal responsibility, an ethical and moral obligation to do pro bono work, there was also a recognition of the wider benefits to themselves that featured more strongly in this research compared with findings in other jurisdictions. One explanation may be that a greater proportion of participants came from large firms; the cultural norms and institutional framework of a large law firm environment are embedded in individual lawyers' motivations. Boon and Whyte, (1999) argue that motivation is informed by the "social, political and organisational context" (p.190) within which pro bono operates; furthermore, influences come not just from the law practice itself but the meanings and values it attaches to pro bono, which will be different for each individual lawyer depending on their practice experience (Granfield, 2007).

Conclusion

The participants in this study identified the altruistic and prosocial benefits of pro bono work, but it is important to be explicit about the wider benefits for lawyers and law firms in undertaking pro bono. Lawyers working for larger firms are more likely to experience prosocial benefits from participating in pro bono compared to those within a small/medium firm where funding cuts have restricted those opportunities. The impact on all lawyers associated with charging policies cannot be ignored. Furthermore, although pro bono work is a fertile environment to support the development of knowledge and skills particularly for young lawyers it cannot be at the expense of pro bono clients or undermine the moral principles associated with the commitment to deliver pro bono and there is growing concern around the wellbeing of the legal profession. If we believe that the legal profession has a responsibility to uphold the principles that underpin the rule of law, we need to ensure there is equal access to justice (Hansford, 2014). Institutionalising pro bono has the potential to place additional pressures on lawyers, given the growing concerns around lawyer well-being and mental health (Jones et al., n.d.) there is a danger that pro bono could

have a negative impact on the profession. The participants in this study strongly advocate the importance of lawyers' undertaking pro bono legal work, but policy makers need to highlight the issues facing lawyers to ensure the long tradition of pro bono is not undermined.

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