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Editorial Note

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Professional Responsibility in Practice: Advocacy in the Law School Curriculum

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Introduction

This article discusses a research project that investigated the feasibility of introducing provisions granting law students a limited right of audience into the various State and federal statutes in Australia regulating the legal profession and procedure in the courts.

The Commonwealth Attorney-General's Department under the National Quality Project (NQP) funded the project for Clinical Legal Education. The NQP funded both programs and research in the area of clinical legal education. It had two objectives. These were the improvement of legal education and the extension of legal services to disadvantaged members of the Australian community.[1]

The research discussed here grew out of our experience as teachers in university clinical legal education programs and in particular, of Susan Campbell's experience of her students representing clients in the Victorian Magistrates' Courts and the Family Court of Australia. Judith Dickson's experience of student advocacy in the United States in law school clinical programs was an additional catalyst to the research. It also grew out of our understanding of recommendations for education in ethics and professional responsibility made in a series of Reports during the past 10-15 years in Australia.[2]

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1 J Dickson and S Campbell, *Student Advocacy in Australian Courts: Recommendations for a Model Program*, A Report of research conducted for the Commonwealth Attorney-General's Department under the Clinical Legal Education National Quality Project, September 2003.

2 See note 18.

For the purposes of this research, we define clinical legal education as a legal practice-based method of legal education in which law students assume the role of a lawyer and are required to take responsibility under qualified supervision for providing legal services to real clients.[3] Clinical programs in Australia now include not only the community legal centre-based university programs but also field placements or externships in a variety of agencies.[4]

Several university law schools in Australia are already conducting informal programs in which students represent their clients in defined circumstances with the leave of the court.[5] Thus, we were able to base the empirical component of the research on interviews conducted with a number of magistrates, judges and practitioners who have already observed at first-hand the process of student and apprentice advocacy.[6]

The research may be understood in the context of two ongoing and intersecting debates in Australia during the past 40 years. These are the debates first on the aims, content and structure of legal education and secondly on the operation of the legal system and access to justice. Interestingly, in Australia, governments have initiated both debates. Inquiries from the 1980s onwards discussed the relationship between legal education, the practice of the law and the operation of the legal system.[7] Governments have challenged the organised legal profession, the courts and the university law schools to examine the part they each play in contributing to or

3 G Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology* CLEPR National Conference: Clinical Education for the Law Student: Legal Education in a Service Setting (Buck Hills Falls: CLEPR, 1973); S Rice, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (Sydney, Centre for Legal Education, 1996); M Noone and J Dickson, "Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers" (2001) 4 *Legal Ethics* 127.

4 See *Guide to Clinical Legal Education in Australia 2003-2004* (Sydney: Kingsford Legal Centre, 2004).

5 S Campbell, "My Learning Friend: Students in Court" (1993) 67 *Law Institute Journal* 914. Other programs operate at Griffith University, University of Newcastle, Murdoch University, University of New South Wales and have agreement to operate at La Trobe University.

6 Details of interviewees and of the research methodology are described later in this article.

7 See, eg, New South Wales Law Reform Commission, *The Legal Profession: Discussion Paper* (Sydney, 1979-81); Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation*, Discussion Papers Nos 1-7 and Final Reports 1 and 2, 1991-1994 (Canberra, AGPS); Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession* (Melbourne, 1992); Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra, AGPS, 1994).

impeding access to justice. Most recently, the Australian Law Reform Commission ("ALRC") focused on legal education and training as a significant influence on the operation of the legal system.[8]

In the last 20 years, a recurring theme in the two debates has been the relationship between the monopoly held by qualified legal practitioners over the provision of legal services and the obligation of legal practitioners to serve the community as well as their clients and the court.[9] The idea and language of "professional responsibility" has been adopted or borrowed from the American literature in recent Reports.[10]

Of course, student advocacy in the courts is an exception to the monopoly. In this research, we examined the existing experience of informal student advocacy by investigating the attitudes of judicial officers and legal practitioners who had been involved either as magistrates and judges or as court supervisors. We hoped that an analysis of the responses would indicate whether a formal legislative scheme of student advocacy within the law school curriculum could be designed to ensure both professional ethical obligations to the client and court and educational purposes were met. In an environment where public legal aid funds are restricted and the legal profession is increasingly called upon to perform "pro bono" legal services, it is critical that any scheme providing legal services to disadvantaged people meet the same standards of competence and conduct as required of lawyers for fee paying clients.

The experience of judicial officers and supervising practitioners of student advocacy in Victoria and of apprentice advocacy in Tasmania has clearly been a positive one. Their views through the research are revealed as supportive of a formal student advocacy regime. They see benefits to the client, court, student and community. Based on these responses, we made Recommendations to the Commonwealth Attorney-General's Department for the development of a student advocacy regime including draft model legislation. These Recommendations (excluding the associated discussion) are appended to this article.

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8 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* Chapter 2; and Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training*, Issues Paper 21 (Canberra, AGPS, 2000 and 1997 respectively).

9 *Access to Justice: An Action Plan*, supra note 7 for the most coherent discussion of this relationship and its impact on the community.

10 *Managing Justice: A Review of the Federal Civil Justice System*, supra note 8.

It is important to note the scope of this research. In our Report to the Commonwealth, we emphasised the limitations of the subject group in both size and experience cautioning that our conclusions must be understood in that limited context. We suggested that the research could properly be understood as a "pilot study" of attitudes of the judiciary and legal practitioners to a student advocacy scheme.[11] The research does not include a survey of client opinion of student advocacy and was not designed or funded to do so. We make the point, as one magistrate commented, that the client is not necessarily in a position to assess the competence of the professional representation provided. Client opinion on the approach and attitude of the student advocate would be valuable, and appropriately formulated research into client satisfaction is a logical next step.

It is important to note that this research project did not seek to examine the impact the experience as an advocate had on the student understanding of ethical obligations or of a wider professional responsibility.[12] However, the research suggests that a program in which students represent a real client in court could provide an outstanding opportunity for them to acquire a deep understanding of these obligations and responsibility.

Legal Education and Professional Responsibility

Forty years ago, in 1964, the *Martin Report* into tertiary education in Australia was published.[13] The effect of the Report on legal education was to consolidate the position of the universities as providers and diminish the role of the practising profession in the primary stages of professional legal education. Underlying the *Martin Report's* recommendations for university-based legal education was the Committee's acceptance of the view that the legal profession performed a public function in the administration of justice. It was therefore necessary to have skills and knowledge of a standard able to meet public expectations.

11 Dickson and Campbell, supra note 2, at 13.

12 Adrian Evans at Monash University in Melbourne is currently conducting a large-scale research project into the values of Australian lawyers with a component directed at graduates of clinical programmes and this one in particular. See also, A Evans, "The Values Priority in Quality Legal Education: Developing a Values/Skills Link through Clinical Experience" (1998) 32 *The Law Teacher* 274.

13 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia* (*Martin Report*) (Australian Universities Commission, Canberra: Government Printer, 1964).

In 1979, the Bowen Committee[14] was also interested in the role of legal education. By the time it was reporting on legal education in New South Wales, the Commission of Inquiry into Poverty (the "Henderson Inquiry") had published its report, *Law and Poverty in Australia*.[15] At times, the language of the Bowen Committee's Report reflected the pervasive concerns of the Henderson Inquiry. The Report discussed the need for law schools to produce lawyers to meet the needs of the community, including the poor in the community. The Committee saw the law school as playing a key role in the development of a professional culture. It described the process as one of "professionalization", that is, "the development of skills . . . but it also involves the development of a feeling for the professional role – for its responsibilities and limits".[16]

This duality of purpose was re-emphasised by the Australian Law Reform Commission in its report on the Australian federal civil justice system when it recommended: "university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility".[17]

This recommendation is part of the considerable, ongoing discussion in both academic writing and in the Reports of Law Reform Commissions in Australia of the need for law schools to engage their students in a serious discussion of the nature of professional responsibility.[18] A similar discussion has taken place in both the United States and in Canada.[19]

14 Committee of Inquiry into Legal Education in NSW, *Legal Education in NSW* (Bowen Committee) (Sydney: Government Printer, 1979).

15 Commission of Inquiry into Poverty Second Main Report, *Law and Poverty in Australia* (Ronald Sackville Commissioner) (October 1975).

16 Committee of Inquiry into Legal Education in NSW, supra note 14, at Ch 3.30-1.

17 ALRC, supra note 8.

18 See, eg, A Goldsmith and G Powles, "Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia" in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998); New South Wales Law Reform Commission, *First Report on the Legal Profession* (Sydney: New South Wales Law Reform Commission, 1982); *Cost of Legal Services and Litigation*, supra note 7; *Access to Justice: An Action Plan* (1994) supra note 7; *Managing Justice: A Review of the Federal Civil Justice System*, supra note 8; *A Discussion Paper: Challenges to the Legal Profession* (Canberra: Law Council of Australia, 2001); M Noone and J Dickson, Special Edition, "Teaching Legal Ethics" (2001) 12 LER, supra note 3 (Nos 1 and 2); and the collection of articles (both Australian and international) contained in M J Le Brun, *Improving the Teaching and Learning of Legal Ethics and Professional Responsibility in Australian Law Schools*, Workshop Materials (July 1999) (the materials developed under a National Teaching Fellowship Award). See also K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Oxford: Hart Publishing, 1998); J Giddings, "Teaching the Ethics of Criminal Law and Practice" (2001) 35 *The Law Teacher* 161 and Special Edition, "Teaching Ethics" (1999) 33 *The Law Teacher* (3).

The ALRC recommendations also expressed the concerns for competence and ethical conduct encapsulated in the statutory regulation of advocacy (the monopoly). Fundamental to our research was an understanding of this statutory regime.

Statutory Regulation of Advocacy

The statutory regulation is of two types. First, there is the legislation regulating who may practise law.[20] Secondly, there is the legislation that regulates each court's jurisdiction and procedure.[21] These latter statutes and rules generally allow a party to proceedings before the court to be represented by a legal practitioner,[22] thereby indirectly granting a right of audience to the legal practitioner.

In no State of Australia is there legislation of either category granting students any right of audience in the courts.[23]

Each State of Australia has legislation that regulates the practice of law in that State.[24] Typically, the legislation prohibits legal practice by anyone other than a qualified legal practitioner and the legislation sets out the way in which a person attains that qualification. The language of the legislation is such as to clearly include advocacy before the courts as "legal practice". This is consistent with the common law.[25] This prohibition

19 American Bar Association, "In the Spirit of Public Service: A Blueprint for the Rekindling of Professionalism" (1986); Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report, *Attitudes-Skills-Knowledge: Proposals for Legal Education to Assist in Implementing a Multi-Option Civil Justice System in the 21st Century* (Ottawa: Canadian Bar Association, 1999).

20 For example, the *Legal Practice Act 1996* (Vic), *Legal Profession Act 1987* (NSW), *Legal Practitioners Act 1893* (WA), *Legal Practitioners Act 1981* (SA), *Legal Profession Act 1993* (Tas), *Law Society Act 1952* (Qld).

21 For example, in Victoria there is the *Supreme Court Act 1986* (Vic), *County Court Act 1958* (Vic) and *Magistrates' Court Act 1989* (Vic); Rules prescribing procedure in each court, eg, *General Rules of Procedure in Civil Proceedings 1996* (Supreme Court); *County Court Rules of Procedure in Civil Proceedings 1989*; *Magistrates' Court Civil Procedure Rules 1989*. Each Australian State has a similar statutory regime.

22 For example, O 1.18 of the *Victorian Supreme Court Rules* is headed "Power to act by solicitor" and provides that, with some qualification, any act which a party to proceedings may do himself or herself may be done by his or her solicitor. Similar provisions are found in the other courts' legislation. See also *Legal Practice Act 1996* (Vic) ss 8(1) and 314(1). See also, eg, *Justices Act 1902* (WA) s 68, *Supreme Court Act 1995* (Qld) s 209(1). In New South Wales the *Legal Profession Act 1987* s 38L(2) grants barristers and solicitors a right of audience in any court.

23 The Tasmanian legislation discussed below refers to articled clerks and "apprentices".

24 Supra note 20.

25 See *Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101 at 105 in which Brinsden J quotes with approval from *State ex rel Florida Bar v*

on non-lawyers engaging in legal practice is consistent with a view that there needs to be some guarantee of competence in those who do offer legal services. The regulatory regime is founded on this view. It assumes that the fulfilment of the prescribed education, training requirements and admission to practice provides that guarantee. Similarly, the regime places legal practitioners under the disciplinary jurisdiction of the Supreme Court, thus conforming to the traditional view that this ensures high ethical standards.[26]

The one variation to this uniformity of approach occurred in Tasmania. In 1968, the then *Legal Practitioners Act 1959* was amended to provide a limited right of audience to apprentices and articled clerks.[27] Issues of competence and conduct were dealt with by expressly subjecting the apprentices and articled clerks to the same "duties and obligations" as legal practitioners and barristers. This scheme remains in the Tasmanian legislation.[28]

Legislation establishing jurisdiction and the rules of civil procedure of most courts throughout Australia generally contains a provision, almost identical in terms, that a party to proceedings before the court may be represented by a legal practitioner who may do any necessary act in the proceedings on behalf of the party.[29]

In criminal matters, legislation such as the *Magistrates' Court Act 1989* (Vic) s 38 provides for a party to appear either personally (s 38(a)) or "by counsel or a solicitor or other person empowered by law to appear for the party" (s 38(b)).[30] It seems that Australian Parliaments accept that legal practitioners have a special status before the courts and are uniquely qualified to represent others before them.

It is interesting to note that where legislation of either category allows for the possibility of an unqualified person

Sperry 140 So (2d) 587 at 591 (1961): it is generally understood that the performance of services in representing another before the courts is the practice of law. See also J Disney et al, *Lawyers* (Sydney: Law Book Co, 1986) 526-94.

26 For a fuller discussion of the "competency and conduct" arguments supporting lawyers' monopoly over advocacy, see J A Dickson, "Students in Court: Competent and Ethical Advocates" (1998) 16 *Journal of Professional Legal Education* 155. See also *Damjanovic v Maley* [2002] NSWCA 230 for a recent reassertion of this principle.

27 See *Legal Practitioners Act 1968* (Tas) Pt IIA.

28 Section 20D(4). However, apprenticeships were abolished in 1999. See the *Legal Profession (Apprentice at Law) Amendment Act 1999*.

29 Supra note 21. The *Judiciary Act 1903* (Cth) provides in s 78 that: "In every Court exercising federal jurisdiction the parties may appear personally or by such barristers and solicitors …"

30 Section 38(c) also allows for appearance by police prosecutors.

appearing in court to represent another, it generally provides that no fee is payable to that person for that unqualified advocacy.[31] An assumption underlying our research was that if a formal system of law student advocacy is introduced in Australia, the relevant legislation or court rule would include a similar provision.

Courts' Inherent Discretion to Regulate their Own Proceedings

It is well established that the courts have an inherent discretion to regulate their own proceedings. The leading case expounding the nature and extent of this discretion is that of *O'Toole v Scott*,[32] a decision of the Privy Council on appeal from the Supreme Court of New South Wales.[33] The Privy Council stated that there was a "general principle that, subject to usage or statutory provisions, courts or tribunals may exercise a discretion whether they will allow any, and what persons, to act as advocates before them".[34] The discretion was stated by the Privy Council to be "an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court"[35] and that there should be no restrictions on its exercise.

The principles enunciated in *O'Toole v Scott*, which in turn drew on the principle laid down in *Collier v Hicks*,[36] were followed and reasserted in *Hubbard Association of Scientologists International v Anderson and Just* (the "*Hubbard Case*").[37] There the Full Court of the Victorian Supreme Court stated:

> The true position would appear to be that the general rule is that any court can, in the exercise of control over its own

31 See, eg, *Supreme Court Act 1995* (Qld) s 209(2), *Magistrates Court Act 1921* (Qld) s 18(2); *District Court of Western Australia Act 1969* (WA) s 39; *Magistrates Court (Civil Division) Act 1992* (Tas) s 36; *Legal Profession Act 1993* (Tas) s 46(3). However, it appears that at least in some courts there is no such express prohibition. See *Local Courts Act 1904* (WA) s 29. Their employer, however, may recover a fee. See *Legal Practitioners Act 1981* (SA) s 21(3)(i), (n), (o) etc relating to industrial matters and conveyancing transactions.

32 *O'Toole v Scott* [1965] AC 939.

33 That case concerned the power of a magistrate to allow a police prosecutor (who was not the informant) to conduct the police case. It was argued that the relevant section of the New South Wales *Justices Act 1902*, which permitted a party to appear personally or by a legal practitioner, was exclusive and prohibited any other person from appearing.

34 *O'Toole v Scott*, supra note 32 per Lord Pearson at 952.

35 Id at 959.

36 (1831) 2 B. & Ad. 663; 109 ER 1290.

37 [1972] VR 340.

> proceedings, allow itself to be addressed in a proper case by any person it considers a proper person to be allowed audience.[38]

A similar view was taken in *R v Visiting Justice at Pentridge; Ex parte Walker.*[39] Similarly, in 1993, the Western Australian Court of Criminal Appeal permitted two law students to represent an appellant who had language and hearing disabilities[40] and the South Australian Supreme Court in the same year allowed an unqualified person to represent litigants.[41] In both these latter cases, the courts relied on their inherent discretion.

Recently, the New South Wales Court of Appeal upheld a single judge's exercise of discretion to refuse leave to an unqualified person to represent a litigant, but reaffirmed the existence of the discretion.[42]

Unless statute expressly abrogates the inherent discretion of the courts to regulate their own proceedings, the discretion coexists with statutory rights of audience granted to legal practitioners and with statutory rights of parties to be represented by legal practitioners.

The logical implication from these cases is that a court has the power to allow an unqualified person to appear before it to represent a party to proceedings. However, the courts have been reluctant to exercise that power in favour of unqualified persons.

While approving in principle the approach taken by the Privy Council in *O'Toole v Scott*,[43] the Victorian Full Court in the *Hubbard case*[44] made it clear that, in the superior courts at least, only qualified legal practitioners were thought suitable advocates. The Court viewed with some alarm the prospect of "untrained and unqualified" advocates conducting litigation.[45]

In *Cornall v Nagle*[46] the Victorian Supreme Court expressed the same arguments:

> The purpose of the legislation in this state … is clearly the protection of the public. The Act [*Legal Profession Practice Act 1958* (Vic)] reflects the need to ensure that those who

38 Id per Gowans J at 342.
39 [1975] VR 883.
40 *Schagen v The Queen* (1993) 8 WAR 410.
41 *Galladin Pty Ltd v Aimnorth Pty Ltd & Ors* (1993) 60 SASR 145.
42 *Damjanovic v Maley*, supra note 26.
43 Supra note 32.
44 Supra note 37.
45 Id.
46 [1995] 2 VR 188 at 209.

> hold themselves out as willing to perform – and who are commonly paid to perform – legal work on behalf of others … shall be properly skilled and qualified and appropriately regulated in that behalf …

The inference to be drawn from these cases is that, although the courts may exercise their inherent discretion to allow an unqualified person to appear as advocate, they will not generally do so.

However, it is important to read these decisions in the context of contemporary litigation. Applications by non-lawyers to appear before superior courts are comparatively rare. Even with the increasing limitations imposed upon the availability of legal aid, defendants to criminal trials are very rarely compelled to appear unrepresented, although the position may be different with appeals. In civil matters, legal aid is far more restricted, but the jurisdictional arrangements in civil matters are such that the majority of civil claims sought to be brought or defended unrepresented would be in the courts of lower and intermediate jurisdiction such as the Magistrates'/Local Courts and County or District Courts, rather than in the Supreme Courts.

Consequently, it is not surprising that the Supreme Courts reiterate that representation by unqualified persons should be permitted only in exceptional circumstances.

However, the pressure resulting from the decreasing availability of legal aid is far more apparent in the Magistrates' or Local Courts and in the Family Court. It is in these courts that the attitude to unqualified representation can be seen to be more flexible.

Nevertheless, the dicta of the superior courts emphasising that the underlying rationale for limiting the right to appear to qualified practitioners is to ensure competent and ethical representation in the public interest cannot be ignored.

The most important principle to be drawn from the cases is the protection of the public through ensuring competent and ethical representation, both in court and in preparation for court. Our view is that any scheme that permits students to appear must build in guarantees of standards of competence and ethical responsibility.

The Experience of Student Advocacy

There is very little literature in Australia or elsewhere dealing specifically with student advocacy. This is not surprising in Australia given its lack of formal status. It is surprising that

there is not more research and discussion in the United States where students have been appearing with formal status in courts since the late 1960s.[47]

The writing that does consider students as advocates does so in the context of clinical legal education. This approach is consistent with the integration of student court appearances into clinical programs both in Australia and in the United States.[48]

Specific court rules or in some cases legislation were developed in the United States in the 1970s to authorise student practice. However, it is important to view the United States situation in the context of the structure of the legal profession in that country where it is a "fused" profession. That is, there is no formal division of work into advocacy and non-advocacy, no separate formal group of advocates. In addition, legal education and training does not include a period of practical training after the law degree. These factors may be seen as contributing to the assumption that clinical practice included advocacy in the courts.

In contrast, clinical practice in Australia has focused on the "solicitor" model of practice and the concept of student advocacy requires a leap to the "barrister" model.

However, the American student practice rules are important as they express the belief that student advocacy and practice have both educational and service goals, the latter being reflected in the rules that generally restrict the students' right of audience to representation of "indigent" clients.[49]

This combination of goals is a recurring theme in the clinical literature. Jerome Frank in 1933 criticised legal education for ignoring the interrelationship between the legal system, lawyers' work and the operation of society.[50] Later, in the 1960s and 1970s William Pincus wrote extensively of the need to expose law students to the practice of law to inculcate a sense of professional responsibility for access to legal services.[51]

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47 The Model Student Legal Assistance Rule adopted by the American Bar Association in 1969 has been followed generally by most States.

48 Two relevant pieces deal with the content of US rules. See F G Avellone, "The State of State Student Practice: Proposals for Reforming Ohio's Legal Internship Rule" (1990) *Ohio Northern University Law Review* 17; and J W Kuruc and R A Brown, "Student Practice Rules in the United States" (1994 Aug) *The Bar Examiner* 40.

49 See the American Bar Association Model Rule Clause IIA (1969).

50 J Frank, "Why Not a Clinical Lawyer-School?" (1933) 81 *University of Pennsylvania Law Review* 907.

51 See W Pincus, "Programs to Supplement Law Offices for the Poor" (1966) 4 *Notre Dame Law Review* 887; W Pincus, "The Lawyer's Professional Responsibility" (1969) 19 *Journal of Legal Education* 22; W Pincus, "Legal

These developments were given further impetus by constitutional decisions of the United States Supreme Court requiring representation of criminal defendants.[52] The practical need to provide legal representation in the wake of these decisions led to the pragmatic view that law students were capable of limited practice.[53]

There is now a vast literature, mainly American, on clinical legal education.[54] It reflects the changing emphasis on goals during a 35-year period, at times concentrated on skills and more recently a reassertion of the goals of social justice and access to justice.[55] In the area of advocacy, Black and Wirtz[56] have argued that clinical programs in which real clients are represented offer the best vehicle for educating students in advocacy. Not only does such a program offer the opportunity for technical skill development, but, just as importantly, it offers the opportunity for education in the values of lawyering urged on the American legal profession by the MacCrate Report in 1992.[57]

As Noone and, later, Giddings describe, the Australian history of clinical legal education is intimately connected with the history of the community legal centre movement, resulting in clinical programs typically based on the premise that education of students about the law and the legal system can most effectively occur while providing legal services to

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Education in a Service Setting" in *Clinical Education for the Law Student: Legal Education in a Service Setting*, CLEPR National Conference (Buck Hill Falls, Pennsylvania: Council on Legal Education for Professional Responsibility, 1973); W Pincus, *Clinical Education for Law Students: Essays by William Pincus* (New York: Council on Legal Education for Professional Responsibility Inc, 1980).

52 *Gideon v Wainwright* 371 US 335 (1963) and *Argersinger v Hamlin* 407 US 25 (1972).

53 H P Monaghan, "Gideon's Army: Student Soldiers" (1965) 4 *Boston University Law Review* 45; J R Brown, "The Trumpet Sounds: Gideon – A First Call to the Law School" (1965) 43 *Texas Law Review* 312.

54 See the bibliography contained in *Clinical Law Review* Special Issue No 1 (2001). See also P G Schrag and M Meltsner, *Reflections on Clinical Legal Education* (Boston: Northeastern University Press, 1998).

55 See L G Trubek, "US Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective" (1994) 5 *Maryland Journal of Contemporary Legal Issues* 381; J C Dubin, "Clinical Design for Social Justice Imperatives" (1998) 51 *SMU Law Review* 1461.

56 J P Black and R S Wirtz, "Training Advocates for the Future: The Clinic as the Capstone" (1997) 64 *Tennessee Law Review* 1011.

57 American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (the MacCrate Report) (ABA, Chicago, 1992).

58 M Noone, Australian Community Legal Centres – the University Connection, in J Cooper and L G Trubek (eds), *Educating for Justice: Social*

disadvantaged people.[58] The idea that clinical students could extend their education and their service through advocacy emerged early, although implementation did not occur until the 1990s.[59]

The question arising in considering a program of student advocacy is how the program might ensure that the student reaches acceptable standards of skill and ethical conduct with the client receiving an acceptable standard of legal service. Can this be provided and how? Is it possible that the extension of existing clinical programs in Australian law schools to include limited advocacy meets both these goals?

In the United States, there appears to be only one published piece of research dealing with students as advocates. In 1973, Wicks published the results of their large-scale survey of judges, students, practitioners, clinical supervisors, Bar Association officials, state attorneys-general and law school deans.[60] The research was conducted during 1971 and 1972, in the very early days of clinical legal education and student appearances set out to obtain information about how those involved in student practice perceived its educational value and adequacy of client representation.

Under categories of competence and ethical conduct, the researchers asked numerous questions about courtroom conduct to compare the student performance with both a "newly licensed attorney" and a "typical attorney of average experience".[61] Their analysis of the responses revealed that "compared with newly licensed attorneys … students were considered to provide a quality of representation that is equal to or better than that of such attorneys in all stages of litigation except cross-examination".[62]

The authors' further analysis was that respondents related the effectiveness of the students' representation directly to the level of supervision. Supervision was seen by their respondents as the cornerstone of effective student representation.[63]

Values and Legal Education (Aldershot: Dartmouth Publishing Company Limited, 1997).

59 M Noone, "Student Practice Rule – Is It Time?" (1992) 66 *Law Institute Journal* 504; S Smith, "Clinical Legal Education: The Case of Springvale Legal Service" in D Neal (ed), *On Tap, Not on Top: Legal Centres in Australia 1972-1982* (Melbourne: Legal Service Bulletin Co-operative Ltd, 1984).

60 A J Wicks and D J Stanard, "Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study: A Study for the American Bar Foundation" (1973) 15 *William and Mary Law Review* 353.

61 Id.

62 Id at 402.

63 Id at 421.

This research does not appear to have been updated in the United States. It clearly has interesting implications for our research and is entirely consistent with the responses of our interviewees as set out below.

While the *Wicks* research focused on "in-court" student practice, the literature on supervision generally in clinical legal education extends beyond "in-court" work. It emphasises the pre-court preparation of the case and the supervisor-student interactions in this process.

Therefore, supervision continues to be the aspect of clinical legal education considered critical to achievement of program goals. Writers such as Kreiling[64] and Shalleck,[65] have focused on the supervision interactions as crucial to the way in which the student learns from experience and discuss the choices to be made in these interactions. Judith Dickson has linked the competence and ethical conduct of student advocates to the effectiveness of supervision, arguing that its presence distinguishes the clinical law student advocate from other non-lawyers protecting the public.[66]

In the wider field of clinical supervision, there is a large body of literature.[67] In particular, the education of students in the health sciences relies on field supervision. While there may be differences in emphases between the health science and legal clinical programs, there are also similarities such as the introduction of students to their professional role and to the practical skills required of them in performing it. The practice of supervision in clinical legal education is firmly based on the same principles of experiential learning as in those other fields.[68] Boud and Pascoe[69] identified three critical criteria for experiential learning. The first was that the learning environment be as "real" as possible. The second was that the student be fully involved in the learning activity, not merely an onlooker. Thirdly, they believed that the student would only maximise their learning opportunity if they had some control over their experience.

64 K R Kreiling, "Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision" (1981) 40 *Maryland Law Review* 284.

65 A Shalleck, "Clinical Contexts, Theory & Practice in Law and Supervision" (1993) 20 *New York University Review of Law & Social Change* 109.

66 J Dickson, supra note 26.

67 D L Best and M L Franke, *Quality Supervision: Theory and Practice for Clinical Supervisors* (Victoria: La Trobe University, 1994).

68 Kreiling, supra note 65 at 289-306; Shalleck, supra note 66 at 152-161.

69 D Boud and J Pascoe, "What is Experiential Learning?" in J Higgs (ed), *Experience-based Learning* (Sydney: Australian Consortium on Experiential Learning, 1988).

Australian clinical legal education programs have traditionally satisfied these criteria. In the context of student advocacy, one can argue that where these conditions are present the educational experience for the student advocate is greatest. Achievement of the goal of competent client service depends on the balancing of student independence with supervision support.

The informal programs currently operating in Australian law schools are all based within the clinical legal education programs.[70] Where a student is approved to appear for their client in court, the clinical academic supervisor works with the student on the preparation of their court appearance (content, ethical conduct, presentation etc). The student is then supervised in court by either their clinical academic supervisor or another legal practitioner. The proposed scheme discussed in this article is founded on the requirement of this pre-court preparation.

Methodology

The specific aims of the project were to investigate the possibility of introducing a formal scheme of law student advocacy and, if it seemed feasible, to recommend the most effective means of implementing such a scheme. The context in which these aims were pursued was that of using student advocacy within legal education as a vehicle to provide students with a deep understanding of a lawyer's professional responsibility in the service of the community.

The method we chose was to ascertain the views of members of the judiciary and of the practising legal profession towards student advocacy. It was our view that unless relevant members of the judiciary and the practising profession were involved in the development of any formal regime of student advocacy, moves to introduce such a regime would be doomed to failure.

Five groups of people were identified to interview. These were:

1. Magistrates in the Melbourne metropolitan area before whom clinical students from Monash University had appeared or sought leave to appear. Of those magistrates who had granted leave to appear, we selected only those who

70 Supra note 5. In these programs students, under the supervision of a clinical academic (who is also a qualified legal practitioner) provide legal services to disadvantaged members of the community.

had experienced student advocacy on at least two occasions to increase the likelihood of a considered opinion.

2. Practitioners who had acted as in-court supervisors for student advocates.
3. Chief judicial officers in Victoria. These were to include the Chief Justice of the Supreme Court, the Chief Judge of the County Court, the Chief Magistrate, the Judge Administrator – Southern Region of the Family Court of Australia and a former Chief Magistrate.
4. Members of the magistracy in the Newcastle area in New South Wales before whom University of Newcastle students had appeared.
5. Members of the judiciary and practitioners in Tasmania with experience of the operation of the limited right of audience for apprentices in that State.

The first two groups were the largest in number and their responses form the basis of the discussion in this article. However, information and insights gained from other interviewees, particularly the Tasmanian group, were helpful in contributing to an overall understanding of the potential for student advocacy.

A total of nine Victorian magistrates, 13 Victorian practitioners and nine judicial officers and practitioners in Tasmania were interviewed. A gap in the research data is the lack of response from magistrates who had refused permission for students to appear. All in this category declined to be interviewed. It is impossible to know whether these magistrates' decisions to refuse a student leave to appear before them were based on the principle that only qualified practitioners should have a right of audience in the courts or whether they had more specific concerns that could be addressed in a formal scheme.

The aim of the interviews with the Victorian interviewees was to ascertain their attitude in principle to law students appearing as advocates and to ascertain their opinions on specific aspects of representation, such as competence, supervision and the types of cases. Consistent with the project aims, it was also important to ask interviewees their views on formal recognition of student advocates by legislative amendment or court ruling.

The emphasis in Tasmania was different. Here, the primary aim was to obtain information and views from the interviewees about the operation and their personal experience of the limited right of audience contained in

provisions of the *Legal Profession Act*. A secondary aim in the Tasmanian interviews was to obtain interviewees' views as to the applicability of such a limited right of audience to law students.

The interview was primarily a structured interview. Questions were developed for each category of interviewee (differing only in minor aspects among categories) and the same questions were asked of each member of that category. (One example of the questions appears in Appendix C.) The questions were both general, such as first opinions, current opinions and why, role of the courts, role of supervisor, and specific, like the standard of advocacy in specific cases, types of suitable cases and appropriateness of legislation.

However, the interviews also included scope for a general discussion of student advocacy. Most interviews were of 30–45 minute duration and most were tape-recorded.

A draft legislative provision and "model rule" were developed for consideration by governments and courts (see Appendix B).

The remainder of this article sets out in detail the responses of the three main groups interviewed (Victorian magistrates and practitioners and Tasmanian interviewees) and discusses our conclusions regarding the development of a formal student advocacy scheme. As the responses show, such a program can be effective in providing competent and ethical client representation.

Responses – Magistrates

Magistrates' Initial Reactions to Student Appearances

Of the nine Victorian magistrates interviewed, five said that when approached with the idea, they had immediately thought the idea of law students doing appearance work was a good idea.

Of the remaining four magistrates, one said that he had had "no reaction one way or the other". Two said they were initially cautious.

The final magistrate described his initial reaction as "mixed, positive mainly" with ethical concerns his focus.

Views after Experience

All the Victorian magistrates said that the experience of having law students appear before them had been positive

and that as a result of this experience they were supportive "in principle" of students appearing in their courts. The magistrates' experience-based views were consistent with the two considerations that had influenced their initial reactions. These were: educational/training benefit to the student as a future practitioner and benefit to the client. One magistrate's comments summarised these views:

> [I]f it is going to be of some benefit to the student in their later life getting that experience … it will be a benefit to them … it will be a benefit to the community. It will be a benefit to the people who they are representing.

The magistrate who had initial concerns about ethical implications still had those concerns although he was "mainly positive" after his experience.

One magistrate who had expressed indifference to the idea at the outset went on to say that he did not have strong views "one way or the other" after his experiences. At the same time, he indicated in his answers to questions in the "competence" category that his experience of student advocates had been a positive one. In summary, his view was that "[i]t [student advocacy] can only assist the running of a court process when much of the case-work we do is without representation".

It is also clear from the responses to this question that the magistrates' views on student appearances were integrally related to the standard of advocacy displayed by the students who had appeared before them. This is to be expected.

Competence

In this part of the interview, we were interested in magistrates' views on the actual performance of the student as advocate. The magistrates were asked how the students' advocacy compared with that of very junior practitioners and to compare the efficiency of a student representation to that of an unrepresented litigant. Within these two general questions, magistrates were asked to consider issues of standard, time and efficiency.

Standard of Student Appearances Compared with Appearances by very Junior Practitioners

Magistrates were asked how the law students who had appeared before them compared with the average junior practitioner appearing in the same sort of cases. The significance

of this assessment lies in the fact that Magistrates' Courts are the traditional training ground for new practitioners, many of whom have had little or no advocacy experience before rising to their feet in their first case.

In comparing the standard of students' appearances with very junior practitioners, magistrates' comments varied. Some magistrates went on to comment on the students' performances in relation to experienced practitioners.

Four magistrates said that the students were just as good as very junior practitioners with "very little difference" between them in performance.

One of this group stated that the students were:

> On par really [with very junior practitioners]. I think that they are very good and I have to say they are always much better prepared. I am often disappointed with some of the barristers, in particular, those who have been briefed to appear and seem to come along with one or two matters and don't really seem to be very well prepared at all. So at least I feel that the students, I am usually confident that they will be prepared and they know what they are doing.

Three magistrates, while generally happy with the standard of advocacy of the students, made the point that it was difficult to generalise because the standards of both students and practitioners vary.

One magistrate commented that: "The well-prepared student is as good … as the rushed practitioner. A well-prepared practitioner who has been doing it for a while would probably be a lot better. That's purely because of experience."

One other comment made was that students often had unrealistic expectations of the sentencing outcome. Two magistrates commented that they saw it as a critical aspect of the supervisor's role to ensure that the student understood the likely sentencing options.

Time taken by student advocates was raised as an issue. Magistrates' Courts are very busy places. Valuable court time might be consumed by lengthy or irrelevant submissions. There was some difference of opinion and not all magistrates dealt with this question by comparing the student to junior (or other) practitioners. Some responded by considering the issue in relation to unrepresented persons. However, one magistrate was quite firm that students were "much faster than most practitioners".

Another magistrate thought that a student's plea was often longer than that of both an unrepresented person and a junior practitioner "because … they are more thorough". He said that "I think junior practitioners very quickly learn when to stop, particularly if they are given an indication" and went on to say that "I think Magistrates who are quite comfortable with the program would allow a student to run the plea right through to the end".

This sympathy for a "trainee" was evinced by another magistrate who contrasted his habit of interrupting a plea by a practitioner (either to accede to a request or to clarify the submission), with his tendency to allow a student to continue to the end "because I think that's part of the training".

On the other hand, another magistrate recounted an experience with a student who had clearly prepared a lot of material and was determined to present it all, notwithstanding the very busy Mention List. Obviously, this could impact on the speed of throughput of cases.

This same magistrate went on to indicate that generally the students who had appeared before him showed a practical understanding of the pressures of the Mention List and tailored their submissions accordingly.

As with sentencing, it is clear from the responses that an understanding of time pressures and the need for relevance are issues to be dealt with in the student's preparation for their appearance.

Overall, in response to these questions regarding student competence in advocacy, only one magistrate thought that junior practitioners presented better appearances than students. He thought this was due to practitioners having completed their course and having "that little bit more 'wherewithal' than the students".

Comparison with Unrepresented Defendants

One obvious aspect of the informal student appearance programs currently operating is their provision of legal representation to people who would otherwise be unrepresented. Therefore, we were interested to ascertain the magistrates' views on whether the representation was valuable.

One frequently mentioned problem associated with unrepresented litigants or defendants is that they take up more of the court's time than if they were legally represented. This is because of the difficulty in elucidating relevant facts and the obligation felt by the presiding judicial officer to ensure

the person has some understanding of the legal process. We therefore asked magistrates to consider the efficiency aspect of students as advocates compared with dealing with an unrepresented litigant. Specifically, as in the comparison with junior practitioners, we asked them to comment on time.

Three magistrates stated in no uncertain terms that students were more efficient than unrepresented defendants. The students were said to be "super efficient", "very much faster than unrepresented people" and "more efficient [due to their] training in law and [because] they are more articulate".

These magistrates said it was often difficult to "extract" relevant information from unrepresented people and made the point that when confronted with an unrepresented person the magistrate often has to "enter the arena and conduct the whole thing" in order to achieve an appropriate outcome.

Three of the remaining four magistrates answered the "efficiency" question by considering time.

Two magistrates indicated that the student pleas took longer than that of an unrepresented person, but that this was because the student appearance was better prepared and provided the court with the relevant information necessary to make the appropriate determination.

Another magistrate took a different approach to the question. He thought that unrepresented people possibly took less time in court because the magistrate intervened to quickly obtain relevant information. On the other hand, he tended to "nurture" a student along, allowing them to follow their prepared path.

Yet another magistrate pointed out that there was a wide range of skills in unrepresented litigants/defendants, from the individual who is articulate and well prepared to those with disabilities including poor English skills. This magistrate emphasised a view expressed by all but one of the nine interviewed, that a defendant should be legally represented so as to enable the court to have all relevant information to proceed efficiently through its work.

We have dealt with responses on competence at some length as both the scheme of statutory regulation of advocacy and the courts' exercise of discretion are built upon the view that restriction of audience to legally qualified persons ensures competent representation of litigants.

The following categories of interview questions sought to discover views on supervision and on the types of cases thought appropriate for student advocates. They sought to build a more specific picture of the extent of student "in

court" practice which interviewees considered would result in competent and ethical advocacy.

Supervision

We asked a number of questions in this category. Two questions dealt with the interviewee's own observations and experience of the student advocate's supervisor in court. A further two questions asked for their views on supervision generally and whether student appearances should only take place in the presence of a designated supervisor.

It is important to note that magistrates focused on "in-court" supervision. However, three did directly express the view that supervision was also essential for proper preparation of the court appearance. Among the Tasmanian interviewees pre-court supervision figured very highly in their concerns. Similarly, practitioner-supervisors held strong views on pre-court preparation. As discussed above, the relevant literature concentrates on supervision of the student in the whole course of their relationship with their client.

All but one magistrate placed importance on the supervision of student appearances. Magistrates stated that supervision was "important" and "essential"; that student appearances were "absolutely" and "obviously" dependent on supervision. One magistrate said that "the success or failure of this system [depends on] the quality of supervision. Quality in terms of practicality, people who know not just what the law is, but how it operates in practice".

Another magistrate said:

> [I]t would concern me [if there was no supervision] because the only feed back that would be available, if magistrates or staff aren't involved, is the defendant, the client, and he or she isn't really in a position to assess whether the plea was done appropriately, whether all the information was put forward … [it is important] as a safeguard and I think just as a credibility issue. I think if the program was allowing students to go unsupervised … well, what is the purpose? You are actually allowing these people to appear in court. Surely you have a responsibility and a duty to ensure that not only are they doing it properly but also ... that they get the necessary tuition, guidance.

The dual purposes of the scheme to educate and provide legal services are clearly expressed in this view of supervision.

The magistrate who placed no importance on the supervision of student appearances said that there was no need for the supervisor to be in court because, as presiding judicial officer, he was able to ensure that all persons before his court were satisfactorily dealt with in the legal process.

The other magistrates had a number of different reasons to explain why they thought the role of the supervisor was important. Some of these magistrates were in fact focusing on supervision of the student's preparation.

In summary, all but one of the magistrates interviewed had a firm view that supervision was a critical component of any student advocacy scheme. They variously expressed their views in terms of the educational obligations (presumably of the university) to the student and of the ethical obligations to the client. In most cases, both considerations were present. While none had experience of the supervisor intervening in any significant way, the extent to which the magistrates themselves would intervene appeared to depend on their personal views as to their judicial role.

Types of Cases Thought to be Appropriate for Student Appearances

The existing schemes of student appearances are all based on clinical legal education programs within the law curriculum of universities. The types of cases in which students appear are generally restricted to minor criminal matters (pleas of guilty), adjournments and uncontested divorces.

In the United States of America, most student practice rules contain some limitations on the matters in which students may appear. Therefore, we were interested to discover whether our interviewees had any fixed views.

There was a consensus that it was appropriate for students to appear in minor criminal pleas. A number of magistrates' specified adjournments, minor thefts, first offender shop stealing and minor traffic offences as suitable cases and one expressed the range as "just about all matters where the person is a first offender". This was consistent with the views of several others that cases in which a gaol term may be considered should be excluded.

The rationale for this view was, as one magistrate expressed it:

> Firstly, because that type of situation usually requires a far more extensive plea, and I think to do a good long plea

you have to be experienced. Secondly, I can see potential resentment in the client having a student if they are facing gaol.

Specific examples given of suitable matters were:

- Neighbourhood disputes
- Stalking
- Diversions
- Licence reapplications
- Consent bail applications
- Applications for a rehearing

Matters mentioned as being unsuitable for student appearances included burglaries, serious assaults and pleas which are "reasonably complicated".

Against this, one magistrate acknowledged that an individual student may have particular skills and experience which would make them exceptionally qualified to appear in a complicated plea.

In other words, the question is whether there should be some flexibility in the range of permitted cases to allow for the expertise of individual students.

All magistrates thought that it would be inappropriate for students to appear in contested matters.

There was unanimity that students should only represent clients who had no access to legal representation other than the duty lawyer service run by the State legal aid organisation. This reflected the limits adopted by the programs experienced by the magistrates. This criterion operates to limit the types of cases in which students might appear, since clients are likely to be eligible for legal assistance in family violence cases and criminal cases where there is a real possibility of a gaol term being imposed.

Introduction of a Formal Limited Right of Audience

Finally, interviewees were asked their views of the creation of a limited right of audience for law students either by way of legislative amendment or court rule.

By unfortunate omission, the first two magistrates interviewed were not asked this question. However, of the remaining seven interviewed, six were in favour of some form of formal appearance rule. The seventh magistrate saw no necessity.

The main reason given by the Victorian magistrates for supporting the introduction of such a rule was that it would encourage more magistrates to allow students to appear as "some magistrates are incredibly legalistic", taking the view that "we are creatures of statute, statute doesn't allow us to do it therefore we won't".

Summary of Responses

While only small in number, the interview group discussed in this section is significant because of its members' direct experience of student advocacy. It is clear from the responses that the magistrates had thought carefully about the program, its operation and possible limitations. Therefore, their views are important indicators of the likely issues requiring consideration in any movement to develop a formal scheme of student advocacy in Australia.

There was clear consensus on the general types of matters appropriate for student advocates. There was also agreement that students should only be representing clients otherwise unable to obtain legal representation (other than the legal aid duty lawyer).

The magistrates' views appeared to reflect the dual purpose of the clinical legal education program which produced the students. These are education of law students and provision of legal representation to disadvantaged persons.

While there was general approval of the competence demonstrated by students, issues of sentencing and submission relevance were raised as needing attention.

Supervision emerged as clearly critical in the views of this group. The magistrates unanimously agreed that in court supervision must be provided to satisfy both educational and ethical responsibilities. Views of the role of the supervisor were varied. However, they can be summarised as either or both educational and protective of the client.

Perhaps because of their positive experiences with student advocacy, these magistrates were prepared to support the formalisation of a limited right of audience in order to introduce some certainty for students and clients.

Responses – Legal Practitioners

A total of 13 legal practitioners were interviewed. All had acted as in-court supervisors on at least two occasions for

student advocates from the Monash University clinical legal education program.

The format of the interview was essentially the same as that for the Victorian magistrates. The interviewees were asked about their initial reaction to the idea of student advocacy and then about their experience of it. Questions going to competence were then asked as previously. They were asked about their own experience as supervisors, their view of that role and to suggest the types of matters they thought suitable for student appearances. Finally, they were asked to consider legislative amendment or court rule introducing a formal limited right of audience.

We summarise the practitioners' views here and only those responses that differ in any significant way from the magistrates' are described.

Twelve practitioners said their first reaction to the concept of student advocacy was positive and they elaborated on the educational benefit of such a program.

Nine of the 13 considered that the students they had supervised or observed were of a standard equal to or better than junior practitioners or the overworked duty lawyers who might otherwise have appeared in these matters.

All the practitioners considered that the students' performance was more efficient than most unrepresented litigants and all considered that the presence of the in-court supervisors was necessary.

Practitioners generally agreed with the magistrates on the types of cases that were suitable for student appearances, except that they unanimously excluded family violence and Children's Court matters, whereas the magistrates' attitudes to these categories varied.

Eight practitioners supported that a formal right of audience should be introduced. The remainder were equivocal or thought that the issue should be left to the discretion of the court. In the latter group, some doubts were expressed about the burdens of supervision placed on practitioners in a formal scheme, raising questions of the obligations of the educational institution to provide qualified supervision. Cost clearly becomes an important issue in the conversion of a small and informal scheme to a formal regime, but this consideration is beyond the scope of this article.

The Tasmanian Experience of a Statutory Limited Right of Audience

As indicated earlier, our purpose in investigating the Tasmanian experience was to learn how a statutorily entrenched limited right of audience operated in practice. Did the interviewees' personal experiences highlight the same or different issues as those emerging from the Victorian experience? What were the interviewees' views as to the applicability of a limited right of audience to law students?

The Tasmanian legislation introduced in 1968 granted to articled clerks a "limited right of audience" before the courts and gave them the same rights and obligations as a legal practitioner.[71] This permitted them to appear unaccompanied in a wide range of matters before the (then) Court of Petty Sessions, Coroners Court, Supreme Court Chambers and Local Court. In 1971, this right was extended to apprentices at law when the post-degree practical training system was restructured. Further amendments were made in 1993. In this discussion, we use the term "apprentices".

Briefly, apprentices had the right to appear unaccompanied by a qualified practitioner in Supreme Court Chambers on enforcement matters and before the Master or before a judge in uncontested matters. They could also appear unsupervised in a Local Court (civil matters) and in criminal matters in the Court of Petty Sessions on bail, remand, adjournments, pleas of guilty in traffic matters and in the Coroners Court. Initially, there were limits placed on civil matters. However, in 1993 these were removed from the *Legal Profession Act*.

Under the legislation, apprentices could appear as junior counsel in the Supreme Court if accompanied by a qualified practitioner.[72]

This is the scheme as set out in the legislation. However, in practice it was clear from the responses that apprentice advocacy occurred mainly in the lower courts, the Supreme Court Master's Chambers and before the Master of the Supreme Court.

An interesting aspect of the Tasmanian scheme is the focus on civil matters as an area open to apprentices. It was clear from the responses that apprentices regularly appeared in minor civil matters such as motor vehicle property damage cases. Several interviewees expressed the

71 Supra note 28.
72 Id and *Legal Practitioners Act 1993* s 46.

view that civil matters provided very useful training for apprentices because of the opportunities for negotiation and the requirements of procedural and evidentiary knowledge. However, it is important to note that the Tasmanian scheme operates as part of the post-degree practical legal training system. Therefore, the scheme was supported by the resources of the firm or government agency in which the apprentices worked. Resources of the kind necessary to conduct civil actions are generally not available in university clinical programs.

We interviewed nine people with experience of the Tasmanian scheme. These were:

- Two Supreme Court judges
- The current Supreme Court Master
- The Registrar of the Supreme Court
- A senior legal practitioner
- Director of the Legal Practice Course
- The former Supreme Court Master
- The first Director of the Legal Practice Course
- The Deputy Chief Magistrate

Within this group, two had been apprentices at law after the insertion of Pt IIA (limited right of audience) into the *Legal Practitioners Act 1968*. Therefore, they had personal experience of appearing as "apprentice advocates".

Five (including these two) had experience of apprentices within their firms. The judges, Deputy Chief Magistrate, Registrar and former Master all had personal experience of apprentices appearing before them pursuant to the legislation.

Since the aim of investigating the Tasmanian experience was to provide a comparison with the recent law student programs, we take the approach of highlighting issues and themes arising in the interviews, rather than setting out a detailed analysis.

Responses to Questions Regarding Competence and Role of Supervision

We asked this group questions regarding competence, efficiency of apprentices and about the role of supervision. All interviewees viewed the scheme as a training scheme and so focused on that aspect of its operation.

Analysis of the responses revealed a very interesting similarity of views among this Tasmanian group with long experience of apprentice advocacy and the Victorian group of magistrates and practitioners with fairly recent experience of student advocacy.

In general, the view was that there was very little difference in competence between a well-prepared apprentice and a junior practitioner; apprentices were regarded as generally within an acceptable range of competence.

Several interviewees made the point that development of advocacy expertise was a continuum and there was "no magic moment".

All interviewees with experience of apprentice advocates in the lower courts agreed that their submissions took longer than those of experienced practitioners. This was because apprentices often had lists of questions to ask and lacked the experience to revise these on their feet. Another feature was the leading of irrelevant evidence. As one judicial officer asserted, there was often "a tendency to overkill" but he did not "necessarily see that as a fault", although it could "raise the ire of a magistrate who wants to finish a busy day".

Supervision was again a critical issue. The Tasmanian legislation does not require the presence of an in-court supervisor. In all cases the emphasis in the interviews was on the supervision of the apprentice's preparation.

All interviewees said that in their experience the conduct of the apprentice's principal in working with the apprentice on the client's file determined the standard of the apprentice's advocacy. Several interviewees were highly critical of a tendency they had detected among some practitioners to send an apprentice to court with no instruction or preparation.

In such a case, the responses indicated that in the Master's Chambers and the Magistrates' Court, the presiding officer regularly stood the matter down, calling for the apprentice's principal or other qualified practitioner who knew about the case to come to court.

One interviewee expressed concern that the system had allowed apprentices to appear without in-court supervision by someone familiar with the case. The interviewee recalled appearing alone in a defended property damage claim within a few weeks of commencing apprenticeship. In retrospect, while the interviewee thought the outcome for the client was satisfactory, the interviewee believed a qualified practitioner should have been supervising in court. This interviewee commented that the interviewee was fortunate in having

excellent supervision in the preparation of the cases in the office.

There was a consensus that lower court work was most suitable for apprentices. The following areas were mentioned as appropriate:

- Lower court civil matters. This interviewee was of the firm view that a monetary limit should be imposed on claims in which law students could appear.
- Prosecutions in health and other local council matters because of the experience in preparing a complete case.
- Minor criminal matters.
- Childrens' Court (Youth Court) matters because of the informality and flexibility of the jurisdiction.

The Tasmanian legislation expressly addresses the question of accountability by providing that the employer is responsible for the acts of the apprentice unless they were done without authority.[73] In the latter case, the Supreme Court had the authority to cancel the apprenticeship if it thought it necessary.

Not all interviewees addressed this question. One who had been involved in administering the professional disciplinary system could recall no instance of cancellation of apprenticeship. Another thought that one practitioner had been called to account for failure to adequately instruct their apprentice.

Both these interviewees thought that in developing a new scheme for law students, there must be an accountability structure built into the scheme. There were no specific suggestions as to the form this might take, although the experience in Tasmania of a scheme that nominated the employer as civilly and professionally responsible clearly influenced the approach.

In summary, responses raised the following issues:

- Variation in the extent of instruction of apprentices by principals, with some spending considerable time on both general education and specific files, while others appeared to treat the availability of the apprentices as a cheap alternative to qualified representation.
- Judicial officers generally held the principal accountable if the apprentice was unprepared and some took steps to remedy the effect on the client.
- Judicial officers, especially magistrates, were generally prepared to guide the apprentice in the representation in the interests of the client.

73 Introduced by the *Legal Practitioners Act 1993* s 46(4).

- Concern as to whether clients always realised that they were represented by an apprentice and not a qualified practitioner.
- Whether there should have been (and should be in any new scheme for law students) in-court supervision at all times in all cases.

It was significant that no interviewee opposed the idea of an advocacy scheme for law students. The key considerations were:

- proper provisions should be incorporated for supervision, both in court and pre-court;
- clear accountability structures;
- clear definition of areas of practice.

It is clear that the 30-year experience of limited right of audience for apprentices in Tasmania was generally a positive one. Despite the various concerns expressed about lack of supervision and preparation, the practitioners and judicial officers interviewed believed that clients had generally received satisfactory services and that the scheme had provided practical training in a structured way.

Conclusion

Our analysis of the applicable legislation and case law showed that the principal concern of both Parliament and the courts in restricting the right of audience to admitted practitioners is to ensure a minimum standard of competence and ethical conduct in advocates appearing before the courts. Competent representation and ethical conduct are the cornerstones of the legal profession's virtual monopoly over advocacy in the courts.

The academic literature on student practice (almost exclusively in the area of clinical legal education) has a strong focus on supervision as the key both to ensuring competent and ethical client representation and to challenging the students to think critically about the law and legal system. Tertiary legal education has repeatedly been the focus of attempts to improve the standard of legal practice and the operation of the legal system. Recent Australian and overseas inquiries have raised the question of how to inculcate a commitment among lawyers to high standards of skill and ethical practice.[74]

Concern over competence and ethics was consistently reflected in the interview responses. All three groups, Victorian

74 Supra notes 7 and 8.

magistrates and practitioners and Tasmanian respondents, strongly supported the educational value to students of the program enabling them to appear, provided that the interests of clients are protected by appropriate safeguards.

The overwhelming majority of respondents considered that the student or apprentice advocacy they had observed did meet acceptable standards of competence and professionalism providing a valuable service to the community. On the basis of their experience, there was a generally positive attitude to the concept of introduction of legislation or model rules granting law students a limited right of audience.

Therefore, in this context it was critical that in formulating our recommendations we should design a scheme which ensured the protection of clients through the key issues identified in the research: supervision, limits on the types of cases in which students could appear and accountability. The model we developed includes both a statutory provision and court rules. Legislation establishes the right of audience and the status of the student advocate. We think it essential that the student advocate assume personal professional responsibility for their work and propose that they have "the same rights and privileges and [be] subject to the same duties and obligations as if that person were a legal practitioner".[75] Court rules provide for eligibility of legal education programs and students, the types of cases in which students may appear, certification by the student's academic (clinical) supervisor of the student's competence, a requirement of an in-court supervisor (who may be the clinical supervisor) and for the client's informed consent. In addition, these may ensure ownership by relevant judicial officers and provide some flexibility to individual courts.

The issue of civil liability is an important one. In our proposal, eligibility depends on the student being enrolled in a "certified legal education program". The educational institution will need to have professional indemnity insurance to cover staff and students engaged in professional activities as part of the educational programs. On reflection, our proposed model legislation and rules could have included such a requirement. While the status of advocates' immunity is uncertain in Australia, legislation creating a limited right of audience for law students could address civil liability for in-court negligence. In our view, the liability lies primarily with the educational institution and the student's clinical supervisor, who will hold a current practising certificate.

75 Proposed Model Student Advocate Legislative Provision (Appendix B).

However, where the student is placed with an outside legal agency, liability may properly lie with that organisation and the field supervisor.

As the ALRC and its predecessor inquiries insist, university legal education must combine the development of professional skills with a "deep appreciation of ethical standards and professional responsibility".[76] The relationship between those in the world of legal practice and those in the legal academy must strengthen into a partnership committed to this goal. Based on the research reported in this article, a formal student advocacy program within academic legal education designed to operate within carefully defined limits with the support of the courts and a commitment to the interests of clients and students, offers the opportunity for students to learn and practise professional legal skills supported by systematic supervision.[77] Importantly, in view of prevailing concerns in Australia over access to justice and education in ethical practice, such a program could meet the requirements of legal education as described by the Australian Law Reform Commission:

> Professional skills training should not be a narrow technical or vocational exercise. Rather it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety, and professional and social responsibility.[78]

76 ALRC, supra note 7, Recommendation 2 at 142.

77 In 1962, J M Morris, in a report to the Dean, Faculty of Law, University of Queensland entitled *Practical Training in Law Schools*, suggested a "clinical training" stage of academic legal education in which students had "supervised and systematic practical training". His report was appended to Volume II of the Martin Report 71.

78 ALRC, supra note 8 at 140.

APPENDIX A

Recommendations

(1) The Commonwealth Government proceed to implement a formal scheme of student advocacy by creation of a "limited right of audience".

(2) This "limited right of audience" should be restricted to the Federal and Territory Magistrates' Courts and to the Family Court of Australia.

(3) Introduction of the "limited right of audience" should be by a scheme of legislation and court rule.

(4) Student advocacy should be restricted to representation of "indigent" clients.

(5) Student advocacy should be restricted to minor criminal cases where there is little likelihood of a custodial sentence; minor civil cases and minor family law cases.

(6) The legislation and rule creating the student advocate status should indicate types of cases but recognise the need for flexibility and continued exercise of the Court's discretion.

(7) Student advocates should be supervised in court by a qualified legal practitioner.

(8) Student advocates should be prohibited from receiving any "fee or reward" other than academic credit for the provision of advocacy services.

(9) The limited right of audience should be restricted to law students in specified legal educational programs.

(10) The Course Director or clinical supervisor should retain a discretion as to the competence of an individual student to appear for a client.

(11) The Course Director or clinical supervisor must certify to the court that in their view a student is prepared and competent to appear in the particular case.

(12) Student advocates appearing pursuant to the "limited right of audience" should have the same rights and privileges and be subject to the same duties and obligations as if they were a qualified legal practitioner. This should be set out in the legislation.

APPENDIX B

Model Legislation and Rules

Proposed Model Student Advocate Legislative Provision

[This provision is to be inserted initially into the *Family Law Act 1975* and the *Federal Magistrates Act 1999*. Subsequently it could be introduced into State legislation regulating either or both Court Practice and Procedure or the legal profession. As a Model Provision it could be inserted into the National Legal Profession Draft Model Bill.

Section 1 (*or however numbered*) Limited right of audience for student advocates

(1) A law student who satisfies the criteria specified in Rules of Court relating to student advocacy has a limited right of audience before that Court in accordance with its Rule.

(2) A law student who exercises a limited right of audience pursuant to subsection (1) has the same rights and privileges and is subject to the same duties and obligations as if that person were a legal practitioner.

(3) A law student exercising a limited right of audience pursuant to subsection (1) shall not be entitled to be paid any fee or receive any reward for the advocacy services provided other than the award of academic credit by the institution in which the student is enrolled

Definition

Student advocate

A student advocate is a person exercising a limited right of audience before a Court pursuant to Section 1 (*or however numbered)* of this Act.

Proposed Model Student Advocate Rules

1 A student who is enrolled in a certified legal education program as defined in Rule 2 hereof ("an eligible student"), may appear before the Court on behalf of a party to proceedings before the Court of the kind described in Rule 3 hereof provided the requirements of Rules 4 and 5 are satisfied.

2 A certified legal education program means a program of legal education leading either to the award of the degree of Bachelor of Laws or to qualification for admission to practice which has been certified by the Dean or Director of the program in or to the effect of Form 1.

3 The proceedings in which an eligible student may appear include but are not restricted to:
   - Pleas of guilty in criminal proceedings
   - Uncontested bail applications
   - Adjournments in both the civil and criminal jurisdictions
   - Applications for re-hearing in both the criminal and civil matters
   - Victims of Crime compensation
   - Uncontested matters generally
   - Any other proceeding at the discretion of the Court

4 A student enrolled as aforesaid must have obtained from the party to be represented the party's consent in writing in or to the effect of Form 2 and such consent shall be filed with the Court.

5 A student seeking to appear before the Court must file with the Court a certificate from the student's academic supervisor in or to the effect of Form 3.

6 A student seeking to appear before the Court must arrange for a qualified legal practitioner holding a current practising certificate in the relevant jurisdiction to be present in Court at the time of the appearance, such practitioner to act as the student's supervisor.

APPENDIX C

Questions for Interviews with Magistrates

- Do you remember how you first heard about student appearances?
- When you first heard about the possibility of students appearing before you, what was your initial reaction? What were the reasons for your reaction?
- Since then approximately how many students have appeared before you?
- Now that students have appeared before you, what do you think about student appearances in principle? What are the reasons for your opinion?
- How would you compare the standard of students' presentation with that of very junior practitioners?
- How would you compare the efficiency of students appearing before you with the efficiency of unrepresented litigants? Do student appearances take more or less time, or about the same, as unrepresented litigants?
- What is your opinion of the role of the practitioner who acts as supervisor in court?
- Has the supervisor ever been required to step in or intervene in a case before you?
- Do you think student appearances are dependent on supervision and training?
- Do you think students should only appear under supervision?
- What types of cases do you regard as appropriate for student appearances?
  - Criminal pleas?
  - Adjournments?
  - Uncontested divorces?
  - Anything else?
- The *Legal Practice Act* or the Court Rules could be amended to give a limited right of audience to certain law students, eg, those in supervised clinical legal education programs (like the ones who have appeared before you). What is your view on that?
- Do you think there is a role for courts to play in legal education?

- Did you have direct contact with the students? For example directing them in their appearance or giving them a critique of their performance?
- Would you like to perform such a role?