

**REVIEW
OF THE
CLINICAL LEGAL EDUCATION PROGRAM
IN THE LAW FACULTY
AT THE UNIVERSITY OF NEW SOUTH WALES**

FINAL REPORT

June 1991

**A REPORT ON THE HISTORY STRUCTURE
AND OPERATION OF THE SUBJECT
'CLINICAL LEGAL EXPERIENCE'**

AT

KINGSFORD LEGAL CENTRE

WITH RECOMMENDATIONS FOR CHANGE

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In preparing this report, I have had the assistance of the academic, library and administrative staff of the UNSW Law School. For the period of the review, no students were enrolled in the clinical subject. The Law School agreed to carry the burden of absorbing these students into other enrolments, thereby making a significant contribution to the review process.

I have had the support and encouragement of the staff of Kingsford Legal Centre, and the invaluable benefit of discussions with my colleagues Robyn Sexton and Paul Batley. The staff has supported, with useful comment, the introduction of and experimentation with numerous educational and administrative initiatives. Ms. Kym Bedford typed the bibliography, which was largely compiled by Ms. Meredith Gibbs.

The Law Foundation of New South Wales has made a significant financial contribution to the review, and has long promoted the worth and importance of clinical legal education.

SUMMARY OF PART 2 OF THE REPORT

- 2.1.1 Content** While there may be a place for skills training in the Law School, clinical legal education offers students more than skills training. Clinical education introduces students to the values and dynamics of the legal system, to questions of social justice and power. In the experience, students necessarily develop practice skill including that of self-evaluation.
- 2.1.2 Site** There is a need for the clinic to be in or proximate to the Law School. If it is not, an office for the clinic in the Law School is necessary.
- 2.1.3 Enrolment** The clinical subject has particular timetable requirements which are not accommodated in the normal enrolment procedures.
- Student enrolment in the subject has implications for clients of the Centre, and questions arise as to the basis on which students are admitted to study in the clinical program.
- 2.1.4 Assessment** The subject is assessed on a pass/fail basis.
- 2.1.5 Type of clinic** The way in which the clinical program runs is important to the Law School for educational, funding and community service considerations.
- 2.1.6 Expense** Although the operation of a clinic is more expensive than other curriculum subjects, the clinical program at the Centre is largely funded from sources outside the Faculty budget and assists by generating its own funds.
- 2.1.7 Academic Status** The clinical teaching staff, including the director, are all employed on contract, with no opportunity to pursue the numerous possibilities for academic research that arise in a clinic. There is no formal teaching status in the Law School for two of the clinical teachers.
- 2.1.8 Integration** Elements of clinical teaching exist throughout the Law School curriculum. There are opportunities for students of other subjects to take part in clinical activities at the Centre, and for exchanges between clinical and other Law School teachers.
- 2.1.9 Curriculum** There are no necessary prerequisites for the clinical subject. The subject should be undertaken at an earlier stage than in final session of a law degree course, to allow subsequent subjects to be studied in a critical context based on experience.
- 2.2.1; 2.2.2 The legal centre model** Community legal centres are, by extreme example, the ideal source for students of a clinical experience
- Characteristic aspects of community legal centres, particularly the diversity and amount and the obligations of casework, compromise the extent to which time can be committed to the education of students at the centre.
- 2.2.3 Selectivity** Despite the continuing obligations that the Centre owes to its community, the type of casework can be restricted for educational purposes.
- 2.2.4 Referrals** A diversity of referral sources for cases will provide opportunities for numerous aspects of clinical legal education.

- 2.2.5 Responsibility** Clinical Legal Experience is essentially student-centred learning, using a high degree of student responsibility in a supervised environment as a device to motivate students.
- 2.2.6 Supervision** Supervision, essential to the operation of a clinical program, occurs at different times in the students' day, and raises for the supervisor the question of reconciling student responsibility with professional pressures and obligations.
- 2.2.7 Continuity** The transfer of files from one session of students to the next is problematic, compounded by the lack of either an overlap of students or an introductory course for students.
- 2.2.8 Advocacy** Representation of clients by students in some matters is possible, and an appropriate means of extending students' responsibility in clinical education. Useful examples, and relevant guidelines, exist in North America.
- 2.2.9 Project work** There is no need to limit the clinical experience to client-based casework; there is ample opportunity to achieve the aims of clinical education in matters of legal policy, education and reform.
- 2.2.10 Teaching** Although the weekly classes remain an important forum for teaching legal practice skills, there is growing emphasis on daily small group teaching.
- 2.2.11 Assessment** The problem of giving the students at the outset the information necessary for constructive participation in the subject can only be overcome by an introductory course.
- Students are assessed on a pass/fail basis, judged by reference to a number of particular criteria. The pass/fail method is considered appropriate for the clinical subject.
- No written work other than that relating to file work is required of students, and assessments are conveyed to the students by an initial written notice, followed by mid-session and end of session interviews.
- 2.2.12 Time Commitment** The educational goals of increasing student responsibility and reducing the need for intrusive supervision would be considerably enhanced by increasing the time spent by students in the clinical program from one to two days a week.

1. INTRODUCTION

A review of the operation of the undergraduate law degree elective subject LAWS7210, Clinical Legal Experience, was conducted in the period July-October 1990.

This is a report to, first, the Curriculum Review Committee of the School of Law (The Law School) in the Law Faculty (The Faculty) of the University of New South Wales (UNSW), and secondly to the staff, present and future, of Kingsford Legal Centre. Other readers may find the discussion useful.

Significant funding was made available by the Law Foundation of New South Wales to expand the scope and increase the depth of the review. This report is also to the Law Foundation.

1.1 History of the clinical subject

The subject Clinical Legal Experience had been available before the establishment of Kingsford Legal Centre (the Centre) in 1981. The clinical subject had, since mid-1975, offered students the opportunity to be placed with a lawyer in a legal aid office, or in Government or private practice.¹

The placement model for the clinical subject had been successful, particularly in providing placements with judges. The Law School nevertheless hoped to be able to establish an 'in-house' clinical teaching facility, at which the work done by each student would be of a consistent type, and the work, supervision, teaching and discussion could all happen in the same place. There existed at the time the example at Monash University: Springvale Legal Service was the place at which the Professional Practice subject had been taught since 1975.²

The proposal at UNSW was the subject of two papers by Neil Rees, lecturer in the Law School and convener of the clinical placement program.³

¹ see *Clinical Legal Experience Course Outline, First Session 1978*, held in the UNSW Law Library, at appendix 1

² see New V., *Clinical Education at Monash* (1977) 51 Law Institute Journal 404; Bartlett, C.C., *Towards Professional Competence - Clinical Legal Education* (1982) 56 Law Institute Journal 121

³ The first was a discussion paper titled 'Professional Practice', dated 28 March 1980. The second, titled 'Clinical Legal Education' and dated 18 March 1981, was submitted by the Clinical Legal Education Committee to the Law School at its meeting on 14 April 1981. Copies of the papers are at appendix 2.

1.1.1 Justification for a separate clinical subject

In the 1981 proposal⁴, and in a 1984 report,⁵ the case for the establishment of a law clinic was made quite strongly.⁶ Although the placement program had operated successfully for some time, the expense and administrative impact of bringing the clinical experience in-house clearly required renewed analysis of the worth of clinical teaching.

Clinical teaching was identified in the 1981 proposal as a teaching method which complements rather than competes against other methods, as a method which highlights for students the facts of a situation as the crucial variable in applying legal rules.

It was not proposed that the Law School adopt clinical method in its ordinary teaching. What was proposed to the Law School was a clinical subject, to be operated on its own in a 'clinic'. This important distinction must be kept in mind, as it is often not made explicit in academic discussion of clinical teaching. A clinical subject will generally be a real practice, based on client cases, whether of a specialised or general kind. This is the model which predominates in the United States,⁷ and which was proposed to, and endorsed by, the Law School.

At the same time, the clinical teaching method is as available to a torts or commercial law teacher as is the Socratic, lecture or tutorial method, quite independently of any distinct clinic.

The discussion that follows is largely in relation to the operation of a separate clinic, ie. clinical teaching as a separate subject. Some of the arguments in favour of a clinic are not always relevant to the clinical teaching of an ordinary law course, and the discussion that follows is concerned mainly with the operation of a clinic.⁸

1.1.2 Not a skills course

It was conceded in the 1981 proposal that the clinical subject would be in large part vocationally oriented. While pains were taken to distinguish the clinical subject from the practical training course at the College of Law, and to emphasise the academic aspect of student involvement in the subject, at the same time a case was made for the need for the Law School to have regard to the practice of law when educating law students.⁹ The extent to which the clinical program functions as a skills course is discussed below at 2.1.1.

⁴ Ibid

⁵ Lansdowne R. & Rees N., *Kingsford Legal Centre: A Clinical Experience*, Paper to the 1984 conference of the Australian Law Teachers Association, at appendix 3 of this report.

⁶ The then Dean, Professor Harry Whitmore, had already indicated his support for the clinical approach, although perhaps overstating the "down-to-earth" skills emphasis of a clinical program: Whitmore, H., *Are the Needs of the Community for Legal Services Being Met by our Universities?* (1975) 49 ALJ 315 @ 321; see also the Interim Report of the Professional Practice Education Working Group of the UNSW Law School 1980 Curriculum Review Committee, @ part D and Recommendation 5

⁷ what Condlin calls "the conventional clinic": Condlin R. J., *"Tastes Great, Less Filling": the Law School Clinic and Political Critique* (1986) 33 J. Legal Ed. 45 @ p

⁸ but see the discussion concerning integration in the Law School curriculum at 2.1.8 below

⁹ A survey of the first intake of students to the degree course in 1971 had shown that half the students chose to study law because of an interest in legal work. 48% indicated an intention to practice law, and 50% were undecided. 56% of students expected that there would be "great emphasis" in their studies on learning technical legal skills: Firth, I., *Characteristics of Students entering the Faculty of Law at the University of New South Wales 1971*, Tertiary Education Research Centre UNSW held in the UNSW Law Library

1.1.3 A successful proposal

Despite reservations, about both the appropriateness of clinical teaching in a university degree and the expense of it, the Law School approved a nine month trial period for the clinic.¹⁰ The period was set by reference to available funding from a UNSW Special Research Grant; subsequently funds were made available from a UNSW General Development Grant.

1.1.4 Kingsford Legal Centre

With the assistance of the grant from the University, and the co-operation and assistance of Randwick Municipal Council, the Law School was able to establish a community legal centre off-campus, in a building at Kingsford. Kingsford Legal Centre began operations on 27 June 1981 and was officially opened on 9 September 1981.

Established as a clinical teaching facility, the Centre functioned, from its inception, as a community legal centre. Other models that could have been adopted include a specialist service, directed only at, say, mental health matters; a service seeing clients only on referral from other agencies and therefore having no public profile; and a non-client based clinic, focussing on reform and research activities, or on skills training by simulation. That a community legal centre model was chosen may have been the result of a number of factors.

There existed at Monash University the then long-standing example of a clinical program being run at a community legal centre.¹¹ Indeed, the initial proposal for a 'one location' clinical program at UNSW¹² was that such a program be grafted on to the existing, independent, community legal centre at Redfern.¹³ That proposal was for a 'Professional Practice' course, the same subject name used at Monash.

The UNSW Law Faculty had had a close association with Redfern Legal Centre, a community legal centre in Sydney. Lecturers volunteered their time to that Centre's clients, and to its management committee. Students at the Faculty were voluntary assistants at the Centre, and the Centre had an office in the Law School.¹⁴

This involvement reflected a view at the Faculty that it could and should make a contribution to the community. Neil Rees's proposals for a legal clinic took account of the contribution that a Law School funded community legal centre would make to the people living and working in and around the University.

Some important aims of a clinical program, particularly the exposure of students to the complexity of applying legal remedies to varied and uncertain facts, clearly are well served by the range of cases and clients in a community legal centre. The authoritative experience in the United States at the time showed a history of law clinics growing from, or being designed for, legal services to the poor. Whether the political factors that were important in the development of that law clinic characteristic in the U.S. were also operative in New South Wales at the time is debatable. In any event, the American experience offered

¹⁰ Minutes of School Meeting held on 2 June 1981

¹¹ supra footnote 2

¹² 28 March 1980, supra footnote 3

¹³ Redfern Legal Centre was never a clinical program or any part of the curriculum at UNSW. The Bowen Inquiry was mistaken in this regard; the relationship has been the same as that described between Fitzroy Legal Service and Monash University, one of autonomy with mutual support and voluntary assistance: *Inquiry into Legal Education in New South Wales*, Government Printing Office, Sydney, 1979 @ part 8.4.1 and fn.3

¹⁴ see Basten J., Graycar R., and Neal D., *Legal Centres in Australia* (1983) 6 UNSWLJ 163 @ 172.

numerous and impressive examples of law clinics operating as community legal services, clearly influencing the choice of such an identity for the new clinic at UNSW.

It is important that the legal centre identity of the UNSW law clinic be kept in mind, as that factor was in large part responsible for the review of the clinical program: see 2.2.1. The centre was established as a 'generalist' centre, not as a specialist centre such as the more recently established Consumer Credit Legal Centre, Women's Legal Centre, and Immigration Advice and Rights Service. There were, at the time, examples in the U.S. of specialist law clinics, but the real development of specialist legal centres in New South Wales has been a more recent phenomenon.

Quite deliberately,¹⁵ the Centre was not established as a separate legal entity. It was and remains only a name, used by the Faculty to identify the place at which one of its subjects is taught. The legal practice is in effect a private practice, with the benefit of the professional indemnity insurance and auditing facilities of the University. While the Centre's compliance with Law Society practice requirements is only as problematic as that of other legal centres, the Centre's management structure, discussed below at 1.2, sets it apart from other legal centres.

¹⁵ see para 5.2 of the 18 March 1981 proposal, *supra* footnote 3

1.2 The structure of Kingsford Legal Centre.

1.2.1 The purpose of the Centre

The Centre is both a community legal centre and a teaching clinic for the Law School.

As a community legal centre, there are many roles the Centre could play. It could provide legal advice, legal assistance, legal representation, community legal education, and social assistance; it could be a place for law reform, lobbying, and socio-legal research. These roles, in general terms, form a legal centre's brief, resulting in much debate over allocation of resources, both financial and personal.

On the other hand, as a teaching clinic, the Centre could teach law, legal theory, legal practice skills, and professional responsibility; it could be a place for empirical research in law and social theory, civil and criminal procedure, and in numerous areas of law such as common law, discrimination, and consumer protection.

Whether one or the other, the Centre is structured to operate as a legal practice, acting on instructions, preserving client confidentiality, maintaining office systems and accounts, and complying with practising certificate requirements.

It is impossible for one office to adopt to their full extent the different identities of legal centre, law clinic and legal practice. Clearly the requirements of the third, the legal practice, are essential to the operation of the Centre at all, and are met. Important features of the legal centre and law clinic identities are found at the Centre, although it is not clearly defined what, of all the possible roles, is and is not done. The extent to which these two roles are compatible or give rise to tensions is referred to below at 2.2.1.

1.2.2. Accountability

To a very large extent, responsibility for resolving the competing demands of the Centre's diverse functions has been left up to the Centre, and is discussed in 1.2.3. below. As a result of this autonomy, there has been no real conflict among those to whom the Centre is responsible in each of its three roles: the Legal Aid Commission, the Law Faculty and the Law Society respectively; the Centre has walked a broad path in which all concerns have been sufficiently accommodated.¹⁶

(i) *Legal Aid Commission*

The Legal Aid Commission requires and receives an annual funding submission, due in February each year for financial year funding. The submission gives an account of the Centre's activities in the areas of legal advice, assistance, representation, and education; it is supported by the case and client statistics for the previous calendar year. Audited accounts must be submitted with the submission. A copy of the submission for funding for the year 1991-92 is at *appendix 5*.

(ii) *Law Faculty*

The Law Faculty is represented on the Kingsford Legal Centre Advisory Committee, described below at 1.2.3. The director of the Centre is responsible to the School, and more particularly to the Curriculum and Teaching Committee. The director is also a member of the Advisory Committee to the Dean and Head of School. On financial and staff matters the director liaises with the Senior Administrative Officer and Head of School.

(iii) *Law Society*

An auditor's report in respect of the solicitors' trust account is submitted to the Law Society annually, and the trust account is subject to inspection. The Law Society receives from the legal staff the usual

¹⁶ see *Review of the Clinical Legal Education Program at the University of New South Wales, Interim Report, March 1991 @ Part 3.A6*, at appendix 4 of this Report

applications for renewal of practising certificates which indicate that sufficient mandatory continuing legal education has been undertaken.

(iv) *Students and the Community*

Apart from funding or professional accountability, the Centre is accountable to its consumers: the students and the community.

While there have been dissatisfied clients in ten years' operation, there have been no formal complaints. This is noteworthy, but it must be remembered that, in general terms, the clients are often of a social or educational background that makes it unlikely that there will be a formal complaint about legal service provision. The community is not likely to express in one voice concerns that the Centre is not fulfilling its purpose; evaluation of service provision in the community sector is notoriously difficult, and in any event has not been done in relation to the Centre. Consequently, the potential of the Kingsford Legal Centre Advisory Committee is being explored: see 1.2.3

Student evaluation has occurred at the end of each session for some years. The evaluations cannot be relied on to show an analysis of the educational aspects of the subject, and often reflect only the students' appreciation of the novelty of the experience.. Reservations students have had about the way in which the subject is taught are not often expressed in a written evaluation of this type, and comments made privately are lost to memory.

The student survey, which formed an important part of this Review, is at *appendix 6*. It is the first such survey of students responses to the subject, especially valuable for having surveyed students who are well past the excitement of the novelty of the clinical experience.

1.2.3 Centre management

The Centre is not an independently incorporated body. 'Kingsford Legal Centre' is the unregistered name under which the Faculty operates the teaching clinic and community legal centre. The Centre might be thought of as the office of one of the law lecturers - it just happens to be a long way from the Law School, and a lot of other people use it.

The Centre's operations are managed by the director, who is accountable as described in 1.2.2 above, but who has considerable autonomy in relation to the day to day operation of the Centre.

The director is the principal teacher.

The director is the senior legal practitioner, a position which is currently shared with one of the other two solicitors who is similarly qualified.

There is an administrator at the Centre, who is classified and paid on the University scale only as an administrative assistant. Final responsibility for many administrative decisions, principally for those extending beyond internal office management, rests with the director.

At a weekly staff meeting, matters of office administration are discussed. Other issues of Centre management are for decision by the director in consultation with staff and members of School.

The Kingsford Legal Centre Advisory Committee was first convened when the Centre was established in 1981. It was a consultative committee on which were represented the Law School, the Council, the Law Society, local community organisations, and the Centre staff. Minutes of Law School meetings, and minutes and agendas of the Advisory Committee meetings show that it was intended to operate to "reflect the community nature of the Centre". Unfortunately, the same records show that the agenda became redirected to "promote closer liaison with the Centre and keep under close review the funding and staffing of the Centre, and the place in the law course curriculum of Clinical Legal Experience."

This last is a necessary undertaking, but not in this forum. At a recent meeting, a revised role for the committee was discussed, confirming its position as a forum in which community expectations of the Centre, as a legal centre, could be expressed, and in which the Centre's ability to respond to those expectations could be discussed; the committee has always disavowed a management role, and does not intend to change this approach. This proposal is now a matter for separate consideration by School.

As a part of the review of the clinical program, a management study is being undertaken: see 1.5.9. The results of that study will not be available at the completion of this report. Although it will be of great significance to the operation of the Centre, and of interest to many other Centres, it is unlikely to be of relevance to the Law School. The consultant undertaking the study is aware of the resource limitations of the Centre and the School, and of the staff, salary and administrative connections that the Centre has with the University.

1.2.4 Staff

Since the addition of a part-time administrative position in October 1990, the staff structure has been as follows.

Director/joint principal solicitor/principal clinical teacher
 Staff solicitor/joint principal solicitor/clinical teacher
 Staff solicitor/clinical teacher
 Administrator
 Legal Secretary (full-time)
 Legal Secretary (part-time)
 Social work placement supervisor*
 Librarian (casual)
 Receptionist (part-time; volunteer)

*employed by the School of Social Work

The people in these positions are listed in *appendix 7*.

In addition, the Centre is staffed on Tuesday and Thursday evenings by lawyers who volunteer their services to give advice to the public and to consult with the students. Some are former students of the clinical subject. The volunteers are listed at *appendix 8*.

At the outset the need for a high staff-student ratio was understood.¹⁷ The Law School committed the time of a lecturer to the clinic, and the grant funds were used to employ a second solicitor. The Law School later committed the time of a second lecturer, so that in 1984 three solicitors, two of whom were on Faculty, worked at the Centre.

In 1984 the Centre first received, as a community legal centre, what has since become annual funding from the Legal Aid Commission. That funding was sufficient to employ one solicitor, so for a brief period there were four solicitors at the Centre. The two lecturers resigned from the Faculty at the same time, and the Faculty thereafter allocated the time of only one lecturer. That lecturer, employed to replace Neil Rees who had already been on Faculty when the Centre was established, was employed specifically and only for the clinical subject.

There has since been legal supervising staff of one lecturer/solicitor, one solicitor on contract on University funds, and one solicitor on contract on Legal Aid Commission Funds. This results in a teaching ratio of 8:1.

¹⁷ see the discussion at 2.2.6

1.2.5 Office plan

The Centre is in a small timber building, previously a Commonwealth building used first as an electoral office and then as an employment office. The building is now owned by Randwick Municipal Council, and is on licence to UNSW to operate a 'legal aid clinic'. A sketch plan of the Centre is at *appendix 9*.

The licence agreement has previously been for a part of the premises only, the remainder being reserved to the use of community groups. In 1991, a new agreement will result in the University, for use by the Centre, having licence to occupy the whole building, on condition that community groups have use of meeting space from time to time.

The director and one staff solicitor each have an office, and a staff solicitor has an office which is partitioned from the main office area. The social work supervisor has a similarly partitioned office. The administrative staff, including the administrator, work in the main office area, at work stations.

Students, five a day, work in the main office area, around three large desks. Also in the main office area are the library,¹⁸ photocopier, fax machine, word processing printers, filing cabinets, office supplies and storage space.

There is a reception counter in the waiting room, and adjacent to the waiting room are four partitioned interview booths.

The Centre has a small kitchen which is also used for file storage space and as a meeting room. There is one toilet each for men and women.

That part of the building which in 1991 will become available to the Centre could be refurbished to accommodate a meeting room, an office, and student work space.

1.2.6 Social work presence

In 1987 the Law Foundation of New South Wales funded the School of Social Work at UNSW to report on the feasibility of a legal studies course in the Social Work degree.¹⁹ As a result of that report, the School obtained a development grant from the University to commence, in 1989, a social work placement at the Centre. The grant was necessary to cover the cost of a social work supervisor at the Centre, and to defray the administrative costs to the Centre of the social work placement.

The development grant has been renewed for 1990 and 1991. It has resulted in the part-time placement at the Centre of three social work students each academic session. The students have been under the supervision of the social worker, and have worked also with the Centre solicitors, and with law students, on client files that are appropriate for common activity.

It has been a considerable challenge to the supervisors and to the students to explore the possibilities of the two professions working co-operatively. The project requires further time and resources, but shows considerable promise if it can be maintained.

¹⁸ The library is similar to that of a small legal practice, with a poverty/welfare law focus. A discussion of the interaction of a law library with clinical education highlights these two characteristics as necessary: Grossman G.E., *Clinical Legal Education and the Law Library* 67 Law Library J. 60

¹⁹ For an introduction to combined law and social work education, see Katlin, D., *Law and Social Work: A Proposal for Interdisciplinary Education* (1973) 26 J. Legal Ed. 294

1.2.7 Student attendance

The general nature of student participation in the clinical subject has remained constant in the nine and a half years of the Centre's operation. The subject is available to students as an option at that later stage in a degree course when students are able to choose from a wide range of elective subjects.

There is capacity at the Centre for twenty five (25) students to enrol in each semester. Enrolment in the clinical subject obliges students to attend the Centre for a day a week during a University semester, meaning five (5) students a day at the Centre. There is an overlap into examination and holidays to ensure continuity of the service to the community. One session in the clinical subject is therefore 16 or 17 weeks. The subject has always been available over summer as well, resulting in year-round student enrolments.

The time commitment required of the students is considered to be roughly equivalent to the time a student is expected to commit to preparation for and attendance at classes in any other subject. The clinical subject carries three credit points, as does any other elective. A normal student timetable results in a student enrolling in the clinical subject and three other subjects in a semester.

Attendance for a full day means that students must organise their timetables to leave one day a week free of classes in other subjects they are enrolled in. Attendance on two half-days a week has been permitted from time to time. Prior to 1984, students did attend for two half days: the Centre used to be open to the public during the mornings only, and file work was done in the afternoons. The Centre had offered its services to the community by encouraging people to make appointments to attend in the morning and be interviewed by a student. The student would then consult with a staff solicitor who advised the client, and a decision would be taken as to whether the person would become a client of the Centre.

In 1984, the Centre adopted a procedure used in other community legal centres, and introduced a system of publicly advertised 'advice sessions'. This required the establishment of a roster of volunteer solicitors to staff the advice sessions. The advice sessions continue to be offered on Monday afternoons and on Tuesday and Thursday evenings.

With the introduction of evening advice sessions the division of the day into two halves became unnecessary. A further attendance requirement for students was thereby introduced: to maintain the experience of meeting and taking instructions from clients, each student attends at least five advice sessions during the semester.

In addition to the weekly attendance for a day, students attend a two hour class, always scheduled for late on Wednesday afternoon, a time at which the Law School does not as a rule schedule other classes.

1.2.8 Student activity

At the Centre, a student is allocated a number of legal files on which instructions have been taken from a client, and on which the legal practice of the Centre is working to achieve the desired result. The Centre has usually maintained between 250 and 300 current files, resulting in an allocation to each student of between 10 and 15 files.

A list of the types of matters handled by the Centre, identified by codes for purposes of statistics, is at *appendix 10*, and statistics for 1990 are in the attachments to *appendix 5*. The cases are fairly typical of those that come to any generalist community legal centre, although there are two qualifications to this.

First, the Centre has always had anti-discrimination cases as a noticeably large part of its caseload. The first and longest serving teacher of the clinical subject, Neil Rees, had for some time been researching and advising in the area. He was able to bring his expertise to the Centre, with the result that the Centre developed a lasting reputation for advising and acting in anti-discrimination matters.

Secondly, to provide students with files which will provide opportunities for them to realise the aims of the clinical subject, the Centre does not refer as many matters to, for example, the Legal Aid Commission as another legal centre would. The files are likely to cover a broader range of matters than would those of a legal centre without a teaching obligation.

In brief, the students have assisted the solicitors in the conduct of the files, taking instructions, drafting letters, dealing with other parties or their solicitors, and assisting at court. The basis on which the students have participated in the subject was described in a paper by the two Faculty teachers in 1984.²⁰

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supra footnote 5

1.3 The need for a review

Student enthusiasm for the clinical subject has always been high. The subject has not wanted for enrolments, and it has been evaluated positively by the students at the end of each semester.

The teaching aspect of the subject has rarely attracted the critical interest or concern of the Faculty. The School meeting once addressed concerns expressed about an antagonistic 'real world v. academic world' attitude that was expressed by a student enrolled in the clinical subject. Apart from recurring concerns about the cost of the subject, there had been no alarms. Students, the Faculty and clients have seemed generally satisfied with the Centre and its operations.

Staff at the Centre, towards the end of 1989, felt that this level of satisfaction with the Centre, and particularly with the clinical subject, was misleading.

Student support could always be relied on, if not for the desired academic reasons. Students will find the clinical experience dramatically different to the teaching in other subjects in their degree; it will challenge them, excite them, and satisfy demands for a degree of skill training. It will also appeal to desires to work in and for the non-legal community. The size and isolation of the office, and the personal nature of involvement in the subject, result in a collective spirit among students uncommon in other classes. In all, it is the type of subject which, if run efficiently, can't go very wrong as far as students are concerned.

This 'inherent attraction' of a subject is no great spur to refine, review or redirect its aims and content. The subject description and aims had not changed for some years. Indeed, there was no reason why, if they were educationally acceptable to the Faculty, they should, although the subject had been running without a break for eight and a half years. The staff of the Centre felt that while the express aims of the subject were reasonably well stated, the practice of the Centre was not allowing the staff or students to pursue those aims.

The feeling was strong, but there were few defined problems. That the thoughts of the staff even turned to these concerns may have been prompted by considerable upheavals in staffing shortly beforehand. Until August 1988 the Centre had had a stable legal staff for over two years. One solicitor then resigned, and was not replaced until November 1988, during which time the Centre continued with only two solicitors, one of whom was the director.

After six months back at a full staff level, the director resigned in May 1989. A locum solicitor was employed to manage his casework, and the director's duties were carried out jointly by the two permanent solicitors. In September 1989 a new director was appointed, and in October 1989 the longer serving of the other two solicitors resigned. She was not replaced until January 1990.

There were contemporaneous changes in administrative staff, resulting in three changes to the administrator's position within a year, and the reliance for some months on temporary staff.

Throughout this period, the legal service to the clients and the supervision of students continued uninterrupted. In the recurring periods when the Centre was short staffed or introducing new staff, the demands of the client casework became acute. More than ever, the students were learning by observation and osmosis.

As part of addressing the full implications of a clinical program, the legal staff began reading literature on the theory and practice of clinical teaching. This served to highlight what appeared to be a growing disparity between the aims of the clinical subject and its practice.

1.4 Aims of the review

Although the extent of the review is such that a comprehensive analysis of clinical teaching could be undertaken, this report confines itself to an analysis of the clinical program in place at the Law School. Many of the points covered could each be developed as an independent study, and extrapolations might be made from observations which are confined in their expression to the particular program under review.

The aims of the review were reasonably well defined by the considerations that motivated the review. The main body of this report, Part 2, is structured to reflect these aims.

This review:

1. considers the place of the clinical subject in the Law School curriculum. It proceeds on the basis that there *is* a place for clinical teaching, and inquires as to where that place is and how it should be occupied. See 2.1.
2. analyses the functioning of the centre in light of its dual role as teaching clinic. See 2.2.
3. recommends changes to the structure of the subject and the practice of the clinic in light of the analyses. See 2.3.

1.5 The structure and implementation of the review

The review was conceived and planned by the legal staff of the Centre. It might be thought the staff would be too close to the Centre and the clinical subject to plan and conduct a credible review.²¹ While recognising this possible criticism, which was never voiced to the staff during the review, the legal staff felt that they were all sufficiently new to the Centre, and removed from any commitment to the status quo, to allay concerns about an inability to be objective. If anything, the criticism may have been that the staff would conduct a review which was overly critical.

There was an initial and then a revised plan for the review. In each plan, it was intended that a number of factors would combine to give rise to recommendations to the Faculty. No single element of the review process would be definitive; rather, the comments and views of one group of people would be discussed with another group. Common threads and popular views would emerge and would, by consensus identification and elimination of issues, result in a position on the state of the clinical subject and proposals for change. Literature on evaluating clinical programs was consulted.²²

The early plan for the review had been:

- * to survey the available literature,
- * to state clearly the staff's concerns about the functioning of the clinical subject,
- * to consult with the Curriculum and Teaching Committee of the School,
- * to consult with a committee of former students of the clinical subject,
- * to restate the staff's concerns, with recommendations for change,
- * to submit the recommendations to the Faculty.

It was modest plan, dependent on the time spent in staff discussions, focussed by the literature. The extent of the plan was circumscribed by financial resources and the availability of people with knowledge of clinical teaching issues with whom to consult.

1.5.1 Expanding the scope: Law Foundation funding

At about the time that the review was being planned, the Law Foundation was organising a Legal Education Colloquium, at which there was to be considerable emphasis on the benefits of clinical legal education and the prospects for its development in New South Wales.²³

The Faculty was encouraged to consider applying to the Law Foundation for funds to assist with the review. The Faculty did apply for a general grant, which was approved in July 1990. Consequently, the scope and depth of the review was considerably increased, providing research and secretarial assistance, the opportunity for comparative studies overseas and interstate, and for a both a management report and student survey.

1.5.2 Expanding the scope: Law School developments

²¹ see Allison J.L., *The Evaluation of a Clinical Legal Education Program: A Proposal* (1974) 27 Vanderbilt L. Rev 271 @ 276 at which the author assumes that evaluators are independent of the clinical program

²² see Allison, *ibid*, passim; Macfarlane J., *The Clinical Legal Education Evaluation Project: Analysing the Lessons of Research* (1990) 24 Law Teacher 65 @ pp. 67-73

²³ North R. & Purcell T. (eds), *The Transition - Law Student to Lawyer - Improving the Process; Colloquium on Legal Education 22-24 June 1990* Law Foundation of New South Wales, Sydney, 1991

In 1988-90 a Law School Planning Committee (the Committee) convened to perform the unenviable task of reviewing, and making recommendations in relation to, the declining resources of the Law School. The particular concern of the Committee was the effect of this phenomenon on teaching arrangements in the Law School. The Committee presented its report in May 1990.

In its reference to aspects of the curriculum,²⁴ the Committee notes for further discussion the extent to which skills, as well as subject matter, might be taught. There is also reference to a submission from Professor Garth Nettheim concerning what he calls "a valid third dimension" in teaching objectives: addressing insights and values in law.²⁵ A discussion of clinical teaching method is relevant to both these aspects of the curriculum.

In chapter IV C (v) of its Report, the Committee addresses options for teaching methods in the Law School. In particular, at IV C (v) (b), the Committee discusses interactive learning methods, and recommends "that the School explores teaching initiatives directed to increasing students' sense of responsibility for learning."²⁶ This review is just such an exploration.²⁷

Towards the end of 1990, the Faculty resolved to establish a Curriculum Review, marking ten years since the last such undertaking. The Law Foundation granted funds to the Faculty to assist with the project. The timing was fortuitous, as the review of the clinical subject would clearly be relevant to the Curriculum Review.

1.5.3 The Review plan

In August 1990, the revised plan for the review was:

- i. to engage a research assistant to research and survey the relevant literature on clinical legal education,
- ii. to state clearly the staff's concerns about the functioning of the clinical subject,
- iii. to consult with the Curriculum and Teaching Committee of the Faculty,
- iv. to consult with a committee of former students of the clinical subject,
- v. to visit the only other clinical legal education programs in Australia, at Monash and La Trobe Universities,
- vi. to visit clinical legal education programs in the United States, Canada and England,
- vii. to engage a locum solicitor for periods of absence on the study-visits,
- viii. to engage typing staff for the report
- ix. to survey a range of students who had completed the clinical subject,

²⁴ UNSW Law School Planning Committee, *Teaching and Scholarship in the Law School - Towards a Sustainable Future*, May 1990, Faculty of Law, University of New South Wales @ p. 35

²⁵ Ibid @ p. 35 fn.23

²⁶ Ibid @ p.38

²⁷ The Committee anticipated the review of the clinical subject for slightly different reasons, referring to it only in relation to the "Reassessment of 'expensive' electives". The question of expense is a topic in this report: see 2.1.6 below.

- x. to review the design of the office as a model clinic,
- xi. to restate the staff's concerns [(ii) above], with recommendations for change,
- xii. to submit the recommendations to the Curriculum Review.

1.5.4 The absence of students.

Time allocation is one of the problems which is recognised as endemic to law clinics. The nature of the problem defeats attempts to solve it. Discussions among the staff made it clear that if the proper correspondence between the Centre's practice and the clinical subject's aims was to be addressed, time had to be set aside to do it. The Centre operates in such a way that, for 50 hours a week, staff time is committed to answering the demands of the clients and of the students. Time could not be set aside consistently or constructively for reflection on and analysis of the clinical program.

The operation of the Centre is such that it can service clients without students, but not students without clients. One of the solicitors had suggested, wistfully, that the Centre might go without the students for a while. The realisation of that improbable idea was the beginning of the review.

A proposal not to enrol students in the second semester of 1990 was put to the Law School's Ad Hoc 1990 Planning Committee, and to the Curriculum and Teaching Committee. Those committees recommended the proposal to the School, which approved it. Consequently, for the second session, July to October 1990, there were no students enrolled in the clinical subject.

Priority for enrolment in the summer session was given to any students who had, in preliminary enrolment, chosen the clinical subject in the second session. All law students were encouraged, by the display of notices and word of mouth, to attend the Centre on a roster to take part in the public advice sessions. There was an enthusiastic response to this, and a solid core of willing volunteers developed. A number of former clinical students spent spare time at the Centre to assist with administrative, clerical and file matters.

1.5.5 Staff discussions

Despite the insidious tendency of casework to fill all the time available, and to flow over, a disciplined approach by the staff meant that some of the time which would otherwise have been spent with students was spent in discussions and planning. This amounted to approximately two and a half days a week for the director, and a day a week for each of the other two solicitors.

The staff discussions were informed by readings on clinical teaching theory, and centred on the observations of the staff as to the practical and structural obstacles to implementation of theoretically desirable teaching practices at the Centre. The discussions were minuted, and by the end of August 1990 the staff had identified a range of issues which formed the basis for the review. These issues were questions to be answered by the review, and are reflected in the matters identified in the discussion at 2.2 below.

1.5.6 Consultation with groups

The Curriculum and Teaching Committee established a sub-committee, to be available to consult with the staff. A membership list of that sub-committee is at *appendix 11*.

A number of former clinical students had heard of and expressed interest in the review. Many more had, in the subject evaluations and in general conversation, expressed interest and concern in the way in which they participated in the subject and the Centre. These students, and others whom it was thought would

provide a mix of views, were invited to form a committee to consider the staff proposals. A membership list of that committee is at *appendix 12*.

The issues identified in the staff discussions were submitted to the members of the committees for their consideration. The committees met with the staff and offered opinions on the prospective solutions for the issues raised.

1.5.7 Comparative studies.

(i) Australia

In September 1990, two solicitors, the office administrator and the office secretary, visited the clinical programs operated by Monash University at Springvale Legal Service and Monash-Oakleigh Legal Service in Melbourne.

A full day was spent at each of the two clinics, as a result of which the visiting staff were able to report in some detail on the teaching methods and subject structure. A report on the visit is at *appendix 13*.

(ii) North America and England

In September and October 1990 the director visited a number of clinical programs in the United States, Canada and England. The initial contact with a North American law clinic was established when the Law Foundation invited Professor Barbara Bezdek of the University of Maryland at Baltimore to attend the Legal Education Colloquium in Sydney in June 1990. Professor Bezdek's assistance in preparing a constructive itinerary for the study tour was invaluable.

Details of the overseas study tour have been reported in the interim report on the review of the clinical subject.²⁸

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supra footnote 16

1.5.8 Student survey

While current and recent students in the clinical subject can generally be relied on to evaluate the subject favourably,²⁹ it was felt that students would be able to offer a more critical evaluation of the subject after some time had elapsed.

One of the educational goals of the subject is that students involved in supervised practice gain an understanding of the development and operation of legal rules - their studies are put in the context of facts and variables. The extent to which students had, with hindsight, become aware of this goal of the subject, and the extent to which the goal had been achieved, would be a valuable comment on the structure of the subject. Other goals of the subject, also amenable to this 'evaluation with hindsight', are those of self-evaluation, legal analysis and research, and appreciation of law in a social context.

The clinical subject is often mistaken for a professional skills subject,³⁰ and it appears that many students enrol with that aim in mind. To the extent that the subject does impart an understanding of professional skills, the observations of students who had since graduated and were exercising those skills would be important. Also important would be any distinctions between the course at the College of Law and that at the Centre, which could be identified by those who had graduated from both.

The clinical subject functions in the context of a legal centre, and that dual identity is important to any review of the subject.³¹ The importance to a student of the legal centre character of the clinical environment, at the time and since, would therefore be a matter for enquiry.

In discussions with John Schwartzkoff of M.S.J. Keys Young, it was agreed that in late 1990 it was inappropriate to survey students from before 1986. Their recollection of the content and management of the subject would be likely to be uncertain, and it would be difficult for them to distinguish from other factors the effect that the clinical experience had had on their personal and professional development.

The survey, and the report on the results, are at *appendix 6*.

1.5.9 Research

There is a substantial amount of literature on clinical legal education theory and practice, at least in the context of the United States. The extent of publications in or about the Australian experience was uncertain, and was anticipated to be limited. In particular, comments on practical legal training, which has received considerable attention in Australia in the last decade, needed to be definitively distinguished from those on clinical legal education.

The review of the clinical subject covers a wide range of matters relating to clinical teaching. Any discussion of these issues ought to be informed by contemporary academic discussion. Publications in North America are voluminous and diverse. To be constructive in the review process, readings needed to be classified into some broad subject headings.

At the same time, the research which was required to identify and categorise readings as an adjunct to the review was also an opportunity to assemble a comprehensive clinical legal education bibliography which would be available for similar inquiries in Australia into clinical teaching. The field is, after all, relatively new and unexplored in Australia.

²⁹ see the discussion at 1.3 above

³⁰ see the discussion at 2.1.1 below.

³¹ see the discussion at 2.2.1 below

From respondents to an advertisement for a research assistant, Ms. Meredith Gibbs, a final year law student with an Honours Arts degree, was selected. She was given a brief as to the purpose and extent of the required research. She worked largely unsupervised, for the total available research time of 50 hours.

The collection which Meredith produced, in subject headings, has since been edited. It was typed by Ms. Kym Bedford on grant funds for that purpose. Many of the articles have been photocopied and are retained at the Centre for easy reference. A copy of the bibliography is at *appendix 15*.

1.5.10 Office management

In 1984 the Law Foundation of N.S.W. funded a report on the refurbishment of the Centre. The report proposed the organisation of the existing office space in a way that constituted a 'model office'. The Centre obtained the necessary grant funds for the refurbishment, and has operated since in the 'model office', described at 1.2.5. The review of the clinical subject has provided an opportunity for evaluating and, if necessary, altering the office plan. This is particularly opportune in light of the focus in the review on the tension between the legal service and legal education functions of the Centre; the office design and its use inevitably tends to favour one purpose over the other.

Consultancy staff at Touche Ross, now a part of KPMG Peat Marwick, had carried out the 1984 report. KPMG Peat Marwick discussed the present proposal at an early stage of the review, and suggested that the design and use of office space could not be assessed properly until a number of management matters were considered beforehand.

The office design evaluation therefore became, necessarily, dependent on the outcome of all other aspects of the review. First, the priorities of activities at the Centre must be confirmed: a necessary outcome of the review of the clinical subject. At that stage, the perceived relative functions of office staff can be identified, and it would only then be appropriate to commission an evaluation of the management structure and related office design. Mr. Terry Purcell of the Law Foundation provided this insight.

Consequently, the office management report, and an account of any changes at the Centre in light of it, will be a later supplement to this report.

2 THE REVIEW

2.1 Clinical Legal Experience: Considerations for the Law School

This report assumes that there is a place for clinical teaching in the Law School. In relation to resources, the Law School Planning Committee was specific in not suggesting that either of the two clinical subjects be abolished,³² and no question has been raised at School in relation to the teaching worth of the subject. The value of the clinical method as an approach to teaching was implicit in undertaking the review: the intention is to look at how the clinical program operates, not whether it should.³³

This part of the Review looks at what the place of the clinical subject in the Law School curriculum is and could be.

2.1.1 Content: A Skills Course?

While there may be a place for skills training in the Law School, clinical legal education offers students more than skills training. Clinical education introduces students to the values and dynamics of the legal system, to questions of social justice and power. In the experience, students necessarily develop practice skill including that of self-evaluation.

A clinical subject is often seen or referred to simply as a legal practice/skills subject.³⁴ This is true of teachers³⁵ and students³⁶. Despite insistence that the aims of a clinical course are not to be confused with those of a practical legal training course such as those at the College of Law, the distinction has always been a difficult one for observers of the two courses to understand.³⁷ It is wrong to begin a discussion of clinical legal education with an account of the College of Law;³⁸ the error is the more apparent when that

³² UNSW Law School Planning Committee, supra footnote 24 @ p. 52

³³ Coincidentally, the same basis was proposed by Condlin in his important analysis of the nature of clinical teaching: "This article does not plan to question the legitimacy of clinical teaching *per se* ... difficult questions remain about the form and content." Condlin supra footnote 7 @ p. 46

³⁴ see Jeeves M. & Boon A., *The Common Law in Action Simulation: Reversing the Burden of Proof in Skills Education?* (1990) 24 Law teach (Special Edition) 82 @ pp.83-4; Macfarlane supra footnote 22.

³⁵ see Macfarlane *ibid* @ pp. 70-1: "The widespread impression held by law teachers...about clinic is one of quasi-professional mechanistic training skills. This view is encouraged by the strong North American antecedents of nuts and bolts ... such as interviewing and advocacy. This can cloud our grasp of the educational argument for clinical work ...(which) ...is broadly characterised by...dynamic discovery rather than simply crude conditioning."

³⁶ M.S.J. Keys Young, *Clinical Legal Experience: Survey of Former Students*, January 1991, @ para 2.5 and Table 2.4. See appendix 6 of this report

³⁷ see for example the Bowen Inquiry supra footnote 13; compare the more discerning observations in Pearce D. Campbell E.& Harding D., *Australian Law Schools (The Pearce Report)* AGPS, Canberra, 1987 @ para 2.136, and much earlier in Thomson C.J.H., *Objectives of Legal Education - An Alternative Approach* (1978) 52 ALJ 83 @ p. 91 and UNSW Law School 1980 Curriculum Review supra footnote 6 @ para 24; see also the results of the student survey discussed at 2.1.9 of this report.

³⁸ *Legal Education in Australia. Proceedings of a National Conference* Australian Law Council Foundation, Melbourne, 1978 @ pp. 626-655

account of the College's activities refers consistently to 'training', a notion which is removed from self-learning and conceptual analysis which are important goals of clinical education.³⁹

The arguments for a skills course in the curriculum do not have to be made out for clinical legal education if the clinical subject is not taught as a skills course. It should be said explicitly that the subject at the Centre is not a skills course, it is a clinical course and different in intent and purpose from a skills course.⁴⁰

The content can be seen as being, in general, of similar type to the content of a number of other class-taught subjects.⁴¹ This should be significantly more apparent in New South Wales than in the United States, where there is a clear expectation that law schools will provide practical skills training for use as professional attorneys.⁴² That vocational focus is not as strong in New South Wales, and should allow a clinical program to develop along considerably more academic lines than is the case in the United States.⁴³

(i) *The United States experience*

A history of modern clinical teaching in the United States suggested in 1985⁴⁴ that it had been through three stages over the previous twenty years: first, legal service delivery to the community combined with teaching lawyer competency, secondly, a "holistic approach to intellect and feeling" with emphases on professional responsibility and student self-learning, and thirdly an amalgam in which there is "limited client representation in specific areas", and students "are encouraged to reflect and generalise about their experiences."

The account went on to suggest that in 1985 most of the clinical programs in America were at the third stage, but that there was then an emerging criticism that legal service aspects were being disregarded; in other words, there was a call to turn the clock back to the first stage.

It has been suggested on the one hand that a demand for skills training in the 1960s was the simple impetus for many clinical programs;⁴⁵ on the other hand, skills training aside, it is said that either the 1960s' push in America for welfare service delivery,⁴⁶ or a new academic radicalism⁴⁷ was the impetus for clinics⁴⁸.

³⁹ see the discussion in Peden J.R., *Professional Legal Education and Skills Training for Australian Lawyers*, Law Book Co., Sydney, 1972 @ p.8, at which he recites the three stages of education of a lawyer - academic, skills and continuing education - which are now being examined, in conferences and committees, as being perhaps too rigidly separated.

⁴⁰ see a similar argument for the subject at Monash University in Nash G., *Skills Course or Clinic?* in ABA, Law Council, NZ Law Society (eds) *American/Australian/New Zealand Law: Parallels and Contrasts* St. Paul Minn. 1980 @ p.205

⁴¹ see Schneider E.M., *Integration of Professional Skills into the Law School Curriculum: Where We've Been and Where We're Going* (1989) 19 New Mexico L.R. 111 @ p.113

⁴² see Norwood, M.J., *Requiring a Live Client, In-House Clinical Course: a Report on the University of New Mexico Law School Experience*, (1989) 19 New Mexico L.R. 265 @ fn.1

⁴³ The non-skills, jurisprudence focus of clinics in the United States should not, however, be underestimated as a concomitant goal of clinics: see, eg, Bird, R.E., *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility* (1974) 14 Santa Clara Lawyer 246 @ p.254: "The clinical teacher who supervises students in court is not simply giving the student what he or she would absorb in the first year of practice. Rather, the clinical supervisor must teach and raise questions which will point out what is transpiring as the system is being manipulated."

⁴⁴ Feldman, M., *On the Margins of Legal Education* (1984-85) 13 NYU Review of Law & Social Change 607 @ p. 608-611

⁴⁵ Keyes W.N., *Approaches and Stumbling Blocks to Integration of Skills Training and the Traditional Methods of Teaching Law* (1980) 29 Cleveland St. L. Rev. 685 @ p. 688; Vukowich

There were in any event, and still are, some structural factors resulting in clinical programs in the United States always having been to an extent, and to have more recently become, primarily focussed on skills training.

There is no opportunity for systematic teaching of practice skills in legal education in the United States; there is no system of articles or pre-admission mandatory practical training as there is in Australia. Law schools in America are places for preparing people for practice.⁴⁹ As clinical methodology is readily adaptable to skills training, the law schools were able to use clinical education, which might well have been politically motivated at its inception, to provide that skills training.⁵⁰

The use of clinical education for skills training had in fact long been on the agenda,⁵¹ most notably since the often quoted article of Jerome Frank.⁵² Although a law school in America can choose not to offer skills training, the free market environment of legal education means that the law schools have to respond to the demands of prospective students. The substantial majority of students at American law schools intend to practise, indeed they often have to practise, in order to repay loans for fees.

A further factor is the system, such as it is, of legal aid in America. Law schools have long been in a position, often welcomed by them as appropriate,⁵³ of providing legal services to those without financial access to the legal system. This tendency, if not predisposition, results in the law schools running community legal services and taking the opportunity to run them as clinical programs.

In fact, federal funding for clinical programs is now premised on the program offering a legal service to answer a community need.⁵⁴ While some law schools have resisted committing their clinical programs to the government's bid to reduce direct funding to legal services, a great many clinics do exist to provide those services. Quality of service is important, and the combination of a skills training course with service delivery is a neat arrangement.

W.T., *The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change* (1971) 23 Case Western L.R. 140; Thompson A.R., *Canadian Experience in Practice Training* (1963) 16 J. Legal Ed. 43, in which the author comments on the shortcomings of legal education in the United States

46 Weaver M., *Clinical Legal Education - Competing Perspectives* (1983) 17 Law Teach 1 @ p.4, and see, for example, the history of poverty law practices in clinical programs in Parker K.E., *A New Approach to Clinical Legal Education* (1971) 8 Cal. Western L.R. 146

47 see Barnhizer D., *The University Ideal and Clinical Legal Education* (1990) 35 New York L.S.Rev. 87 @ pp.87-91

48 and may have impeded their intellectual development as sites of academic endeavour: *ibid* @ pp.105-6

49 *Ibid* @ p.91

50 see Cahn E.S., *Clinical Legal Education from a Systems Perspective* (1980) 29 Cleveland St. L. Rev. 451, an article which addresses "the consequences of choosing to make the imparting of lawyering competency a primary objective of legal education and utilizing a clinical methodology to accomplish that objective." (at p.451), and Clemmens B.Q., *Updating Legal Education: A Proposed Curriculum Emphasising Clinical Education* (1990) 12 Geo. Mason U. L. Rev. 57 @ 63: "First, legal education is undertaken for the sake of future clients."

51 since "about the turn of the century": Stolz P., *Clinical Experience in American Legal Education: Why Has It Failed?* (1970) No. 1 ABF Research Contributions @ p.1

52 Frank J., *Why Not a Clinical Law School?* (1933) 81 U. Pa. L. R. 907

53 For a contemporary discussion of this issue in the clinical context in American law schools, see Feldman, *supra* footnote 44 @ pp. 637-639

54 Interim report *supra* footnote 16 @ Part 2.43

Despite the tendency for clinical aims to be clouded by the practice emphasis, the non-skills goals for the clinical method are recognised. Of nine possible goals for a clinic,⁵⁵ identified in a paper to a conference of the Association of American Law Schools,⁵⁶ only four are even indirectly related to practical competency in legal practice:

- *dealing with unstructured situations, ie working with facts
- *practice skills⁵⁷ eg, interviewing, drafting and advocacy⁵⁸
- *professional responsibility
- *acting in role, ie awareness of lawyers' place and behaviour in society

Indeed, of these, the first and the last are, like the remaining five further goals, arguably necessary goals in any legal and/or tertiary curriculum, prospects of legal practice aside.

The other five goals suggested in the paper are:

- *teaching students to learn from experience
- *teaching students to learn collaboratively
- *providing an awareness of the impact of the legal system on the poor
- *teaching substantive law
- *subjecting the legal system to analysis and criticism.⁵⁹

In visiting American law schools in 1990,⁶⁰ while it was often said that providing skills training "is not the most important use or objective of the clinical method", the rider "but it is not unimportant either"⁶¹ tended to betray a dominant commitment to skills training in the conduct of many of those clinical programs observed.

This focus on skills, or technique,⁶² is necessarily at the expense of other aims and purposes of a clinical program.⁶³ It has been suggested that the development in this direction in America is a betrayal of sorts of the real contribution of clinical teaching, which is "to create visible models of justice in action that demonstrate a deep commitment to achieving justice and to challenging injustice", "teaching law students

⁵⁵ For discussion of possible goals see also Munger F.W., *Clinical Legal Education: The Case Against Separatism* (1980) 29 Cleveland St. L. Rev. 715 @ pp. 722-727; Barnhizer, D.R., *The Clinical Method of Legal Instruction: Its Theory and Implementation* (1979) 30 J. of Leg. Ed. 67 @ pp.75-79

⁵⁶ Gottlieb D.J., *Goals of 'Live Client' Clinics*, paper to the AALS Conference on Clinical Legal Education, University of Michigan Law School, Ann Arbor, Michigan June 1990, Conference papers p.23

⁵⁷ of which the author says: "This goal is so well established that it is often taken as a synonym for clinical education", *ibid* @ p.24

⁵⁸ These practice skills are more fully listed, and discussed as principal *competency* objectives of a clinical program, in Cahn, *supra* footnote 50 @ p. 453

⁵⁹ among other suggested goals is the teaching of Spanish for lawyers(!): Norwood *supra* footnote 42 @ p.269 fn.13

⁶⁰ Interim Report *supra* footnote 16

⁶¹ Feldman *supra* footnote 44 p. 626

⁶² for a celebration of law as technique verging on art, see Aman A.C., *Studying Music, Learning Law: A Musical Perspective on Clinical Legal Education* (1987) 13 Cornell Law Forum 8

⁶³ Walker L. Goldstein B., *After The Clinic What?* (1975) 27 J.Legal Ed. 614

that the privileged class of lawyers possess the responsibility to facilitate a just society."⁶⁴ Goals such as this make the concentration of clinical programs on poverty law apt,⁶⁵ though not necessary.⁶⁶

(ii) *In an Australian context*

Coming in late on the scene, at about the time that clinical teaching in America was taking an overt bent towards skills training for its own sake, the clinical programs in Australia, at UNSW and Monash, were, to an extent, born of the idealism and drive for social justice that had earlier been a force in the modern development of clinical teaching in America. Coupled with the existence of articles or post-degree skills training, the pressure has never been on the Australian clinical programs to be primarily skills focussed.⁶⁷ An influential contemporary commentator clearly separated skills training from the law school's role, leaving to the university those concerns which ought be seen as appropriate for a clinical program to address: public policy, law reform, social and moral questions, law in a social context, and legal service of the public interest.⁶⁸

Such goals for a clinical program are consistent to an extent with the Law School being, as most modern university based law schools are, an academic institution not necessarily concerned with the practice of its discipline,⁶⁹ though having to recognise that its graduates will practice. Thus, while Australian law courses have had to offer "subjects thought essential to the practice of law",⁷⁰ it does not follow that those courses teach anything about the practice of law.

Clinical Legal Experience at the Law School is emphatically a *practice-based* subject. It is about legal practice, but not about the practicalities of legal practice. It is about the structures and implications of legal practice, the values and dynamics of systems of justice.

The Law School has often, in its elective subjects, embraced the practical importance and relevance of law to issues of social justice and power. Such issues are very much concerned with legal practice, without being about the practical skills of practice. The clinical program at the Centre can be seen as an extension of this agenda at the Law School, especially when it is understood that the first cases taken on at the Centre were anti-discrimination cases, and that they have continued to be prominent in the Centre's practice.

The fact that the subject name Clinical Legal Experience is not as descriptive of content as, say, Contracts, adds to the uncertainty about the nature of the subject. The *content* of the clinical subject is not identified in the subject name, the *teaching method* is.

⁶⁴ Barnhizer (1990) supra footnote 47 @ p.123

⁶⁵ a point misunderstood or not properly canvassed in the Bowen Inquiry supra footnote 13 @ part 8.4.1, fn 3. It is not service to the poor but the manner of providing the service which may compromise educational aims: see 2.2.1 of this report.

⁶⁶ Barnhizer (1990) supra footnote 47 @ p. 123; see also the discussion at 2.1.8 of this report.

⁶⁷ The primacy of the analytical, non-skills objective is, however, never clearly stated, and may be questioned in light of contemporary writings: see for example, Hanks P., Clinical Education for Lawyers in Legal Education in Australia. Proceedings of a National Conference, Australian Law Council Foundation, Melbourne, 1978 @ p 642; the 1984 proposal to UNSW Law School at appendix 3 of this report; part 1.1.2 of this report.

⁶⁸ Peden supra footnote 39 @ pp.1-6

⁶⁹ Barnhizer (1979) supra footnote 55, passim, in which he questions the place of appellate case study as the near-exclusive method of modern legal education; compare an argument in favour of the case method which concludes that, in that context, clinical teaching is a failure: Stolz supra footnote 51 @ pp. 65-75

⁷⁰ AULSA *Legal Education in Australian Universities, Report No.2*, Butterworths, Sydney, 1977 Ch. 1 part 2.1, Ch. 3

To identify a subject by reference to its teaching method is unusual but in this case not surprising: the subject does have appeal simply for not being classroom-based. While it is appropriate that students are aware of the dramatically different teaching environment in which they will be learning, this need not define the subject name. Subject names which may be more descriptive of the content, but arguably less attractive to students seeking an apparent 'alternative' from the bulk of subjects in the curriculum, are Applied Legal Reasoning, The Practice of Justice, Legal Systems 2 (Clinical), Litigation 2 (Clinical), or Law Lawyers and Society 2 (Clinical). In any event, students tend simply to call the subject 'Kingsford'.

There is an important way in which 'education' is the content of the subject. The experience of learning-by-doing, to put it simply, is itself an education: an explicit goal of the clinical subject is to teach students to learn from their own experience, to 'self-learn'.⁷¹ This is as useful a skill in legal study as it is in legal practice, and one which undergraduate students rarely develop during their casebook studies.

(iii) *Skills in the clinical program*

There is no doubt that because the clinical approach is practice based, a clear sighted pursuit of the non-skills goals of teaching can be impeded. The presence of this 'danger' should not suggest that the non-skill goals are misconceived, but should warn clinical teachers to be ever alert to the risk of being smothered by the relentless demands of legal practice and the consequent focus on the 'how' rather than the 'why'.⁷²

Practice skills are a necessary part of the content of a clinical subject, but skills training is not a primary aim of the subject. The acquisition of skills is subordinate to introducing students to the intellectual aims of the subject.⁷³

To the extent that students will participate in legal practice to learn, they must have the requisite skills. This is only the same reasoning that results in students learning research and writing skills to prepare them for academic activity.

⁷¹ see Tarr N.W., *The Skill of Evaluation as an Explicit Goal of Clinical Training* (1990) 21 Pacific Law Journal 967

⁷² see Condlin supra footnote 7 @ pp.53-59

⁷³ Condlin ibid @ p.53 fn.24; Kreiling K.R., *Clinical Education And Lawyer Competency: The Process Of Learning To Learn From Experience Through Properly Structured Clinical Supervision*.(1981) 40 Maryland Law Review 284 @ p. 284

There may be a place in the Law School curriculum for a skills training course: one that teaches drafting, interviewing and negotiation in the context of legal practice. Argument on this point can be related to the 'university ideal' of the pursuit of knowledge for its own sake.⁷⁴ That may be contrasted, with some cultural dislocation, with "the old Chinese proverb:

I hear, I forget,
I see, and I remember,
I do, and I understand."⁷⁵

Whether law schools should have the potential legal practice of its students in mind when offering a curriculum is debatable.⁷⁶ Whatever the view taken, the validity of the clinical teaching method does not depend on it. It is unfortunate that clinical teaching has come to be seen only as training for legal practice skills: it offers much that is different from simple skills training.

If and whenever there is a call for an emphasis on practice skills teaching, a clinical subject is well placed to be a vehicle for that. In fact, the training already given in necessary skills at the Centre is well received by students, apparently of use to them after graduation regardless of whether they go on to practise.⁷⁷

(iv) *Skills in the Law School*

There are skills subjects in the Law School: Trial Process is the most apparently skills-oriented subject in the curriculum, committed to teaching the practice of, preparation for, and conduct of matters in court at first instance. Legal Research and Writing is quite clearly a skills course, although one which forms the basis of academic research; it could easily include similar writing and research skills for legal practice.

The manner in which many other subjects are taught⁷⁸ indicates a strong regard for the fact that students will be practising the law taught, even if 'tricks of the trade' are not part of the syllabus. The acknowledged bent of the School's curriculum to what are broadly termed 'commercial subjects' is itself a function of the indirect pressure of the demands of the practising legal profession on the orientation of legal education.

The expectations that the profession has of law schools and their curriculums threaten in Australia⁷⁹ to demand skills training of clinical programs. This function is not the basis of the relevance of clinical teaching to the Law School's curriculum, and disregards the place of clinical education in bringing to students ideas of lawyers' place in a just society. These ideas form the basis for the effective use of lawyers' skills at a later stage.

(v) *Learning law in the clinic*

Perhaps the goal least readily associated with the operation of clinical program is that of teaching substantive law. More accurately, it should be said that work at a clinic reinforces and deepens a student's existing knowledge of substantive law, and invites a student to learn law not previously known. The second phenomenon is one familiar to practising lawyers, particularly barristers: learning what needs to be known for a particular situation. It is by no means an ideal way in which to practice, but it is often unavoidable. Certainly exposure to this type of learning is not be an explicit goal in a clinical program, but it can be stimulating for students and can give rise to discussions concerning lawyers' duties and role in society.

⁷⁴ see Barnhizer (1990) supra footnote 47

⁷⁵ Tribe D.M.R. & A.J., *Paperchase Revisited: The Huddersfield Experiment* (1985) 19 Law Teach. 24 @ p. 36

⁷⁶ see especially Barnhizer (1990) supra footnote 47, discussing the academic/training school identity of law schools in their history.

⁷⁷ Student survey supra footnote 36 Tables 3.6, B1-B6.

⁷⁸ see, for example, 2.1.8 below

⁷⁹ as has been the case in America: Barnhizer (1990) supra footnote 47 @ p.128

Importantly, a student's considered approach to a client's problem will require the student to demonstrate a clear understanding of legal doctrine that has already been learnt. Each instance in practice will be an 'advanced' lesson in a subject, what has been called a "seminar plus".⁸⁰ By way of simple example, a student, whose client has fallen in the bath because a handrail recently installed by a government sub-contractor has pulled off the wall, must be able to review and apply a great deal that was learnt in at least Contracts and Torts. When the client wants to include in a claim for the loss suffered, being unable to attend a wedding because of the injury, there is a nodding recognition in a student's face when reminded of principles relating to damages. Thus, not only is substantive law learnt or re-learnt, but an opportunity arises to consider policy considerations in relation to loss and compensation.⁸¹

A survey of three different clinical programs in England⁸² showed student endorsement for the proposition that involvement in a clinic is an effective way of learning, or of expanding existing knowledge of, substantive law. In an otherwise comprehensive analysis of clinical teaching, Barnhizer is all too brief, although positive, about the extent to which the teaching of substantive law is a realisable goal of clinical teaching.⁸³

The relevance of clinical teaching to the study of 'black letter' law is perhaps better illustrated in a discussion about the use of clinical method in a normal curriculum subject, without reference to the idea of an independent clinical centre.⁸⁴

2.1.2 Site: A Subject Somewhere Else

There is a need for the clinic to be in or proximate to the Law School. If it is not, an office for the clinic in the Law School is necessary.

The clinical subject is not taught in the Law School. It is taught a couple of miles away in a separate building. The original proposal for the clinic⁸⁵ saw the necessity for a Centre which was accessible to students, close to the law library, and sufficiently close to campus to encourage the involvement of Law School staff. The proposal anticipated the use of premises somewhere between the University and the Prince of Wales Hospital. In light of limited University resources, it is no more reasonable now than it was then to suggest that the Centre be located in or adjacent to the Law School.

⁸⁰ Gottlieb supra footnote 56 @ p. 26

⁸¹ see the observation by Weaver in relation to the Common Law In Action course at South Bank Polytechnic: Weaver supra footnote 46 @ p.8. That common law course is described in greater detail in Jeeves & Boon, supra footnote 34 @ pp.83-4

⁸² Macfarlane supra footnote 22 @ p. 72

⁸³ Barnhizer (1990) supra footnote 55 @ p. 77

⁸⁴ see the discussion at 2.1.8

⁸⁵ see para 5.2 of the 18 March 1981 proposal, supra footnote 3.

The present site has the following implications for the Law School:

*The Centre is in the community it services, and so:

- the Centre has ready access to casework,
- 'walk-in' clients have ready access to the Centre, and
- the Law School has a profile in the community.

*The Centre's distance from the Law School:

- gives the Centre its own independent identity;
- reinforces, for better or worse, a perception among staff and students that the subject is different in type and purpose from other subjects;
- adds at least a day's delay to written communication between the Law School and the Centre;
- renders its unique and resource-intensive method of teaching an unseen mystery to members of Law School staff;
- militates against the ready interaction of the clinical teachers with other subjects and of the Law School staff with the clinical subject;
- militates against the ready use of the case and clinical material by other Law School staff for their own teaching;
- prevents students responding to the fluidity and vagaries of the demands of their file work.

On balance, on these considerations, a site closer to the Law School is preferable.

The particular clinical program at the Centre is one with a high profile in the local community. It has been operating in and for the community for close to ten years. While, for the purposes of clinical teaching, it need not have been set up in the community in the first place, it could not easily be withdrawn from the community now.⁸⁶ The Law School does, through the Centre, provide a considerable resource to the community, which must be a factor in considering in the future if and where the clinical program might be relocated.

If a clinic is to service a community, it can nevertheless be located in or adjacent to a Law School if the Law School is itself reasonably accessible. If, as is the case, location in or adjacent to the Law School is not feasible, then a happy medium needs to be found. The assertion, on its own, that a clinical office "should be in a place that is accessible to and convenient to clients"⁸⁷ disregards the educational and institutional concerns that arise if, by putting the clinic close to clients, it is at a distance from the Law School.

The extent to which the removed site is an impediment to the development of clinical activities in the law school curriculum is a cause for concern. This educational aspect alone⁸⁸ is sufficient to prompt consideration of the relocation of the clinic. There may also be a failure to take advantage of the possibilities of professional and teaching interaction between the clinic and the Law School.⁸⁹ Another concern is that the physical remove of the Centre symbolises a conceptual isolation of the Centre, its staff and its purpose, from the School.

⁸⁶ see Munn M.K., *Clinical Legal Education Through the Looking-Glass* (1989) 12 Dalhousie L. J. 505 @ pp.510 ff. for a discussion of how a clinical program in the community is closed down and withdrawn to the law school. The article was written after the decision and before the event.

⁸⁷ Ibid @ p. 521

⁸⁸ see Barnhizer (1979) supra footnote 55 @ pp. 100-101

⁸⁹ see the discussion at 2.1.8

These phenomena appear to have been present in the Law School to different degrees from time to time, though without any lasting effect. Such concerns are referred to in an article by Munger,⁹⁰ and are summarised here, with reference to the UNSW clinical subject:

- *a perception among Law School academic staff and the students that the clinical subject is less intellectually demanding;
- *a perception among Law School academic and office staff that the clinical staff are separate from and/or have little in common with the Law School;
- * a perception among the Law School academic staff that the clinical staff carry less educational responsibilities than other academic staff;
- *a tendency among clinical staff to become defensive and adopt a separatist attitude;
- *a belief among students that the clinical subject is appropriate only for those intending to practise and/or those wanting to take part in community legal services;
- *a belief in the Law School that the Centre is a drain on resources disproportionate to the numbers of students taught.⁹¹

It is not possible to operate a clinic of any sort on site at the present Law School; space, if nothing else, dictates against it. It is unlikely that there is anywhere available on campus for the operation of a clinic. The present site is quite adequate, but attempts should be made to locate the clinic closer to the Law School in the short term and, the question of funding aside, to incorporate clinical facilities in the design of any new law building⁹².

In the meantime, the extent to which the clinical subject can interact with the Law School (see particularly 2.1.8) is compromised by the director having no office at the Law School. A base for the lecturer is desirable for the reasons outlined above. Further, it would facilitate teacher student/discussions which at the moment take place at the Centre as time out of the students' time in the subject. It would enable the lecturer undertake academic research in circumstances more favourable than those enjoyed by students using the library. It would also address a phenomenon not otherwise relevant to this report, the occasions on which the director is consulted by academic and administrative staff of the Law School for legal advice and assistance. The office need not be available full-time; a shared office would be sufficient

2.1.3 Enrolment: A Whole Day for a Subject

The clinical subject has particular timetable requirements which are not accommodated in the normal enrolment procedures.

Student enrolment in the subject has implications for clients of the Centre, and questions arise as to the basis on which students are admitted to study in the clinical program.

The need for students to attend the centre for a whole day rather than for two half days, and indeed the desirability of students attending for more than one day, is discussed below at 2.2.12. The point is also made there that for as long as the clinic is at a distance from the Law School, it will always be necessary to have a large block of time set aside in the timetable for the clinical subject.

⁹⁰ Munger, supra footnote 55 @ pp. 719-721

⁹¹ This objection may well have substance, generally speaking. In the case of UNSW, the clinic is in fact of little cost to Faculty due to external funding. See the discussion at 2.1.6

⁹² see also the Interim Report supra footnote 16 @ Parts 3.A3, A8

The result of this for the Law School is that the clinical subject is a cumbersome intrusion on the timetabling process: students must set aside a free day for the clinical subject and must fit the other three subjects of their choice into the remaining four days.⁹³ Subjects in the Law School are taught in two classes a week, on paired days: usually Monday/Thursday and Tuesday/Friday. There are some Monday/Wednesday and Wednesday/Friday subjects, though fewer of them as Wednesday is a lighter day for teaching.

Wednesday is a prized day for enrolment at the Centre, as it gives students a reasonable range of options in choosing other subjects, and allows students to attend class on the same day that they attend for their clinical work. This latter point is important for part-time students and those with child-minding considerations. As only five students can enrol on one day, there is a scramble for Wednesday on a first-come, first-served basis.

This all takes place at preliminary enrolment in October. The computer does not allocate students into groups on the basis that Clinical Legal Experience requires a free day: it takes account only of the Wednesday two hour class. Consequently, the contrived planning by students at preliminary enrolment is often for nought. The students, the General Office staff and the Centre staff go through contortions to fit students in after final enrolments are complete.

Enrolment in the summer session is also much sought after by students. Invariably there are up to sixty or seventy enrolments, although many later declare themselves unavailable due to travel or summer clerkships. Enrolment for the summer session is by registration during first session at the General Office, on a first-come, first-served basis.

The enrolment and timetabling procedures do not, and appear as yet unable to, take account of many of the unique demands of the clinical subject. A memorandum regarding possible refinements to enrolment procedures is at *appendix 15*, and is the subject of discussion with the administrative staff. In effect, it suggests the incorporation of the full-day attendance obligation into the Law School's timetable planning, rather than only the weekly two hour class. Computer sorting of timetable clashes is of no point if it does not take proper account of the obligations attached to a subject.

A practice has developed as a result of which students in their final year have been given priority in enrolment in the subject when, as is particularly the case in summer, students have been on a waiting list. Final year status has resulted in some students insisting that they must have priority for enrolment in the summer session as they "need the subject to finish the degree". This demonstrates an expectation on those students' part that they will pass the subject, which is presumptuous. This 'reason' for priority enrolment is a criterion unrelated to the educational aims of the subject, and one which, if acted on, undermines the quality of those student's experience.

Two particular aspects of the enrolment process, beyond the administrative considerations, merit further discussion: the criteria for acceptance into the subject and the priority of acceptance. The stage at which a student might enrol and the question of prerequisites are discussed at *2.1.9*.

The particularly personal demands of the subject raise the possibility of interviewing students for enrolment in the subject. Demand for the subject is not so great as to render this necessary, nor is the overall ability of students of any great concern. The issue arises in relation to the summer session, for which up to eighty students apply for the subject. Many of them do so simply because it is available, and have no understanding of the purpose and demands of the subject.

The 'first-come, first-served' approach to enrolment, common in the Law School, is used to select twenty five students from eighty. Many students with a genuine interest in the subject and its aims would be excluded, preference being given to those who saw the notice and reached the General Office first. A fairer

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Ibid @ Part 3.A3

system, which would not purport distinguish more 'meritorious' students but would give equal access to the subject would be a ballot.

There remains the question of suitability for the subject. While ordinarily it would be sufficient to say that if students choose a subject for which they are unsuited they may fail, there are consequences to third parties - clients - if students operate at a 'fail' standard in the clinical subject. A student with no inclination to participate in the subject, to pursue the subject's goals and to develop over the session, will do more than fail, they will disrupt a legal office, jeopardise the merit of a client's case, and compromise the professionalism of the legal service.

In practice, these consequences are avoided by the clinical staff intervening frequently and severely, distracting them from the smooth supervision of the subject as a whole. It is preferable to try to minimise the occasions when this might arise, by identifying students' motives and abilities at enrolment.

The difficulty then is identifying the criteria for selection. To demonstrate the point: is a student, who has no thoughts either way about the subject and who displays unremarkable personal skills and no predisposition to think critically about the legal process, not appropriate for enrolment or in fact just the sort of student who should be enrolled? It may be possible to select a mix of students, blending enthusiasm with indifference, life experience with naivety, young with old.

From time to time, the involvement of certain students does raise the question but, as it happens, the experience at the Centre of late has not resulted in a strong case being made out for the need to select, and early impressions of students are often shown to be wrong.

2.1.4 Assessment: Without Distinction

The subject is assessed on a pass/fail basis.

The subject is notable in that it is assessed only according to a pass/fail standard. The formal expression of the result is Satisfactory Completion. This approach is discussed in greater detail at 2.2.11 below.

When the subject commenced, an ungraded result for a subject was a part of the same philosophy that resulted in the Faculty deliberately not awarding Honours degrees. The clinical placement program had operated since 1975 on a pass/fail basis, and there appeared to be no question that the subject the clinical subject at a clinic would not continue in the same way. With Trial Process, however, it remains anomalous in the scheme of grading in the Law School. For the reasons outlined in the fuller discussion below at 2.2.11, the clinical subject is likely to remain in this position.

2.1.5 Type of clinic - Community Legal Centre

The way in which the clinical program runs is important to the Law School for educational, funding and community service considerations.

The Law School operates a general casework clinic. More than this, it runs a general casework clinic as a community service.

The consequences of providing both a clinical subject and a community service at the same time is problematic,⁹⁴ although the simple fact that the centre uses, as its teaching material, general rather than specialist casework may not be of particular concern to the Law School. The legal centre/law clinic split

⁹⁴ This is despite the off-hand assertion that a clinic "has to set priorities for service that accord with the mandate of the legal aid plan and the university, but, given the will to realize the clinic project jointly, this should not be an insurmountable task"(!) in Munn, *supra* footnote 86, @ pp.508-9.

bears upon the internal operation of the Centre more than it does on the Law School, and the implications of this double identity are discussed below at 2.2.1.

The following matters are likely, however, to be of general concern to the Law School: the educational experience for the students, funding, and the legal service contribution to the community. Although in this report the community legal centre character of the Centre is scrutinised and reservations about it are expressed, it is not recommended in this report that that character be substantially altered.

(i) *The educational experience for the students*

The particular educational advantages that accrue to a clinic from its character as a community legal centre are discussed below at 2.2.1. In brief, they are the access that a legal centre offers students to a variety of areas of law, the opportunity students have to appreciate the unanticipated workings of the law in society, the need that students discover to draw on or seek knowledge of law and to apply it in an unanticipated range of situations, the exposure of students to non-commercial legal concerns, and the promotion of law as a service to the community.

(ii) *Funding*

The legal centre identity of the clinic attracts funds that might not otherwise be available: see 2.2.1. Any proposal that threatens this source of funds would presumably have the support of the Law School only if the Centre was making do without the funds or if other funds were available.

(iii) *Contribution to the community*

Through the Centre, the Law School provides a substantial service to the community in the provision of free legal advice and representation. That community includes staff and students of the University. The service has been available for ten years. The Law School would have to consider its commitment to that community service if there was a proposal that would result in its diminishment or cessation.

2.1.6 Expense

Although the operation of a clinic is more expensive than other curriculum subjects, the clinical program at the Centre is largely funded from sources outside the Faculty budget, and assists by generating its own funds.

The cost to the Faculty of conducting the clinical program at the Centre is greater than that of conducting other subjects in the Law School. This can be analysed on a number of bases with different results relative to other subjects;⁹⁵ there is quite simply no way of avoiding the fact that a clinical program costs more.⁹⁶ It has been said bluntly that this must be accepted if a worthwhile clinical program is to be maintained, and that a great deal of staff and student time and effort can be wasted on "mediocre" (underfunded) clinical programs.⁹⁷

What constitutes a 'worthwhile' program is itself problematic, and is perhaps best determined by looking at the aims of the program, and the goals in relation to which students' participation is assessed: see 2.2.11 below. The worth of the program cannot be seen, however, only in light of its product: the Centre does more than teach students, it provides a service to the community and a public and educational profile for the Law School. The point is well made that while "(i)t is not hard to arrive at a cost, ... the calculation of the benefit necessarily requires some kind of measurable outcome that one can relate to costs."⁹⁸

The Centre is a separate clinic, with its own staff, structure, and associated expenses, and is one of the more expensive models of clinical education. The provision of legal education need not, however, be expensive. Taking the form of a placement program, it can be "a fiscal administrator's delight."⁹⁹

The tendency in North America has been for clinical programs to obtain external grant funding, and for that funding either to become recurrent or to be taken on by the University.¹⁰⁰ The following account of the expenses associated with the clinical subject reflects this pattern, and shows that, although it is expensive to operate, it is not an expense borne to any great extent by the Law School.

⁹⁵ see 1971 Report of the Curriculum Committee on Clinical Programs of the New York University Law School, (1972) 4(8) CLEPR Newsletter @ pp.5-8; Swords P. deL., Including Clinical Education in the Law School Budget in CLEPR, *Clinical Education for the Law Student*, Meilin Press, N.Y, 1973 p.309

⁹⁶ To describe the cost as "staggering" must be hyperbole: Hardaway R.M., *Problems in Clinical Integration: A case Study of the Integrated Clinical Program of the University of Denver College of Law* (1981-82) 59 Denver Law Journal 459 @ p.462. Hardaway's reference at his fn. 25 to the cost as "breakbreaking" is very dated: 1950

⁹⁷ Barnhizer (1979) supra footnote 55 @ p.100; Swords supra footnote 95 @ p.346

⁹⁸ Cort H.R. Sammons J.L. Catz R.S. Tyler R.S. & Anderson T.J., *AALS Clinical Legal Education Panel: Evaluation and Assessment of Student Performance In A Clinical Setting* (1980) 29 Cleveland St. L. R. 603 @ p.603

⁹⁹ Ibid per Anderson @ p. 618; see also Condlin's discussion of an "outside office program", supra footnote 7 @ pp. 63-73

¹⁰⁰ Interim Report supra footnote 16 @ Part 3.A2; see, for example, the NYU experience in NYU 1971 Curriculum Report, supra footnote 95 @ p.8, and the Stanford Law School experience in Bird, R.E., supra footnote 43 @ p. 254.

(i) Salaries

The provision of professional staff to the clinical subject is in fact no direct expense to the Faculty.

The position of the director of the Centre is that of a lecturer in the Faculty. That lecturer necessarily also practises as a solicitor at the Centre. The lecturer's position existed before the Centre did, would presumably be maintained if the clinical subject ceased, and is not an extra salary cost arising from the clinical subject.

The lecturer in the clinical subject teaches no more than 25 students in a session. This represents 44 % of the average standard teaching load in the Faculty when that load is measured in terms of class size. The Faculty standard is in fact measured over three years, during which period the clinical teacher's load is 66% of the standard, the increase due to the teaching of nine sessions in three years rather than the standard six sessions.

Whether it is costed in dollars or simply accepted as a resource liability, the commitment of a lecturer to the clinical subject results in the Faculty having to find a teacher for an extra seventy five students every three years.

A different perspective on this point is that the lecturer's teaching load, in terms not of student numbers but of hours taught, is considerable. In addition to the formal class and student meeting time of five hours a week for which the director takes responsibility, approximately twenty hours a week are spent consulting with students, supervising and observing them, and checking their work. The teacher is teaching for up to twenty five hours a week, quite apart from the usual concomitants of teaching: marking, assessment, and class preparation. This is at least two and a half times more than the standard number of teaching hours per week, and is sustained for three sessions every year. It represents no 'saving' to the Law School: those who benefit are the students who receive the increased teacher-time in the clinical subject.

The clinical subject requires the employment of two other teachers. They are employed ostensibly as solicitors, and they work as such in the Centre. At the same time, they do teach, carrying a less responsibility for direct teaching, but no less responsibility for supervising and checking than does the director. One of these positions is paid for by the Legal Aid Commission.

The other position is maintained by the Faculty from recurrent grant funds from the University: the development grant of \$85,000 in 1984 has been continued since that time.

Other salary expenses are administrative. The positions: two full-time, one part-time and one casual, were created solely for the operation of the Centre. The salaries amount to approximately \$65,000 a year. But for the casual job, the positions are permanent in the University, and the administrative staff are staff of the general office of the Law School.

(ii) Non-salary

Non-salary expenses relate to items such as rent, telephones, electricity, cleaning, practising certificates, equipment and stationery. The figures for recent years show a steady containment of the expenses. Of the current expenditure of, say, \$35,000 a year for non-salary items, approximately \$10,000 is met by funds from the Legal Aid Commission. The balance is paid, along with a solicitor's salary, from recurrent grant funds of \$85,000 from the University. The provision of these non-salary items to the clinical subject therefore represents no direct expense to the Faculty.

(iii) Income generation

The Centre makes every effort to generate its own funds and to seek funding from other sources. Income has been generated over the years in an irregular fashion by acting for a successful client in litigation. If the client has been awarded party/party costs, that client has been billed accordingly.

Until 1986, the Legal Aid Commission, in its grants of legal aid to community legal centres, paid solicitor's professional costs to legal centres as it would to any solicitor. Since then, it has not done so except in special circumstances, and a grant of legal aid to a community legal centre has been a full grant in all respects but for the payment of professional costs. For the few years that the Centre was able to claim profit costs, it did so. The Centre has used those funds for equipment or expenses such as locum staff and conferences, rather than drawing on the Faculty funds.

In lieu of paying professional costs, the Legal Aid Commission has invited legal centres to enter 'special relationships' through which a centre can receive professional costs for doing certain work which is both a speciality of the legal centre and of assistance to the Commission. The Centre has such an arrangement for duty solicitor work done at Waverley Local Court.

The Centre receives a share of royalties from the sale of the Lawyers Practice Manual, of which it is a joint editor.

The Centre has been successful in obtaining grant funds from time to time to assist with capital maintenance of the Centre. At the founding of the Centre, the Law Foundation provided a grant for the purchase of a library. The Law Foundation has since given a grant for the consultation regarding and design of office refurbishments. Statutory interest funds, made available to legal centres for a time but no longer, were obtained to pay for refurbishment.

The clinical subject, although expensive in itself, does not represent a significant expense to be borne by the Law School. To the extent that this has not been fully understood from time to time, it is heartening that the clinical subject has had the support of the Law School despite its apparent expense.

The fact that the subject is funded from sources almost completely outside the Law School must not distinguish it from other subjects in the curriculum. The obligations which are attached to that external funding¹⁰¹ do not impinge on the Law School, and allow the subject to function without any identity other than that of an ordinary, albeit clinical, curriculum elective. If any part of the substantial recurrent external funding was to cease, the Law School's commitment to the provision of clinical education may well be tested: "(f)undamentally, the issue is one of educational priorities."¹⁰² If the importance of clinical teaching to legal education is embraced and promoted, it is then a demonstrable argument for the position that legal education is not to be dismissed as simple and cheap; legal education can be as complex and resource-dependent as the best clinical teaching program.

¹⁰¹ see, for example, the discussion at 1.2.2 above.

¹⁰² Swords *supra* footnote 95 @ p. 352

2.1.7 Academic status

The clinical teaching staff, including the director, are all employed on contract, with no opportunity to pursue the numerous possibilities for academic research that arise in a clinic. There is no formal teaching status in the Law School for two of the clinical teachers.

The position of the director of Kingsford Legal Centre is a fixed term contract position for three years, in the course of which the director teaches for nine sessions. Attached to that position is the status of lecturer in the Law Faculty, and the position is remunerated accordingly, with a director's loading. Technically, the contract is not renewable, and it clearly gives no access to a tenurable position.

Although there is no written job description, nor any written contract in which there are terms of employment, it is understood that the position of lecturer in the Faculty carries with it no entitlement to tenure or academic promotion, nor any right to study leave or to teach another subject. On the other hand, it is also understood that the person in the position cannot be required to teach any other subject.¹⁰³

The Law School employs two solicitors whose status with the University administration is described as that of 'consultant'. This is a one year contract position, renewable at the option of the Faculty. The pay is unrelated to academic pay scales, and has usually been set by reference to community legal centre salaries.¹⁰⁴

The distinction in description between the work of the director and that of the employed solicitors is that the director must take responsibility for the non-casework aspects of the Centre: formal teaching, administration, funding and external liaison. The distinction in practice is that primary but not sole responsibility for the non-casework activities rests with the director, and that although the staff will defer to the director's 'casting vote', the director consults with staff on most major decisions. Most, importantly, day-to-day supervision and teaching responsibility is shared.

As is described below at 2.2.10, although the classes are usually taught by the director, the responsibility for convening daily meetings with the students and for constantly supervising the students' work is shared by the three legal staff. The students are assessed jointly by the legal staff.

In terms of teaching, the three legal staff are in very similar positions, the principal distinction being in that the final decisions concerning course content and teaching method are the director's. The legal staff share responsibility for the case supervision and, by that activity, for teaching the students. Keeping this in mind should help focus attention on what clinical teachers do, "on the nature and content of their role in the process, rather than on the problematic features of administration, cost, caseload...".¹⁰⁵

The importance of recognising the place in the Faculty of the three legal teaching staff at the Centre is best expressed in a fairly lengthy quote:

"Clinical teachers whose sole responsibility is to teach the clinical program ... face additional pressures ... The position of clinical teacher requires the individual to meet virtually all of the responsibilities of law practice, but provides little of that system's rewards, whether economic, self-conceptual, or status. At the same time, other faculty often possess distinctly different ideas of excellence. The result can be that the clinical teacher may feel himself a form of half-breed, caught between the values of two very different systems ... The clinical teacher can decide to accept the values of the practitioner, or of the other faculty.

¹⁰³ see also the Interim Report supra footnote 16 @ Part 3.A5

¹⁰⁴ If the clinical staff are "the right people" then they are expected to be able to "command high salaries"!; Weaver supra footnote 46 @ p.7

¹⁰⁵ Bellow, D.R., On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in *Clinical Education for the Law Student*, CLEPR supra footnote 95

He can attempt to alter the perspectives of the educational system, or he can remain in the middle, succeeding in some ways and failing inevitably in some of those related to others' perspectives."¹⁰⁶

To give clinical teachers a place in a law faculty raises questions of the academic content and contribution of a clinical teacher's time. The discussions relating to academic status for clinical teachers are made mainly in the context of the United States, where the clinical programs are more explicitly skills based. The arguments there are therefore that much more difficult, having to raise the profile of what is essentially a practice-focused activity to an academic level.

The nature of clinical practice makes it difficult to pursue academic inquiry on terms enjoyed by non-clinical teachers. Quite simply, there is no time to be at once a teacher, a solicitor, an administrator, and an academic. The suggestion that a clinical teacher "be offered a special appointment, so that the usual tenure requirements do not apply",¹⁰⁷ is insufficient in two ways. Unless some alternative tenure system is in place, the incentive that Barnhizer speaks of above is wanting, and the suggestion that a teacher can teach effectively without the opportunity to research, reflect, revise, read, reconsider, and prepare the subject, is educationally unsound. On the other hand, a clinic would have to be well structured and reasonably well resourced to release a clinical teacher from casework and supervision obligations to allow for "leaves of absences from day-to-day clinic work in order to have an opportunity to research and write."¹⁰⁸

While it may well be "absurd" to have to assume that applied aspects of law are not scholarly,¹⁰⁹ that is how the battle has proceeded.¹¹⁰ The battle has been won to an extent, with the recognition of the academic status of clinical teachers in the accreditation of law schools by the American Bar Association. A copy of the relevant ABA standard, and its interpretation, is at *appendix 16*. In one American law school, giving clinical staff access to tenure was explicitly "to make the clinical teaching positions more attractive and reflective of their importance in the educational mission of the Law School." Even when external funds are used for contract employment of clinical teachers, 'a temporary academic appointment is made.'¹¹¹ Similar status for teachers of legal research and writing subjects remain, however, beyond the pale.

Making allowance for a clinical teacher to be absent from teaching duties would acknowledge that there is a some legitimate academic work being undertaken. This work may be as unsurprising as preparing teaching materials, as academically correct as research into the constitutional justification for the delegation of criminal prosecutions of federal offences, or as removed from the immediacy of casework as an inquiry into the jurisprudential predispositions of left-handed lawyers,¹¹² or into the degree to which a supervisor ought be personally but non-physically intimate with students.¹¹³

¹⁰⁶ Barnhizer (1979) *supra* footnote 55, @ pp. 138-139

¹⁰⁷ Munn, *supra* footnote 86, @ p.520

¹⁰⁸ *Ibid.*

¹⁰⁹ Clemmons *supra* footnote 50 @ p. 69

¹¹⁰ see for example the debate between Carrington P.D. and Rivkin D.H. in *Faculty Status for Clinical Teaching?* 13(1) *Syllabus 1*

¹¹¹ Norwood, *supra* footnote 42 @ p. 274.

¹¹² Strong G.B., *The Lawyer's Left Hand: Non-Analytical Thought in the Practice of Law*, draft paper presented to a clinical theory workshop, Columbia University, 19 October 1990

¹¹³ Sullivan K., *Self-disclosure, Separation and Students: Intimacy in the Clinical Relationship*, draft paper presented to a clinical theory workshop, Columbia University, 1 March 1991

Clinical teaching method is in itself a legitimate matter for academic inquiry, in the field of legal education theory. Extensive writing and debate in North America bears this out,¹¹⁴ backed by calls for more scholarship in the area.¹¹⁵

At the heart of the discussion concerning academic acceptance is the nature of the work that is done by a clinical teacher. A clinical teacher's subject matter is the casework, the substantive law of the clients' difficulties. Thus, any relevant area of the clinical teacher's legal practice could be the subject of inquiry and, necessarily for academic status, publication. There is great scope for the clinical teaching environment to provide all law teachers, as well as the clinical teachers, with a source of empirical legal research,¹¹⁶ based on cases and experiences which demonstrate the operation and anomalies of legal rules and socio-legal behaviour.

A supplement or alternative to making time available to clinical teachers is to recognise the work that is done in the course of their clinical teaching as appropriate for consideration in relation to academic achievement. Most apparent in the casework are briefs to counsel,¹¹⁷ advices to clients and submissions to courts and committees. No doubt they would have to be of a complexity and a standard that would merit consideration, but it is the principle that needs to be recognised first. In addition, practice texts and journal articles are produced from time to time in the course of a clinical practice.

The adoption of a Bar Association standard, and the various approaches adopted by different law schools in the United States, indicate a tendency to require of clinical teachers similar but not identical standards to attain and retain equal academic status.¹¹⁸ It is probably true that this tends to marginalise clinical teachers,¹¹⁹ but at least it puts them on the margin and does not leave them out of the picture altogether.

There is recognition of the teaching role of the director of the clinical program by, appropriately,¹²⁰ giving that teacher membership of Faculty, albeit for the duration of only a fixed term contract position. There is no teaching status accorded the other two clinical legal staff at the Centre, although they are welcome to attend, and to vote at,¹²¹ School meetings. Within the terms of the contractual nature of their employment,

114 see for example the Condlin-generated debates in Condlin R.J., *Clinical Education in the Seventies: An Appraisal of the Decade* (1983) 33 J.Legal Ed. 604, Redlich N., *The Moral Value of Clinical Education: A Reply* (1983) 33 J.Legal Ed. 613, *On Talking Tough to Each Other: Comments on Condlin* (1983) 33 J.Legal Ed. 619, Condlin (1986) supra footnote 7, Hegland H., *Condlin's Critique of Conventional Clinics: The Case of the Missing Case* (1986) 36 J. Legal Ed. 45. And also see for example Amsterdam A.G., *Clinical Legal Experience - A 21st. Century Perspective* (1984) 34 J. Legal Ed.612; Barnhizer (1979) and (1990) supra footnotes 55 and 47; Leleiko S. H., *Clinical Education, Empirical Study, and Legal Scholarship* (1979) 30 J. Legal Ed. 149; Menkel-Meadow C., *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education* (1986) 4 Antioch Law Journal 287

115 Amsterdam A.G., *Clinician Speaks Out* 13(2) Syllabus 5 @ p.5

116 Leleiko S. H., *Clinical Education, Empirical Study, and Legal Scholarship* (1979) 30 J. Legal Ed. 149, passim

117 see, for example, the briefs of a clinical teacher and appellate lawyer published in Sokol R.P., *Language and Litigation, A Portrait of the Appellate Brief*, Michie, Virginia, 1967; but for an argument against the validity of regarding briefs as academic work, see Condlin supra footnote 7 @ p.60

118 see Feldman supra footnote 44 @ pp 622-3. See also the Interim Report supra footnote 16 @ Parts 3.A1, A4

119 Feldman ibid @ p. 623

120 see Allison, supra footnote 21, at p. 276, in his discussion of "how a program should be structured and operated".

121 School resolutions 87/8, 87/25

it is open to the School to recognise the need to bring them within the Faculty, and to invite to them to join the Faculty as Visiting Fellows. It is open also to the Faculty to make the contract position of the director tenurable.

2.1.8 Clinical integration

Elements of clinical teaching exist throughout the Law School curriculum. There are opportunities for students of other subjects to take part in clinical activities at the Centre, and for exchanges between clinical and other Law School teachers.

In a simplified analysis, a law school which incorporates some type of clinical teaching may have either a discrete or an integrated clinical program.¹²² These two models may be at either end of a scale of clinical presence in a curriculum.¹²³ Although this report is concerned primarily with the operation of the Centre as a separate clinical program, mention is made here of integrating clinical teaching only to ensure that the expertise in a particular teaching method is not overlooked or necessarily confined to one subject. An integrated program would result in a number of substantive law courses being taught, if only in part, by a clinical method. To address and continue to monitor and implement proposals in this Part, it would be appropriate to establish a committee of the Law School, and to consider broadening the scope of the clinical program director's position so that assistance is available to teachers who wish to introduce clinical teaching aspects to their subjects.¹²⁴

(i) clinical teaching method

In speculating on ways of accommodating clinical teaching, it has been suggested that this type of integration ought occur, with a requirement that students take subjects with a clinical component for no less than 30% of their post-first year subjects.¹²⁵ This opportunity is in fact available to students at Osgoode Hall Law School in Toronto.¹²⁶

Clinical teaching method may involve academic staff using in their classes games, simulations¹²⁷ or casework for analysis, research, demonstration or assessment.

As it happens, the Law School can boast of having a curriculum which, perhaps without conscious planning, and certainly without resources, has, to an extent, an integrated clinical element in its teaching, quite apart from the Centre.¹²⁸

Compulsory court reports in Criminal Law and Law Lawyers and Society, visits to gaol in Criminal Law, simulated interviews and studies of cases at first instance in Legal Systems/Torts, similar case studies in Litigation, case studies and trial simulation in Evidence and Advocacy, research papers on current issues in Human Rights, and trial simulation in Trial Process, are examples of different types of clinical teaching. There is too a past example in Business Associations 1. Just how truly each exercise conforms to a

¹²² Munn, supra footnote 86, @ p.510, identifies four levels of intensity with which a law school can adopt clinical teaching

¹²³ Schneider E.M. supra footnote 41 @ pp.112-4

¹²⁴ see the UNSW Law School 1980 Curriculum Review supra footnote 6 @ recommendation 6

¹²⁵ Keyes supra footnote 45 @ p.691

¹²⁶ Interim Report supra footnote 16 @ pp 6-9

¹²⁷ The method of simulation and games is a large topic in itself. As in introduction to the inoffensive way in which games can be considered as part of a standard law subject, see Katsh B.J. & M.E., *Preventing Future Shock: Games and Legal Education* (1973) 25 J. Legal Ed. 484

¹²⁸ for a thesis that "all law teaching is clinical teaching", see Lesnick H., *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching implicit in The Law School Curriculum* (1990) UCLA L. R. 1157

demanding and academic definition of clinical education is uncertain, but the potential, if not always the full realisation, is there.

There are numerous other subjects which might at first be considered too 'black letter' to be amenable to clinical teaching, but which elsewhere have been taught by a clinical method. Examples are contract and torts,¹²⁹ administrative law,¹³⁰ tax,¹³¹ commercial law,¹³² civil procedure,¹³³ discrimination,¹³⁴ environmental law¹³⁵ and constitutional law.¹³⁶ In North America there are other examples, including criminal law, housing, professional responsibility, and employment law.¹³⁷

(ii) *interaction with a clinic*

The clinical element of legal education is, at UNSW, a distinct clinical program, a subject to itself. 'Integration' in this context refers to the possible interaction of that clinical program with the teaching of other subjects. That process is not necessarily the thin end of an integrated curriculum wedge,¹³⁸ but simply an attempt to make available to the Law School the range of opportunities that a concurrent clinical program offers.

The extent to which a discrete clinical program can contribute to the other teaching in a law school is already demonstrated to a degree at UNSW. The general casework of the Centre gives rise to numerous examples of rules and anomalies in evidence and civil procedure. These files are summarised, relevant documents extracted, the dummy file is the anonymised, and made available to Litigation teachers. Appropriate files are similarly made available as material for Trial Process. The casework throws up matters of policy, sometimes relating to Human Rights; these cases are available for inspection by students in that subject for research purposes.

The cases and experiences at the Centre offer opportunities not only to students of other subjects but also to other teachers.¹³⁹ The Centre's casework is available as empirical research data, and the functioning of the Centre, combined with its access to the legal system and those working in it, together provide a unique research environment which has not yet been exploited.

129 Jeeves & Boon, supra footnote 34

130 Botein M., *Simulation and Roleplaying in Administrative Law* (1973-74) 26 J. Legal Ed. 234

131 *Growing Pains in Law School Tax Clinics: A Report on the Experience at Hofstra, Southern Methodist and Michigan* (1978) 10(8) CLEPR Newsletter @ p.1

132 Dauer E.A., *Expanding Clinical Teaching Methods into the Commercial Law Curriculum* (1973) 25 J. Legal Ed. 76

133 Walker & Goldstein supra footnote 63

134 Oppenheimer D.B., *Boalt Hall's Employment Discrimination Clinic: A Model for Law School/Government Cooperation in Integrating Substance and Practice* (1985) 7 Industrial Rel. L.J. 245

135 Pain N., *Learning By Practice in The United States - Options For Australia: Clinical Education For Law Students* (1990) 7 Environmental and Planning L. J. 106

136 Amsterdam supra footnote 115 @ p. 2

137 Interim Report supra footnote 16

138 see Hardaway, supra footnote 96 @ pp.476-481, recounting the development of an integrated clinical curriculum from a discrete clinical program at the University of Denver; Allison, supra footnote 21, @ p. 276, identifying integration as a principle of clinical teaching; note the UNSW Law School 1980 Curriculum Review supra footnote 6 @ para 45: "an important part of clinical legal education in a law school should be the introduction of clinical material into other courses in the school where appropriate and desired by the relevant teacher."

139 Leleiko, supra footnote 116 @ pp.154 ff.

Students in some subjects have actually had the carriage of files at the Centre, under the joint supervision of the Centre and the teacher of the particular subject. This has occurred in at least three subjects. In Succession, students have taken instructions for wills which a student enrolled in the clinical subject would otherwise do. Students have interviewed the client, drafted the will, and attended to its execution. The students' research and will drafts are matters for assessment by the Succession teacher.

In Immigration Law and Policy, students took initial instructions from clients and prepared a written advice to the Centre on the client's position under current immigration law. If appropriate, the students went further and prepared necessary documentation for an immigration application. The advice and the preparation of the documentation were matters for assessment by the Immigration Law teacher.

In Computers and the Law, a student had access to a file which was already well-documented and which, it was anticipated, would increase dramatically in size. The student wrote a litigation support program which would assist the Centre in the indexing and management of the file and its heavy documentation. This program was assessed by the relevant teacher.

Among other areas of the Centre's practice which could foreseeably be exploited by teachers in the Law School are, in terms of subjects taught, Discrimination, Contracts, Torts, Commercial Law A, Criminal Law, Remedies, Conflict of Laws, Family Law, Law Lawyers and Society, Law and Social Theory,¹⁴⁰ and Research Component.¹⁴¹ Adding more to the list is only matter of teachers inquiring as to the possibility. The first stage may be concurrent enrolment (see 2.1.9) to allow subjects to feed off one another.¹⁴²

(iii) *Staff interaction*

In addition to the casework, the expertise of the lawyers at the Centre is available to the teaching in the Law School, and is used to a limited extent. As practitioners, the clinical teachers are aware of theories and rules that underpin their practice, and as clinical teachers they are interested in teaching these concepts. The clinical teachers have given classes on domestic violence in the Family Law course, on the Bail Act in Criminal Law, and on ethics and professional responsibility in Law Lawyers and Society. Subject to the time constraints implicit in the duties of clinical teaching the clinical teachers at the Centre are as available to the Law School as are the Centre's cases.

(iv) *Staff rotation*

Whether or not the clinical teaching staff are in a position to teach another subject raises practical questions. There is perhaps also a question of principle, related to the discussion concerning academic status at 2.1.7 above.

Less hampered by principle, but still raising questions of practicability, is the possibility of other teachers taking part in the clinical program.¹⁴³ The voluntary rotation of staff into the Centre for a session could be a valuable supplement to the teaching and legal resources at the Centre, as well as providing a special opportunity for teachers to carry out some empirical research, and to explore or refine practice skills.

As the students are told so often during their time at the Centre, it is a relatively safe environment, in which there are sufficient checks to ensure experimentation with responsibility without risk. At the same time, the clinical teachers make it quite clear that they are not experts or even knowledgeable in many matters that

¹⁴⁰ see for example Klare K.E., *The Law School Curriculum in the 1980s: What's Left?* (1982) 32 J. Legal Ed. 336 @ p. 343

¹⁴¹ see the discussion of the Prison Research Council in Silverberg H.M., *Law School Legal Aid Clinics: A Sample Plan; Their Legal Status* (1968-69) 117 U.Pa. L.R. 970

¹⁴² see Weaver supra footnote 46

¹⁴³ see Norwood, supra footnote 42 @ p. 274-5, discussing the in-house clinical course at the University of New Mexico; Feldman supra footnote 44, @ pp. 622-4, discussing integrated curricula, with examples and a critique; Hardaway, supra footnote 96, reviewing the integrated clinical program at the University of Denver @ pp.478-480: the Rotation Plan.

can arise at the Centre: there is often joint discovery of law and procedures.¹⁴⁴ This environment is a good one for teachers, necessarily perhaps with some practice experience, to maintain or explore practice skills while contributing both to the students experience and their own work.

As a practical matter, the teacher rotating into the clinical program may or may not be, by dint of experience, in a position to replace for a session one of the clinical teachers. To be able to do so would be ideal, allowing the clinical teacher to take leave which she or he would otherwise forfeit or take at financial expense to the School and/or at the expense of short-staffing the Centre. If unable to do so, the teacher would nevertheless be able to work with the staff and students, with a view perhaps to relieving a clinical teacher for a week or two sometime late on the session.

It may not be necessary for the teacher to have a current practising certificate, depending on the way in which the teacher's involvement at the Centre was structured.

¹⁴⁴ but see the concern of Condlin that clinical teachers are not themselves amenable to constructive criticism: Condlin *supra* footnote 7 @ pp. 54-55

2.1.9 Place in the Curriculum

There are no necessary prerequisites for the clinical subject. The subject should be undertaken at an earlier stage than in final session of a law degree course, to allow subsequent subjects to be studied in a critical context based on experience.

For many years students have been told that the clinical subject has been available only or firstly to final year law students.¹⁴⁵ Litigation has been a prerequisite for the subject.

Although the practice of the Centre is very much litigation based, students are rarely involved in litigation to an extent that they are assumed to know matters covered in that subject. Questions of evidence and procedure do arise, but only as much as do questions of Family Court jurisdiction, Credit Act remedies, principles of succession, and solicitor/client privilege. Some students have, in the last couple of years, undertaken the clinical subject while concurrently enrolled in Litigation, or before having begun it. Their ability to cope with the subject, to respond to clients' needs, and to address the analytical aspects of the subject has not, in the observation of the staff and the view of those students, been compromised at all.

Anecdotal accounts of students' apparent or stated motives for enrolling in the clinical subject indicate a danger that enrolling in the subject in, say, the last session before graduation, puts undue emphasis on the skills and 'practice preparation' aspects of the subject.

Certainly the survey of students shows that a desire "to develop practical legal skills and experience" has been the principal motivation for students choosing the subject.¹⁴⁶ Nevertheless, the students surveyed did not confuse the role of the subject in this regard with the role played by the College of Law; of those who had done or were doing the College course after the clinical subject, over 94% distinguished the two experiences.¹⁴⁷ The distinction was principally based on the reality/simulation contrast, with reference too to an emphasis in the clinical experience on social and welfare issues in law.¹⁴⁸

Significantly, of those students who had done the clinical subject but were still to undertake the College of Law, nearly half were unsure whether there was any difference between the two courses.¹⁴⁹ In light of the well known non-client basis of the course at the College, this uncertainty is presumably based on something that relates to an apparent similarity in aims, presumably the skills/practice aspect.

The non-skills aims of the clinical subject, those that relate to contextual analysis of law and the legal system, were clearly not seen as a definitive characteristic of the subject for students enrolling in the subject. They were not, however, without relevance to students, over 30% enrolling in the subject either to put their legal studies into context or to experience working in a legal centre¹⁵⁰. At the other end of the clinical experience, after it was over, many students then saw more clearly the impact of the 'other', non-skills aims of the subject: 40% of students saw the clinical experience as having put their other studies in some context, or as having influenced their choice of subjects and legal interests.¹⁵¹

¹⁴⁵ see for example the 1989 UNSW Annual Report @ p.50

¹⁴⁶ Student survey supra footnote 36 @ para 2.5, Table 2.4

¹⁴⁷ Ibid @ para 3.1, Table 3.1

¹⁴⁸ Ibid @ para 3.1, Table 3.2

¹⁴⁹ Ibid @ Table 3.1

¹⁵⁰ Ibid @ Table 2.4

¹⁵¹ Ibid @ para 3.4, Table 3.7

Both to emphasise the non-skills aims of the clinical subject, and to increase the opportunity for students to have a framework or perspective for their legal studies,¹⁵² the subject could be offered at an earlier stage of the degree than the final year. It may well be available concurrently with some of the subjects noted in 2.1.8 above. Certainly it could be seen as a subject which is both a vehicle and an impetus for focussed and informed study in later subjects.¹⁵³

For the ordinary five year undergraduate combined degree, third year is too early a stage at which to expect students, with only a limited amount of legal study and life experience, to undertake the clinical program. A clinical program at that stage would not be inappropriate, but it would need to be one that is properly structured to take account of the likely degree of inexperience. The existing clinical program could be undertaken in the summer preceding fourth year, or during fourth year, and the following account proceeds on that basis.

B Juris LLB students would therefore be in the clinical program after completion of all compulsory subjects.

Students who combine an LLB with either a BA, B Com, B Ec or B Sc degree would be in the clinical program immediately before or concurrently with enrolment in relevant compulsory subjects such as Litigation, Law and Social Theory, Legal Theory, and Legal Research and Writing 2, and shortly after having studied Law, Lawyers and Society. BSocSc LLB students would be similarly placed. This seems quite an appropriate coincidence of subjects, allowing the clinical program to provide a relevant context for much of a student's study.

BE LLB students only have the opportunity to take elective subjects in their final year, although to do so would result in concurrent enrolment in the subjects mentioned above as well as Law, Lawyers and Society. For BSW LLB students, Clinical Legal Experience is compulsory. The intended coincidence of the clinical legal placement and the final social work placement is problematic, but is being discussed in anticipation of the first such student reaching this point in her studies in 1992.

The straight LLB course, generally available only to students who have completed another degree, allows enrolment in electives in the second of a three year degree. This does not seem an inappropriately early time at which to be in the clinical program: with a first degree and some life experience behind them, graduate students would be enrolled in the clinical program concurrently with the subjects noted above for BE LLB students.

Part-time students enrolled in the LLB degree course will be disadvantaged, if not excluded, by the proposal to increase hours of attendance at the Centre outlined below at 2.2.12. In the fourth year of their degree they would be in a similar position to most of the combined students, but would have already completed Litigation.

Students could, of course, enrol in the subject in the final year of their degree, although the Law School's preference should be for students to do so at the earliest possible opportunity: summer or first session. See the discussion at 2.1.3 above concerning final year students choosing to enrol in the clinical subject in the final session of their degree.

¹⁵² even in an article which expressed real reservations about clinical education as a then-new form of legal education, this idea of context and motivation for later studies after a clinical experience was seen as a principal asset of the clinical method: Packer H.L. Erlich T. & Pepper S., *New Directions in Legal Education* Carnegie Foundation for the Advancement of Teaching/McGraw-Hill 1972 @ p. 41

¹⁵³ Ibid, and see CLEPR *Clinical Education: The Student Perspective* (1974) 7(1) CLEPR Newsletter @ pp.5-6

Any formal limit, or even expression of School preference, relating to the time at which a student enrolls would not, in fairness to the planning of students, be able to be implemented until pre-enrolment November 1992 for 1993, with notice to students at pre-enrolment November 1991.

2.2 Clinical Legal Experience: Considerations for Kingsford Legal Centre

At the beginning of each academic year, a Statement of Objectives for the subject is distributed to the students. It tells students that the subject will give them "the opportunity to teach themselves through their experience:

- (a) an understanding of the application in practice of procedural and substantial rules of law
- (b) the complexity and interaction of various areas of law
- (c) the origins of appellate law in facts, evidence and people's difficulties
- (d) the details of the lawyer/client relationship
- (e) interviewing, negotiation and drafting skills
- (f) questions concerning the role and adequacy of law as an instrument of social change and control
- (g) the pressures and responsibilities of legal practice
- (h) evaluation of one's own activities, and the skill of self-teaching

This is an ambitious statement, especially as it represents only one of the two purposes of the Centre, the other being the operation of a legal centre. This 'twin-purpose' identity is the first point to consider when looking at the extent to which the aims of the subject are attainable.

The following account gives a picture of the tensions that exist for the teacher/solicitors in the process of running the subject along its present lines. Changes are suggested only to improve the subject - it does not need rescuing. Some of the following observations on these matters are drawn from a paper prepared for the Law Foundation's Legal Education Colloquium, June 1990.¹⁵⁴

2.2.1 The community legal centre model as an enhancement of clinical teaching

Community legal centres are, by extreme example, the ideal source for students of a clinical experience

The nature of legal centre casework is, to a sufficient extent, straightforward enough to be manageable by students under supervision. At the same time, because of its origin, such casework gives an immediate reflection of the social genesis of legal needs and the social context in which law operates. It is in the nature of legal centres that they will attract a number of clients who are, to different degrees, ignorant of the legal system and of social support systems, who have difficulty formulating or conveying their instructions, and who have difficulty comprehending the details or the implications of legal advice.

This makes legal centres, by extreme example, the ideal source for students of opportunities to learn for themselves the relevant substantive law, to analyse the complexity of identifying and applying the appropriate legal rules and to consider structural and practical aspects of justice and social equity. Invariably, issues such as the client's retainer, acting on instructions, and ethical questions are raised for discussion. At the same time, this necessarily involves the acquisition, to a degree, of legal practice skills such as fact gathering, interviewing, and drafting.

In a market which shows an increasing number of lawyers in the commercial part of legal practice, it is no bad thing to expose students to a range of legal consumers they may not deal with once they are in practice. For those students in the clinical subject who do go on to practice, the insights and understanding of the legal process, as well as the practice skills, that a student will develop in a legal centre environment are as applicable in any other legal practice environment. An argument that "legal aid work" is not a substitute

¹⁵⁴ North & Purcell supra footnote 23 @ p.64

for "actual practice"¹⁵⁵ is dated, and is no longer a basis for saying¹⁵⁶ that clinical legal education is a failure.

More than simply broadening the legal and world-view of students, a legal centre will introduce to students, not for the first time in their studies but in the most intense fashion, the need to learn law critically, to see a lawyer's role in an inherently conservative system and to analyse it.¹⁵⁷ Recognition that there are values inherent in the legal system, and that the players in that system must adopt roles which, to a greater or lesser extent, attempt to belie those values, is fundamental to the purposes of clinical education. A questioning of the neutral 'compartmentalizing' of legal issues, processes and remedies¹⁵⁸ is reflected in the stated objectives of the clinical subject at the Centre: see *appendix 17*.

Additional, incidental, advantages of the legal centre model are that it is likely to avoid conflict with the business interests of the private profession, and it assists the University to contribute to its local community.¹⁵⁹

2.2.2 The community legal centre identity as an obstacle to attaining the clinical teaching goals

Characteristic aspects of community legal centres, particularly the diversity and amount and the obligations of casework, compromise the extent to which time can be committed to the education of students at the centre.

Although a legal centre is a rich source of relevant casework, both the self-promoted identity and the public perception of a clinical program as a legal centre rather than as a law clinic compromise the extent to which the Centre can focus on the educational needs and expectations of the students.

Considerable time and effort is spent by staff promoting and maintaining the practice as a legal centre, at the expense of time spent on the clinical perspective. This is done for numerous reasons: the Centre is a part of a community referral network, the Centre has held itself out to the community and the students for ten years as a community legal centre, the Centre receives funding as a community legal centre.

(i) Interagency relations

While referral of matters from other agencies is desirable in any event, it is recommended in this report that such referrals should be developed to ensure an appropriate clinical caseload. It is not possible, however, for a community legal centre to be a successful part of a referral network without participating in the activities of that network. In an under-resourced community sector, there is considerable interdependence among local agencies: cross-membership of management committees, reliance on staff availability for advice and consultation, co-operation in community activities such as fund-raising, lobbying and surveys. A community legal centre needs to be a part of a referral network if it is to serve its community adequately.

¹⁵⁵ McGechan R., *A New Zealander's Comments on American Legal Education* (1953) 5 J.Legal Ed. 286 @ p. 299; Packer et al supra footnote 152 @ p.45; Haskell P.G., *Legal Education Can Be Cheaper, Quicker and Better* (1971) 22 Case Western L. R. 515 @ pp.516-7

¹⁵⁶ Stolz supra footnote 51 @ p. 55; compare fn 60 of this report and the associated text.

¹⁵⁷ see the discussion of critical teaching by Muir I., *Clinical Training for Law Students* [1977] N.Z.L.J. 425 @ p.426, quoting at fn.(g) Grbich Y., *Law Teaching as a Submissive Activity*, unpublished paper, and in Thomson supra footnote 37 @ fn. 37 quoting Grbich Y., *The Systematic Re-structuring of Law Schools*, unpublished paper 1974

¹⁵⁸ see Barnhizer (1979) supra footnote 55 @ pp. 108-109

¹⁵⁹ in its only reference to clinical education, the AULSA report noted the Monash clinical program as an example of a law school's contribution to the community: supra footnote 70 @ p.29

Reciprocal obligations in a referral network may not arise when the legal service is explicitly a clinical program only. When other agencies are keeping a clinic supplied with cases¹⁶⁰ rather than referring clients to a community legal centre, it may be possible for the clinic to take without giving. That is not possible when operating as a part of the local community service network. A 'one-way' referral system would, however, deprive students of the opportunity to learn of and interact with other disciplines.

The Centre is seen by other community legal centres as a community legal centre, if for no other reason than it joins with them in the competition for available funding. The association is obviously deeper: the Centre clearly conforms to a standard legal centre model in NSW, involving students in the legal service, running a roster of volunteer lawyers, attracting and acting on the same range of casework, working within the legal centre funding guide-lines.

The interdependence that exists to a degree among local agencies of different character is considerably stronger among community legal centres. As a part of their charter, legal centres pursue, individually and together, issues of law reform and legal education. Each month, the Combined Community Legal Centres meeting co-ordinates such activities, co-opting legal centre representatives onto policy and special purpose committees. These committees range in function from preparing submissions for relevant inquiries to organising conferences and seminars.

Participation by staff of the Centre in the policy and education aspect of the legal centre identity is expected and necessary, but again is an encroachment on the time available for focus on clinical activity.

(ii) *Volunteers*

The Centre conforms to a Legal Aid Commission funding guideline, and has followed the approach of other legal centres, in establishing and relying on a roster of lawyers who volunteer their services to provide free advice to the community. This may itself be necessary, in the absence of sufficient staff, to generate the required amount of client contact and casework for a viable clinical program: it cannot be said that but for the funding requirement there would be no use of volunteer lawyers. However the way in which they are used conforms to the usual legal centre model, rather than to any particular clinical purpose.

Lawyers who volunteer their services to give free legal advice to the community are not necessarily volunteering to give teach students, especially not along the lines of a finely tuned clinical approach. Their presence will not necessarily, therefore, contribute to the clinical aims, other than perhaps by example.

(iii) *Funding*

The clinic, as a legal centre, carries with it particular and restrictive funding obligations.

The Centre receives approximately one third of its professional salary commitment and almost a quarter of its non-salary budget from the Legal Aid Commission on the basis that it operates as a community legal centre. This is a crucial aspect of its financial viability.¹⁶¹

Legal centre funding is, in simple form, received from State and Federal allocations and administered by the relevant state Legal Aid Commission. The Commonwealth funding eligibility criteria states that "the primary purpose of a centre should be the provision of legal care services (eg. advice, referral, duty lawyer, casework and test cases)". Further, "centres undertaking a high volume of casework will normally be funded at a higher level than centres undertaking lower cost legal services."

The funding criteria mean that to attract funding the clinic must remain modelled very closely along legal centre lines, providing as much of a casework service to the community as any other legal centre would. Time which another legal centre spends on activities, viewed by the funders as secondary, such as law reform and community legal education, would be spent by the clinic on clinical teaching.

¹⁶⁰ see, for example, clinics at University of British Columbia, University of California (LA), University of Maryland, described in the Interim Report *supra* footnote 16

¹⁶¹ see discussion at 2.1.6.

The Law School could reasonably expect the commitment of the Centre to purely legal centre casework obligations to be in proportion to the level of funding for that purpose. If cases were apples, this would be easy. Casework, however, is not readily quantifiable and divisible, and for as long as it is generated by a legal centre identity, factors other than funding will work against allocating time to clients according to funding sources.

(iv) *Amount of casework*

The cases generated by the people who attend the Centre during the advice sessions form the core of the clinical subject.

To provide the service a community legal centre normally would, the Centre is under pressure from the community, the Legal Aid Commission, and its own history of service provision, to maintain between 250 and 300 files at any one time. The cases come from the practice of the Centre as a community legal centre, from the community that attends the advice sessions seeking assistance. When the Centre applies the usual legal centre exclusionary guidelines - geography, means, eligibility for legal aid, appropriateness of self-help, and availability of other assistance - there remains a large number of matters to be dealt with, such is the nature of legal centre practice.

Previously, these files have been allocated to students under the supervision of the solicitors. Each solicitor would supervise up to a hundred files, and each student would be allocated up to 12 files.

In such a system, students attend the Centre one day a week to work on their files. Many of the files are litigation files, and require the solicitors' time in court. It does not need a detailed analysis of available time and resources for the effects of this workload to be apparent: solicitors are limited in the time they can spend on considered discussion with the students, and students are limited in the time they can spend on considered involvement in any of their files.

The fact that cases come to the Centre in numbers that exceed an ideal or even a manageable number for clinical education is not to discount the value of students learning by proximity to the legal activity. Students working as clerks, as pupils to 'masters', will experience legal practice and will develop an understanding of legal processes. This learning by osmosis is, however, unpredictable and uneven; it results in a disparity of students' experiences, and fails to ensure that the experiences, diverse as they are, are reflected on and analysed. Most importantly, having students contribute to such a substantial workload in so short a time precludes them from taking real responsibility for their conduct; the experience is interesting but not necessarily important to them, and the opportunity for students to learn that they must learn by their experience and their errors is lost.

In simple terms, students could have fewer files. There would then be greater scope for the students to do more of the work on the files, and to maintain a greater degree of control over them. Related questions of responsibility and supervision are discussed below at 2.2.5 and 2.2.6. respectively

Reducing numbers of files does not necessarily mean reducing the level of legal service provision to the community. Numbers can be maintained at advice sessions, ensuring that the same level of initial legal assistance is available. It is only the level of *continuing* legal assistance to the community will be reduced. The criteria for this case selection is discussed below.

(v) *Type of casework*

The nature of the clinical experience that students get is determined in large part by the type of matters they work on. Even in the most rigidly controlled environment, a simulated one to take an extreme, the experience of the students will vary; experience, and learning by experience, is in essence a subjective matter. This consideration bears most directly on the question of assessment, discussed below at 2.2.11. Suggestions relating to 'appropriate' clinical casework will always be subject to the predisposition or ability of a student to exploit the educational possibilities, no matter what other efforts are made to provide the best material.

As is noted above, the cases the students use as their clinical material are generated by the Centre as a community legal centre. Many matters offer the opportunity, on a slow day, to exploit the full learning potential of a client's case in the clinical situation. There could be, say, analysis of tactical, ethical, personal and social considerations of the client's instructions, detailed consideration of the legal issues generated by those instructions and of the appropriate and available legal remedies, deconstruction of a magistrate's reasons for sentencing or ruling on liability, and reflection on the preparation and presentation that would or would not have been possible to achieve a different result; perhaps then a social cost/benefit analysis could be made of both the actual and the desired result for the client with reference to the extent to which this does and ought accord with professional expectations. This could be rounded off with a brief look at the financial and career realities of thinking about such things when time costing the client.

A legal centre's practice, however, often attracts matters which call for a crisis response. This necessarily reduces a student to being a hanger-on and helper as the solicitor attends to the client's urgent needs. At the end of the day, the student is invariably impressed by the efficiency/idiocy of the legal system, curious about the causes and mechanics of the solution, and not much wiser.

The problem is not just one of urgency. After application of the exclusionary guidelines noted above, a wide variety of matters forms the basis of the casework for the students: note the list of cases by matter-types at *appendix 10*. A student can have only a single file, but it needs to be the right type of file: complicated enough to challenge and maintain interest, but within the students' conceptual ability. Legal centre case work has the potential to exceed the capability of a student, requiring the intervention rather than the guiding hand of a solicitor, or it can be repetitive and without sufficient challenge or content. A case could take two or three years (up to nine different student intakes) to resolve, or it could all be over in a day with a phone call.

A wide range of types of matters makes equitable distribution of workload administratively difficult. It also impedes attempts to ensure that all students have a range of experiences, and that those experiences are good material for clinical education.

2.2.3 Reduction and selection of casework

Despite the continuing obligations that the Centre owes to its community, the type of casework can be restricted for educational purposes.

The problems of trying to use casework from a general legal centre practice as a basis for a clinical experience was anticipated to an extent in the initial proposal for the clinical subject: "in order to be an effective teaching operation, the clinic must selectively retain clients".¹⁶² The problem of case selection has also been a phenomenon in the United States experience.¹⁶³

Selectivity of casework has been adopted by a number of North American clinics.¹⁶⁴ The extent to which a clinic operating as a community legal centre can be selective in its casework is, however, problematic. Despite an apparent awareness of the problem at the outset, the Centre's selectivity of casework has not been ruthless, and has certainly not been dictated by an adherence to clinical teaching criteria.

Funding considerations make it difficult to pick and choose casework to suit the purposes of a clinical program. Maintaining a high volume of casework, for purposes only of having a profile for funding, compromises the selection and tailoring of casework appropriate for clinical study.

¹⁶² 1981 proposal, supra footnote 3

¹⁶³ Barnhizer (1979) supra footnote 55 @ p.100

¹⁶⁴ see the Interim Report supra footnote 16 @ Parts 3.B1, B2

If, for educational reasons, the clinic chose to act in only a certain range of types of casework, it must at the same time acknowledge the generation, over ten years, of the community's legitimate expectations of the service available from the Centre. Numerous types of casework are important to the community but may be rejected by the Centre as inappropriate to clinical needs at the time. Recent experience at the Centre has shown that it is hard to justify to clients the apparent inconsistencies which arise in taking on only those cases that will best suit a clinical program.

Selection of casework to suit clinical needs is further complicated by an important Legal Aid Commission guide-line, itself compounded by a general policy expectation of the Law Society.

It is a condition of Legal Aid Commission funding that community legal centres "do not duplicate the legal services provided by the Commission or other organisations." Put simply, if a person qualifies for legal aid, a legal centre ought not act. Many cases which would be appropriate for clinical use should, on this basis, be referred; a number of such cases are in fact kept.

While the Legal Aid Commission has not taken the point, the Law Society certainly has. Providing for nothing a service for which a private solicitor would be paid, even if by legal aid, is considered beyond the bounds of legal centre practice. This is a notable limit on the range of cases available to the clinical program.

Within these limitations, selectivity would be on a number of criteria. Cases would be taken on when the Centre needed more work, a particular case would be taken on if the Centre needed that particular type of case. The Centre's determination of these matters would be based on an assessment by the Centre of the need for a student to take on more work, to take on a different type of legal matter, or to be exposed to a particular type of experience, such as legal analysis, advocacy, identifying issues from client's instructions, working with a social worker, or coping with procedural rules.

Selection of cases would, ideally, result in a file load for each of twenty five students attending one day a week, of two or three matters for each student.¹⁶⁵ The process would help to ensure that the supervising solicitors maintain a sufficient level of expertise in the relevant law, and a working knowledge of all active files in the office. At the same time, care would have to be taken to ensure that the work remained professionally challenging and sufficiently diverse for the solicitors, even though the clinical teaching would be a substantial focus of their time at the Centre.

In the second half of 1990, because there were no students at the Centre,¹⁶⁶ the staff tried to limit the number of new matters taken on. These efforts, never formally implemented as a policy at the Centre and not strictly monitored, appear to have been largely unsuccessful. Statistics for the period show as many files being opened in that period as in previous years.¹⁶⁷

Since the formulation by the staff of draft recommendations as a part of this review, an attempt has been made to introduce selectivity in taking on new clients.¹⁶⁸ Statistics for files opened in the 6 month period that this approach has been adopted show some success in keeping numbers down. They also show that certain types of matters are no longer being taken on by the Centre as they are not considered useful and can be dealt with elsewhere.

As the beginning of an attempt to address the degree of responsibility that students could take, fewer files were allocated to students in 1991. There was, however, an existing caseload which, if allocated to

¹⁶⁵ for discussion of the appropriateness of a similar caseload, see Aiken J.H. Koplw D.A. Lerman L.G. Ogilvy J.P. & Schrag P.G., *The Learning Contract in Legal Education* (1985) 44 Maryland L.R. 1047 @ p. 1054

¹⁶⁶ see 1.5.4 above

¹⁶⁷ see funding submission to the Legal Aid Commission at appendix 5

¹⁶⁸ see Interim Report supra footnote 16 @ Part 4

students, would have maintained the inappropriately large number of files for each student. The Centre has allocated to the students an ideal workload of 3 or 4 files each, drawn from the body of current casework; the remainder of the current files are unallocated and are being managed to their conclusion by the solicitors themselves. It is hoped that this approach, combined with a reduced client-intake, will gradually reduce the total number of files.

The extent to which this has already resulted in increased and improved time for supervision, and the adoption by the students of a greater degree of responsibility, is discussed at 2.2.6.

2.2.4 Alternative sources of casework

A diversity of referral sources for cases will provide opportunities for numerous aspects of clinical legal education.

Many clients arrive at the Centre's advice sessions after having been referred to the Centre by another agency. Some clients are referred directly to a solicitor at the Centre, bypassing the advice session but still subject to 'screening' before any commitment is given to take the matter on.

Most commonly, those agencies are other legal services such as the Legal Aid Commission, the Local Court chamber magistrate, a court registry or government agency, the Law Society, or another legal centre. Other sources of referrals are community health centres, neighbourhood centres, hospitals and refuges. Clearly it would not be difficult to establish an arrangement with any one of these agencies, subject to reservations on the part of the Centre as to the amount of work that could be taken on from time to time.

The opportunity, from the Centre's point of view, is to obtain casework that provides an appropriate teaching vehicle for students. Most of the casework available from such sources is going to be work that, in the context of providing legal services to all those in need, ought to be done. The casework will inevitably have that imperative attached to it, making selection difficult, but also making students' exposure to it important. Beyond this consideration, casework will be chosen to offer different opportunities, opportunities for advocacy, interdisciplinary work, research and reform, alternative dispute resolution, ethical consideration, systemic analysis, and practice skills.

Appropriate sources for such work, by referral on a regular basis, are¹⁶⁹:

- *the Welfare Rights Centre and the Social Security Appeals Tribunal,
- *the Anti-Discrimination Board and the Human Rights and Equal Opportunities Commission,
- *the Immigration Advice and Rights Service and the Refugee Advice and Casework Service,
- *the Public Interest Advocacy Centre,
- *the Tenants' Union and the Residential Tenancies Tribunal,
- *the Consumer Claims Tribunal,
- *the Waverley Local Court chamber magistrate and
- *the Bondi Junction office of the Legal Aid Commission

2.2.5 Casework management: students' responsibility

¹⁶⁹ discussions or arrangements have already commenced with a number of these agencies

Clinical Legal Experience is essentially student-centred learning, using a high degree of student responsibility in a supervised environment as a device to motivate students.

The principal solicitors of the Centre's practice are the solicitors on the record in any legal proceedings in which the Centre is instructed to conduct. All solicitors are covered by a professional indemnity insurance policy. Final responsibility for the conduct of the cases rests with the solicitors.

For the sake of the students and their clinical experience, the question to be addressed concerns the extent to which the responsibility for the day to day conduct of files can be delegated to the students. The need to consider the degree of student responsibility for a file is implicit in the adoption of a clinical program.¹⁷⁰ Students are not given responsibility for clients' files just for the sake of developing a student's maturity.¹⁷¹

In the usual practice at the Centre, clients are seen first by a student, and are invariably contacted by the student when the student is at the Centre working on files. Clients come to understand that the terms on which the Centre operates involves the students in the cases, although there is no formal introduction to the client of the special way in which the Centre operates.

There are rarely problems with clients dealing with the students.¹⁷² The focus of the clients is, however, on the solicitor: the solicitor is in the office every day, the solicitor signs the letters, the solicitor stays when students come and go. It is difficult to deflect the client's approaches to the student, especially if, say, the client calls on a Tuesday and the relevant student attends only on Mondays. This lack of continuity is addressed further in 2.2.12.

When assisting solicitors on a number of files, a student will, in the available time, research points of law, draft necessary letters for checking by the solicitor, contact other parties, obtain further instructions from the client, and discuss matters with the supervising solicitor. In this scheme of operation, the solicitor will take responsibility for initiative on the file, and for directing the students' activities. The extent to which these activities are done with full preparation and understanding, and to which responsibility of their completion is with the student or the solicitor are functions of time and caseload. It is understandable that a student will not take responsibility for the drafting of a brief, or for exploring fully the client's legal and social needs, if the student is trying to do the same on a number of other matters and all in the next two weeks. The question of taking responsibility barely arises when students are given up to a dozen files to take care of on the one day a week they attend the Centre: there is little that the students can do other than what they are asked or told on their day. The files are maintained in the meantime by the supervising solicitor.

If the students are to do more than learn by osmosis, and are to learn from their own experiences as much or more than from those of the people around them, then the existing balances in the Centre need a bit of rearrangement. More time and fewer files would mean greater depth. All three participants in the educational process, clinical teachers, students and clients, must be encouraged to look to the students as the people responsible for the legal practice.¹⁷³

The adoption by a student of a considerable degree of responsibility for the conduct of a file is an educational device, intended to intensify the learning, to introduce personal consequences, rewards and sanctions for legal analysis and learning. It is, in essence, student-centred learning, requiring analysis and reflection by the student, rather than the student's response to what might be termed the teacher's

¹⁷⁰ Aiken et al supra footnote 165 @ p. 1053

¹⁷¹ This is the way 'responsibility' is characterised by Condlin in his rejection of it as a legitimate goal of clinical teaching: Condlin supra footnote 7 @ pp.75-76

¹⁷² see the Interim Report supra footnote 16 @ Part 3.B5

¹⁷³ Ibid @ Part 3.B6

autocracy.¹⁷⁴ The responsibility for the client's interests is both an incentive to learn and a medium for learning.¹⁷⁵ "The theory of clinical education assumes that students will have primary client and case responsibility as the method of instruction."¹⁷⁶ Nevertheless, to the extent that the clinical experience is a means of conveying a sense of professional responsibility - ethical duties, personal morality, and the reconciliation of personal and structural notions of justice - student responsibility for the carriage of a client's matter can be an end in itself.¹⁷⁷

A student's responsibility for a client's file is at the same time a student's responsibility for learning. The awareness that learning can be, and outside a class room must be, derived from self analysis of experience, is an important aspect of clinical teaching. Responsibility for a client's file is only discharged by the student if the student takes responsibility for learning the relevant law, for understanding it, interpreting it, criticising and justifying it, and finally for applying it or choosing not to rely on it.

No matter how much or how little responsibility passes to students, the clinical teachers will remain acutely conscious of their professional and legal responsibilities to the clients and to society for the operation of an efficient and capable legal practice. This need not be compromised by having the practice conducted, under supervision, by students. If analogies to practice must be made, students with considerable responsibility under supervision are in a very similar position to that of solicitors in their first year of practice, and to that of para-legals and clerks who so commonly conduct legal practices under little more than nominal supervision. The students in a clinical program have the advantage of an environment committed to supervision, without the encroachment of business concerns such as time/cost efficiency. In fact students have access to, and time for, carefully researched and well rehearsed legal work, whether in the post-interview analysis of a client's legal position, the preparation of legal advice, or the presentation of legal argument.

The survey of students, commissioned as a part of the review, does not show strong student support for this shift in emphasis: while 38% agreed with the proposition that students "should have much greater responsibility for the files they deal with", 58.3% disagreed.¹⁷⁸ It is possible that the 3.7% who 'couldn't say' were unable to do so because they had in mind variables such as 'if there were less files to cope with', or 'if there was more time to do it'. It is not surprising that students, who recall having been allocated a dozen files to deal with on their one day a week attendance, were not enthusiastic about a suggestion that they take more responsibility. To increase that obligation without an adjustment to the operation of the Centre would be unworkable.

The same student survey, at Table 3.15, does show support for the students working in groups, although Tables B7, B8 and B9 show there is least enthusiasm among the youngest students. Taking group responsibility for files, even in pairs, addresses a number of aspects of the clinical experience, and is a common device in clinical programs elsewhere. Students are encouraged to work co-operatively, to share knowledge and information - the process counters tendencies to competitive conduct of clients' files. At the same time, group work relieves supervisors of constantly addressing repetitive questions on procedure and practice: see 2.2.6. For as long as the subject, and therefore the students' commitment to clients, is less than full-time, group work helps to bridge the gap between individual student attendances, and to maintain some continuity on the files without excessive recourse to the solicitors.

¹⁷⁴ see Beck A., *Legal Education and Reflection* (1985) 19 Law Teach 192 esp @ p.198

¹⁷⁵ see student comments from empirical research in Macfarlane, *supra* footnote 22 @ p.71

¹⁷⁶ Tyler *supra* footnote 98 @ p. 613 fn. 18

¹⁷⁷ Barnhizer (1979) *supra* footnote 55 @ pp.74-75

¹⁷⁸ Student survey *supra* footnote 36 @ par 3.5 and Table 3.15

Tentative steps towards the devolution of responsibility began at the Centre towards the end of 1990, and are noted in the Interim Report.¹⁷⁹ The process, if it is to continue, will be a gradual one, and imperfections will be apparent at each stage.

In the summer 1990-91 session it was clear that a reduction in the number of files allocated to students did not of itself result in students taking on a greater role in the management of the cases. Despite the increased time available to students to think critically about the legal processes they were involved in, and to consider the appropriateness, by a number of criteria, of their conduct, few took the opportunity. It seems a horse doesn't walk to water, you have to lead it there. This is not surprising, in hindsight, and has helped focus the clinical teachers on the need for them to initiate and engender the critical discussion.

Nor did the students respond as spontaneously as was hoped to the opportunity, offered by a lighter caseload, to show initiative in their analysis of legal strategies and remedies. It became clear that students were getting mixed messages from the clinical teachers, who were themselves still coming to terms with a new approach.

There is a backdrop to the difficulties of the transition: the existing casework that has not been allocated to students but which must be managed to its conclusion by the clinical teachers: see 2.2 3 above. This casework will be a continuing legacy of the high volume of previous years. It will always be present to the extent that the student capacity, as defined by educational needs, is unable to meet the community demand.

2.2.6 Casework management: student supervision

Supervision, essential to the operation of a clinical program, occurs at different times in the students' day, and raises for the supervisor the question of reconciling student responsibility with professional pressures and obligations.

Fundamental to the distinctive nature of clinical teaching is supervision. This is accepted not only in the relatively undeveloped field of clinical legal education,¹⁸⁰ but in the better established areas of clinical teaching in social work, medicine and the health sciences. The practice of student supervision is, despite the separate headings in this report, inextricably tied in with the issue of student responsibility for learning.¹⁸¹

There is at the Centre a student/supervisor ratio of 8:1, necessary for an effective clinical teaching environment.¹⁸²

¹⁷⁹ Interim Report supra footnote 16 @ Part 4 (ii)

¹⁸⁰ Hoffman P. T., *The Stages of the Clinical Supervisory Relationship* (1986) 4 Antioch L.J. 301 @ p.301 and fn. 4; Hoffman P. T., *Clinical Course Design and the Supervisory Process* (1982) Arizona St.L. J. 277 @ p.279; Cooke B. F. H. and Taylor J. P., *Developing Personal Awareness and Examining Values: Interconnected Dimensions of Supervision in Clinical Legal Education* (1978) 12 UBC Law Review 276 @ p.276; Amsterdam A., *Keynote Speech Clinical Teachers' Conference, Boulder Colorado, 17 May 1986*, unpublished

¹⁸¹ see the endorsement of students surveyed: CLEPR supra footnote 153 @ pp. 8-10: supervision is the *sine qua non* of clinical teaching; Student survey supra footnote 36 @ para 3.2, Table 3.3: 89.3 % say that supervision is very important, 10.1% say important. Would the 0.6 % (1 person) who disagrees please come forward.

¹⁸² cf. NYU 1971 Curriculum Report, supra footnote 95 @ p.2: "The Committee estimated (in 1969) that effective supervision in most clinical programs would require a student-faculty ratio not greater than 10 to 1 and, in certain intensive programs, 5 to 1. Such supervision was essential, the Committee reasoned, to relate clinical experience to educational program (sic), to assure that students would not become trapped in routine work, and to evaluate performance." See also the

The time taken to establish and maintain the supervisory teaching relationship, and the possibility, if not the fact, that the legal matter may slip beyond the student's ability, are issues which a solicitor would have great difficulties coming to terms with. The simple conflict is one between experiential learning (teacher mode), and directive supervision (solicitor mode).¹⁸³

The issue of supervision is a clear demonstration of the collision in the clinic between legal and academic practice. Conceptually and practically, there is no doubt that it is difficult to reconcile being both a practising lawyer and an academic teacher.¹⁸⁴ A suggestion to the contrary arises in the context of finding ways to fund a clinic - "practicing professors would have dual responsibility: to serve the clients and train the students" - and clearly does not examine the implications of such an arrangement.¹⁸⁵

A clinical teacher must address and attempt to resolve this conflict. The fact that the conflict exists is what often defines any discussion concerning the status of a clinical teacher: see 2.1.7. The real point is that, however the tension is resolved, the clinical teacher is a teacher, with responsibility for the education and assessment of students undertaking a law degree course.

Sensible, sensitive supervision, which carefully adjusts to ensure that students carry sufficient responsibility for the analysis and solution of a legal problem without exceeding the student's capacity or transgressing the student's style of learning, is important in a clinical program. There are detailed considerations relating to the timing, type and degree of that supervision.¹⁸⁶ All those considerations are important, and they are matters for the clinical teachers to learn, understand and practice.¹⁸⁷ Condlin says that it is institutionally impossible to subject a clinic supervisor's supervision to constructive criticism;¹⁸⁸ others disagree.¹⁸⁹ This is only part of the larger question of the extent to which tertiary teaching is subject to criticism, or even review. Clinical teachers will be attuned to educational method and will therefore demand of themselves some review of their method; the same questions could be said of any teacher of law. The problematic synthesis of legal practice and law teaching has resulted in a degree of discussion about the training of clinical teachers.¹⁹⁰

maximum 10:1 position at the longstanding compulsory clinical subject at New Mexico School of Law: Norwood, supra footnote 42 @ p. 273, and the 10-15:1 maximum when the supervision carries no casework: Pye A.K., *Clinical Education in the Law Schools* (1970) Bar Examiner 9 @ p.14

183 note the supervising lawyers' "profound aversion to telling interns what to do on their cases" at an American clinic, and the lawyers' need to be convinced by interns "that the decisionmaking required by a case was beyond their knowledge" before there could be any direction given: Aiken et al supra footnote 165 @ pp.1059-60

184 see the discussion at 2.2.2, and Hoffman P.T., & Sullivan K.A., *Conflict for the Clinical Teacher: Teacher or Lawyer?* paper to the AALS Conference on Clinical Legal Education, Ann Arbor, supra footnote 14, @ p.33; Condlin supra footnote 7 @ pp.53-59; Barnhizer (1979) supra footnote 55 at pp.135-136.

185 Hardaway R.M., *Legal and Medical Education Compared: is it time for a Flexner Report on Legal Education?* (1981) 59 Washington University Law Quarterly 687 @ pp.715-6.

186 Shallek A., *One Theory of Clinical Supervision: Drama and Commentary* Paper to the UCLA/Warwick Conference 1989, unpublished, passim

187 see the Interim Report supra footnote 16 @ Part 4 (i)

188 Condlin, supra footnote 7 @ pp.53-9; note Amsterdam's apparent endorsement of this: Amsterdam, supra footnote 180

189 Hegland H., *Condlin's Critique of Conventional Clinics: the Case of the Missing Case* (1986) 36 J. Legal Ed. 45

190 see *Training of Clinical Professors* (1972) 5(3) CLEPR Newsletter @ p.14

In explaining the operation of the clinical program, it is true that supervision is "the most invisible of the activities."¹⁹¹ Although there may be defined times for supervisor-student contact, supervision occurs spontaneously throughout the day, and has the potential to occur at any time that the student chooses. Such exchanges invariably occur just when the student is eager to learn or to analyse, and are important opportunities in the student's legal education.¹⁹²

Whether the student catches the supervisor at just the time when the supervisor is best able to teach or join in the analysis is always uncertain, but the obligation on the supervisor to respond is a part of the considerable demand of clinical teaching.¹⁹³ Even when the supervision is anticipated, the supervisor is in a demanding situation. As was described above at 2.2.5, there are fine lines to draw between guidance and direction, between intervention and intrusion. The supervisor must be aware of her or his own approach to teaching, and must be aware of the type of the supervision perhaps even as it is happening.

Supervision is principally by way of one-to-one consultation at the initiative of either the student or the supervising solicitor. When this contact takes place will depend on the extent to which the student is aware of the need to consult over a matter and is conscious of the wisdom of consulting from time to time in any event. A clinical teacher will keep such considerations in mind and will take the initiative if necessary.

When there is contact between the student and clinical teacher, the nature of the supervision may often be directive, giving the student instructions on the next necessary step to take. This approach is a legacy of the need to manage a substantial file load in a short space of time, and should be less apparent as the file load decreases and responsibility shifts to students. It is probably the aspect of supervision that most nearly equates with an articulated clerkship and is appropriate, if ever, only in either the early and bewildered stage of a student's time at the Centre,¹⁹⁴ or when substantial or procedural knowledge is needed¹⁹⁵ and there is little to be gained by putting the student through the process of discovery.

An important part of the students' clinical experience is interviewing. Quite apart from developing the necessary skills, students have the opportunity to assess the solicitor/client relationship, to consider the nature of a retainer and the point at which it is established, and to understand the cultural, social, economic and personal factors that affect the way that lawyers and non-lawyers interact.

There is no direct supervision of interviewing at the Centre. Students have sole responsibility for the initial contact with a client, for establishing on behalf of the Centre a relationship with the client, and for obtaining instructions sufficient for advice to be given. This process is not video-taped, and only occasionally is it analysed in detail after the event. Copies of the written instructions taken by the students are now available to the clinical teachers when considering assessments, and could form the basis of detailed discussion in, say, group meetings if there is insufficient opportunity for one-to-one discussion. Volunteer lawyers are not expected to be a formal part of the educational supervision.

Work that a student does at the Centre and that is checked by a solicitor is the drafting of letters and other documents. 'Checking' need not amount to supervision: there is no need for the student to be present, consulted or taught; in urgent matters the students, who attend only a day a week, will in fact be by-passed: a draft is redrafted and produced without solicitor/student discussion. The supervision in respect of, say, a letter comes even before the preparation of a letter; it comes at a stage when the student is considering what

191 Shalleck supra footnote 186

192 Barnhizer (1979) supra footnote 55 @ p.92

193 note the miserable picture of a hack clinical teacher described in Mlyniec, W.J., *Notes on the Premature Demise of Clinical Teachers; Burn Out or Cop Out* Paper to the 1990 AALS Conference, supra at footnote 56

194 Hoffman (1986) supra footnote 180 @ pp.303-7

195 Cooke and Taylor supra footnote 180 @ pp.282-4

options are available, what steps could and should be taken, what issues in legal theory and practice arise.¹⁹⁶

A limitation on the supervisor's ability to supervise consistently will be the other demands made of the supervisor's time: direct obligations to clients in the absence of the relevant student, court appearances, Law School business, administrative matters and legal centre activities. Certainly steps can be taken to minimise the need for persistent spontaneous supervision,¹⁹⁷ without questioning its fundamental importance to the clinical process.¹⁹⁸ The Centre has instituted on a trial basis group meetings each day, at which students focus on their activities for the day and raise legal and practice issues for discussion and clarification. This avoids a degree of repetition in the one-to-one supervision,¹⁹⁹ and reduces the need for that supervision during the day. It is also an investment in the accessible demeanour and general equanimity of the clinical teachers.²⁰⁰ The group meetings are discussed further at 2.2.10 below.

Another anticipated innovation is the availability to students of procedural summaries, referring to common matters dealt with at the Centre. These would avoid the need for repetition by the clinical teachers and, although giving the students what they might otherwise have to find out for themselves, would be designed not to deprive them of a significant educational experience.

Reducing face to face student time is not going to save money within an existing clinical structure,²⁰¹ although it could well result in a more diverse use of a clinical teacher's time and therefore have human resource implications. It will result in lower levels of exasperation and fatigue. It need not compromise the students' clinical experience, as long as appropriate aspects of the supervision are relocated into group meetings, class, and handouts.

2.2.7 Casework management: continuity

The transfer of files from one session of students to the next is problematic, compounded by the lack of either an overlap of students or an introductory course for students.

Files, and therefore clients, that last longer at the Centre than do the students are passed on, from one session to the next and from one student to the next. This process has been subject to a Transfer Memo, written by the outgoing student to introduce the incoming student to the file. Such a memo is relied on by the incoming student as statement of the content and status of the matter.

As it has not been feasible for the solicitors either to assess the outgoing student on a memo written in the last hours of contact with the Centre, or to check on the accuracy of all such memos, the incoming student may not have been getting a complete or accurate picture of the file from the Transfer Memo. From the perspective of client management, this is a dangerous period when crucial matters can be overlooked unless the solicitors are alert to all files.²⁰²

¹⁹⁶ Aiken supra footnote 165 @ p.1054 fn.33 for a description of the extreme case of going through several case team meetings to decide how to make a particular phone call. I am not sure that the authors considered the exercise extreme.

¹⁹⁷ Interim Report supra footnote 16 @ Part 3.C6

¹⁹⁸ Amsterdam supra footnote 180, passim

¹⁹⁹ Ibid

²⁰⁰ Ibid, and Mlyniec supra footnote 193

²⁰¹ Amsterdam ibid, in which he says that the need to reconsider time spent on supervision derives in part from the expense of one-to-one-supervision. He goes on however to express the savings in terms of saved resources rather than funds

²⁰² see the Interim Report supra footnote 16 @ Part 3.B4

With administrative and educational issues in mind, the Centre has introduced Incoming Summaries at the expense of the Transfer Memos. It is possible that while this avoids blind dependence on an inaccurate or insufficient transfer summary, an incoming summary puts too much pressure on already anxious students at an early stage in the clinical experience. This was not apparently the case with students commencing in 1991, but the process will be reviewed. Experience at the Centre confirms observations about the first stage of students' time in a clinic as being one of fear, eagerness and confusion.²⁰³

Numerous other issues, administrative, legal and personal, arise in the transfer of files.²⁰⁴ Perhaps the most useful comment is that the file transfer itself is not simply an administrative step, but requires "explicit awareness and consideration of the issues inherent in the process."²⁰⁵ Disruption to clients in the transfer process is inevitable. To date it has been addressed by the outgoing and incoming students speaking to the clients personally.

The whole process of file transfer, involving as it does dislocation for students, supervisors, administrative staff, and clients, would be made easier by an overlap of students, as well as the introductory period referred to above. This would also allow the incoming students time to acclimatise and to be introduced to procedures, skills and files without at the same time having to cope with the full brunt of the file work. From time to time the Centre has requested outgoing students to return during the first week of the next session to assist new students. This is not a formal arrangement, and really only addresses problems of office familiarity.

The problem of the lapse between student sessions is compounded by the lack of familiarity students have with any office procedures, let alone those of the Centre. There is no escaping the fact that the clinical experience requires an awareness of skills and procedures which the students would, ideally, bring with them. Time is taken to introduce systems, as well as to introduce to the students an often unprecedented expectation of self-learning and of personal responsibility in education.

At its worst, the effect of the students' abrupt arrival at the Centre is to reduce the students' effective legal learning time to as little as ten weeks. It is not uncommon for some clinical programs to have an introductory period,²⁰⁶ although this is often in tandem with a full-time student commitment, a longer clinical course and a file load which is more controllable than that generated by a community practice.²⁰⁷

2.2.8 Advocacy: an extension of student responsibility

Representation of clients by students in some matters is possible, and an appropriate means of extending students' responsibility in clinical education. Useful examples, and relevant guidelines, exist in North America.

Students at the Centre can, under supervision, take responsibility for every stage of a legal matter but for appearing in court proceedings. There is no right of appearance in court for representatives of parties other than solicitors or barristers admitted to practice in the jurisdiction. When the Centre is acting in a matter that proceeds to a hearing, a staff solicitor appears, or instructs counsel.

²⁰³ Barnhizer (1979) supra footnote 55 @ pp.102-3; Hoffman (1986) supra footnote 180 @ p.303

²⁰⁴ see the very detailed discussion of "substantive, institutional and psychosocial" factors in file transfers in: Cahn N. R. & Schneider N.G., *The Next Best Thing: Transferred Clients in a Legal Clinic* (1987) 36 Catholic U.L.R. 367

²⁰⁵ Ibid @ p. 390

²⁰⁶ see the report on Springvale Legal Service at appendix 13

²⁰⁷ see the Interim Report supra footnote 16 @ Part 3.C3

When a staff solicitor appears, the relationship between the student and the solicitor is similar to that between solicitor and barrister: the student prepares the matter for hearing, and may go as far as preparing points of witness examination and cross-examination. The degree to which the student can be involved in the case presentation will vary considerably from case to case: much more in a criminal plea, when the student can draft the submission on mitigation, than in a contested discrimination case involving cross-examination of expert witnesses.

There is ample precedent in North America for student appearances in courts for clients; despite the particular features of the American judicial system, such a practice could be emulated here to the benefit of the clinical experience.²⁰⁸

Client representation in court or a tribunal is clearly an extension of the student's responsibility for the conduct of a client's case,²⁰⁹ and has been put as high as being an "essential dynamic of the strict adaptation of the clinical method."²¹⁰ It need no more be an exercise in advocacy *per se* than the generic clinical consideration of students' responsibility need be an exercise in personal responsibility. The advocacy would be a means by which students would gain insights into the operation of law in society, the flexibility of legal rules, and the characteristics of justice. The skill of advocacy need not be the point of the exercise although, like interviewing and drafting, it would be learnt and practised to the extent necessary to facilitate the clinical experience.

It would be important to keep the participation by the student in the adversarial process in perspective. Participation in it would be an exercise in our system of justice, and should not be an endorsement of the adversarial model as the invariably appropriate means of dispute resolution.²¹¹ Advocacy can be considered in the broadest possible sense. The community legal centre environment for a law clinic is appropriate in this regard: legal centres have always pursued non-adversarial resolution of disputes when appropriate, relying particularly on community justice centres and alternative jurisdictions such as the Consumer Claims Tribunal and the Social Security Appeals Tribunal.

At the same time, there are many arguments to be met before the principle of student appearances as part of the clinical experience can be accepted.

The first is structural: there was once in America the same barrier to this dimension of clinical experience that there is now in Australia: admission to practice. Most North American jurisdictions now have 'student practice' rules, allowing student representation of clients in prescribed circumstances.²¹² The case for student representation of clients was enhanced considerably by the dicta of Justice Brennan of the U.S. Supreme Court in Argersinger v. Hamlin,²¹³ in which his Honour, in a decision confirming a right to counsel, endorsed student practice rules, and saw a significant contribution being made by students to representation of the poor. Those comments gave rise to great optimism and enthusiasm for extending clinical experience.²¹⁴ There is in New South Wales a less *ad hoc* system for providing legal representation to the poor, despite the lack of any constitutional guarantees, but in the absence of complete coverage by the system, and of any right to representation, the sentiments of Argersinger have some contemporary local relevance.

²⁰⁸ see Nash G. *Should Law Schools Produce Lawyers?* (1991) 76 (Autumn) Victorian Bar News 39 @ p.44

²⁰⁹ Barnhizer (1979) *supra* footnote 55 @ p.74

²¹⁰ *Ibid* @ p. 93

²¹¹ These concerns have been expressed forcefully in the context of the proliferation of student practice rules in the United States: Brown L.M., *Prefatory Remarks* (1980) 29 Cleveland St.L.R. 372

²¹² see the Interim Report *supra* footnote 16 @ Part 3.B7

²¹³ 407 US 25 @ 41

²¹⁴ see papers to the Argersinger conference: (1972) 5 (4: I & II) CLEPR Newsletter

From an extensive table of United States student practice rules,²¹⁵ it is helpful to note the following considerations in granting those rights of practice, with parenthetical notes concerning the position of the Centre:

(i) *minimum student qualifications*

All jurisdictions require a minimum period of completed study, a certain number of years or semesters. Less common is a requirement that certain subjects, such as Evidence, be completed; concurrent enrolment in such a subject may be required, as will concurrent enrolment in a clinical program.

(There are no formal prerequisites for the clinical program at the Centre, although it is likely that students will have completed Litigation or be concurrently enrolled.)

(ii) *duration of admission to practice*

The right to practice as a client's representative is often for a fixed number of months. It is sometimes co-extensive with enrolment in a clinical program, or may be for the duration of enrolment in a law degree course, other criteria being met.

(The clinical program at the Centre lasts for only four months. Some students graduate on completing the subject; many continue at Law School for up to two more years, during which time they have the opportunity to take part in clinical activities in other subjects: see 2.1.8 and 2.1.9 above.)

(iii) *nature of client*

Some jurisdictions will restrict a student's practice rights to representing an 'indigent' client; others have no limitation on the nature of a student's client. Some identify a particular type of client, such as 'prisoner' or 'government'. Most jurisdictions do, however, preclude any remunerative arrangement between the student and client: the litigation must be funded from some source other than the client, such as the clinical program, or perhaps a local legal aid service.

(Identifying an 'indigent' person in New South Wales would not be as simple as applying the Legal Aid Commission's means test: that test caters for only the poorest of the indigent, and precludes a large number of people who are nevertheless unable to afford legal representation.)

(iv) *nature of the case*

There are few real limitations on types of cases, most jurisdictions saying simply 'Criminal and Civil', or 'Any proceedings'. Some limit the criminal jurisdiction to misdemeanours.

(The extent to which legal aid is available in New South Wales could define the student jurisdiction to an extent: summary matters for which there is not a reasonable likelihood of gaol, civil claims of less than \$1,000.)

(v) *necessary supervision*

All jurisdictions have requirements of some sort that relate generally to the circumstances in which a student must be supervised. This may relate to the activity of the student, such as interviewing, advising or court appearance, or to the gravity of the activity, ie requiring supervision in civil cases above a certain amount, or in criminal cases involving a certain level of penalty. The necessary minimum qualifications of the supervisor are usually specified.

Discussions in New South Wales in late 1990, on a court by court basis, were encouraging. A right of student appearance in certain matters is something which Local Courts are prepared to consider in principle, although it would remain a matter of discretion for each magistrate as to whether or not leave would be granted. Appearances in the Family Court encounter an apparent obstacle in s. 78 of the Judiciary Act 1903 which appears to confine representation to lawyers admitted to practice; whether there is in the court any discretion to allow representation by leave is uncertain.

²¹⁵ (1980) 29 Cleveland St.L.R. 817

Something less *ad hoc* than a 'by leave' entitlement on a case by case basis is preferable in any event. The question would be resolved by a formal admission to practice, on terms. This is clearly a matter for the Solicitor's Admission Board and, indirectly, for the Attorney-General and the Law Society.

Specifically, it is anticipated that students would appear on hearings in summons matters, on pleas in charge matters dealt with summarily, on hearing or at arbitration in small civil claims, at callovers and mentions, and on uncontested applications for dissolutions of marriage. Students already can and do appear, with leave, in tribunals such as the Social Security Appeals Tribunal and the Residential Tenancies Tribunal. These opportunities can be increased as the choice of casework becomes more refined: see 2.2.3 and 2.2.4 above.

Quite apart from the structural consideration of an appropriate practice rule, there are arguments of principle in the issue of student appearances. The first is one of competency.²¹⁶ Experience at the Centre shows that students are likely to be no less able than an inexperienced solicitor, and have the benefit both of an enthusiasm for a task which may be uninspiring for a regular litigator, and of a considered and supervised preparation.²¹⁷ Students have a strong awareness of the personal impact of the justice system on their clients; they are not numbed, as one with years of advocacy experience might be, to the fears that a client has of the adversary system, and such considerations are reinforced in the course of the clinical teaching.

There are some things that a student lawyer, no less than an inexperienced lawyer, will have difficulty with. The sudden turn case might take, the unpredictability of oral evidence, problems with admissibility of evidence: all are example of situations where a student may want for experience. As far as is possible, cases that are likely to be difficult could be culled as being unsuitable for student representation. Beyond that, such events are ever-present factors in the administration of justice, to be dealt with in court in the ordinary course.

An argument that student practice would encroach on private practice is even less tenable than the now-discounted fear that community legal centre practices would encroach on private practice. The client group that is anticipated is made up of precisely those people who cannot afford a private solicitor. For those solicitors who do take legal aid work, there are sufficient gaps in the provision of legal aid to require another line of defence, already provided to an extent by community legal centres and, in the future perhaps, by students.

Finally, it has been suggested, and the suggestion rebutted, There may be concern that the courts would become de facto nurseries for the students.²¹⁸ Legal representatives have varying abilities, and courts are under no constraint to show tolerance to a faltering lawyer. If a student is admitted to practice or appears by leave, it would be well understood that the court is then dealing with a legal representative, as in any other case.

2.2.9 Non-litigious casework

There is no need to limit the clinical experience to client-based casework; there is ample opportunity to achieve the aims of clinical education in matters of legal policy, education and reform.

The casework the students work on has only ever been that in which the Centre acts for clients as their solicitor in relation to a legal difficulty. Despite the diverse activities of a community legal centre, noted above at 1.2.1, the Centre has not taken on those other, non-litigious roles, ostensibly because the time that

²¹⁶ Hardaway supra footnote 185 @ pp. 474-6

²¹⁷ Ibid @ p. 475; Nelson D.W., *Prefatory Remarks* (1980) 29 Cleveland St. L. R. 363 @ p. 365

²¹⁸ but see Nelson ibid @ pp.365-6

might be spent on such activities is spent on clinical education. There is, however, no attempt at the Centre to marry the two, to use non-litigious activities as clinical activities.

The casework at the Centre is client-based, in the usual sense that characterises the client as a person seeking a remedy through the legal process. The casework does not usually anticipate clients such as community groups seeking a course of seminars on neighbourhood issues, non-profit publishers seeking authors for lay people's law guides, or interest groups seeking advice on the content of legal information pamphlets or on their rights and liabilities in anticipation of public activities. There is, in short, no project work done by the students.

Clinics in North America do do this type of clinical work,²¹⁹ but not to any great extent. There are two likely reasons for its low incidence. Most importantly, the clinics in the United States, as noted above, are concerned with legal practice skills, with preparing students for practice. Even in those clinics with an express focus on academic analysis of the legal system, the secondary purpose, and the one that motivates many students, is preparation for legal practice. Contested rather than transactional legal matters provide greater scope for pursuing in the one case different aspects of legal practice.

It is also the situation in America that many clinics are funded, at least in part, to provide legal services in response to a huge unmet demand; indeed, demand defines the role of many clinics. There, as community legal centres find in Australia, it is a hopeless battle in times of economic restraint to persuade government funders that non-casework legal services, such as education and policy work, are necessary forms of community legal service.

Non-litigation casework - project work - would make demands of the students which are very similar to those made by the client based casework. Students would have the opportunity to consider the operation of law in society, and to present considered and coherent accounts of their own inquiries and reasoning. There is the advantage of the activity being without risk to a client, although the experience at Parkdale²²⁰ is that students lack some enthusiasm for the amount of non-client work that is done in that course.

Project work that could be dealt with by a student as a clinical activity includes writing material for use in the Law Handbook²²¹ and the Legal Service Bulletin,²²² updating material in the Lawyers Practice Manual,²²³ presenting law classes to community groups and schools,²²⁴ making submissions to the Law Reform Commission and to parliamentary inquiries, advising community groups on the content of legal information pamphlets, and producing such information for the Centre. All these activities are done already by staff members in their capacity as community legal centre workers.

2.2.10 Class and group teaching

Although the weekly classes remain an important forum for teaching legal practice skills, there is growing emphasis on daily small group teaching.

²¹⁹ University of California (LA); University of Victoria, British Columbia; Osgoode Hall/Parkdale Legal Services, Toronto: see the Interim Report supra footnote 16 @ Part 3.B8; Vanderbilt University, described in Allison, supra at footnote 21, @ p. 278

²²⁰ Interim Report *ibid* @ pp.8-9

²²¹ Spender. L.(ed.) *The Law Handbook*, Redfern Legal Centre Publishing, Sydney, 3rd ed., 1988

²²² *Legal Service Bulletin, a National Magazine of Legal Issues*, Legal Service Bulletin Cooperative Ltd., Monash University, Victoria

²²³ Redfern Legal Centre (ed.) *Lawyers Practice Manual*, Law Book Company, Sydney, loose-leaf ed., 1983

²²⁴ Note the activities of the Schools Legal Education Group (SLEG) at the UNSW Law School

The problem of giving the students at the outset the information necessary for constructive participation in the subject can only be overcome by an introductory course.

Students in the clinical subject attend a two hour class once a week for the seventeen week duration of the subject. After allowing for an introductory class, a final class for evaluation, and a mid-session or public holiday at some stage, there are often not more than twelve or thirteen classes.

As to the content, no amount of substantive law that would anticipate the casework could be taught in the available class time. While some areas of law are likely to be dealt with by all students, many will be relevant to only a few. This inconsistency of exposure, combined with the severe limits of time, and the lesser limits of the clinical teachers' knowledge, make attempts to teach matters of substantive law or practice fairly futile. On the other hand, supervision time should not be spent giving repetitive vignettes of legal information to students. Learning substantive law is actually outside both the supervisory and formal teaching part of the clinical subject. It is a matter for the students' own inquiry and, after research and detailed consideration, it is then a matter for discussion with a clinical teacher. The availability of practice texts and loose-leaf services, along with the anticipated practice information referred to in 2.2.6 above, facilitate this.

The existing class time already encroaches on the time spent at the Centre by those students who attend on a Wednesday; it cannot be suggested that more time be spent in class, as things stand. It follows from the proposal concerning attendance times, at 2.2.12 below, that more class time would be available on a Wednesday.

The conduct of classes benefits from the relatively small size of each student intake. With a maximum of twenty five students, there is scope for discussion, debate and group work in the class. There is now a growing emphasis at the Centre on group work as an appropriate means of teaching young adults certain skills, and of exposing them to ideas of responsibility, accountability, and co-operation in their legal reasoning and analysis.²²⁵ A simple structure of introducing ideas based on readings, breaking into groups for an exercise, and returning to a large group for discussion, is becoming common at the Centre in classes on skills, ethics and professional responsibility, and for case studies.

The group method now extends from the weekly class into the daily supervision of students. Each morning the students of the day meet at nine o'clock with one of the clinical teachers for up to an hour. The agenda includes a review of the Office Diary, in which students have recorded the files they intend to work on, and staff and students have recorded any commitments to clients, court, or meetings. This will lead to a discussion of time allocation and management of effort, streamlining the students' already short working time at the Centre and clarifying priorities.

The morning meetings then become an opportunity to pursue an agenda which is set by the students or, by default, by the teacher. A wide range of matters is raised by the students for discussion, deriving from their casework, client contact, court experience or personal deliberations. The discussions are informal, and noted without being minuted. They cover substantive law, procedure and practice, professional conduct and analysis of the legal system. Notes of the content of some morning meetings are at *appendix 18*.

From the morning meetings, teachers and students gain the opportunity to pursue matters that are of personal interest and concern. Together they have the opportunity to monitor progress towards the reflective and analytical aims of the course, and to set a daily agenda for supervision and for the students' responsible conduct of a client's file.

There is a problem about the timing of the classes. The students' need for instruction is not spread evenly over a session. The classes are a supplement to concurrent learning activities, principally file and client work, and that work is in much greater need of supplementation with skills training and administrative information in the early stages of the session.

²²⁵ see Lacousiere R.N., *A Group Method in Clinical Legal Education* (1980) 30 J.Legal Ed. 563

Interviewing, drafting and negotiating are skills to be used in the clinical subject; the development of these skills for their own sake is not a primary objective of the clinical subject: see 2.1.1 above. These skills will be learnt and refined on every occasion they are used: the willingness to try, and to learn from trying, is a part of the clinical experience. But those skills must first be introduced to the students, and rudimentary instruction must be given.

In short, as with most subjects in the degree curriculum, there is a lot to be taught in a short time. A particular difficulty comes from the fact that in the clinical program the need to know is directly related to the concurrent need to practice what is known.

The content necessary for constructive participation in the clinic can be reasonably well defined and anticipated. The following topics need to be introduced to the students at an early stage of their involvement in the clinical program, if not before they start. Each is the content of a two hour class.

- {Course aims
- {Personal aims and dispositions

- Office systems

- {Office administration and authority
- {Client management

- {File structure and management
- {Legal personnel and procedure
- {Legal practice research

- Legal and social referrals

- Letter drafting

- Interviewing principles

As the session progresses, further skills classes are appropriate, some of which require two classes:

- Interviewing

- Drafting

- Negotiation

- Case preparation

- Advocacy

- Use of interpreters

- Interdisciplinary practice: doctors, social workers and counsellors

Classes relating to aspects of practice are also necessary:

- Ethics and professional responsibility

- Client expectations, remedies and costs

- Case reviews

In the present system, most of these topics are addressed in part, but none until the session has begun, and some not until the optimum time for their relevance to the clinical experience is past.

The real problem, therefore, is preparing the students at the outset for the clinical experience. With an increase in time spent at the Centre (2.2.12 below), the delay in the students becoming familiar with both the office system and the educational expectations may be reduced. Even so, a great deal of anxiety on the part of students, clients and staff would be avoided, and a lot of teaching time would be preserved, if an introductory course was available.

The introductory course presents timetabling and administrative problems, and would be the students' first taste of the personal demands that the subject makes of them. Feasible options for such a course include

- *A two or three day intensive course held on the weekend preceding commencement at the Centre
- *A course during the week preceding commencement at the Centre
- *A two day course in the first week of session, if the students were enrolled for two days as suggested in 2.2.12

It is possible that a compulsory introductory course will alienate prospective students.²²⁶ It could not, however be made optional, and the Centre does not have the resources to offer it at a range of alternative times. It is only for the anticipated long-term gain for selves, students and clients that staff are prepared to commit their time within current limited resources to such an introductory session.

2.2.11 Assessment

Students are assessed on a pass/fail basis, judged by reference to a number of particular criteria. The pass/fail method is considered appropriate for the clinical subject.

No written work other than that relating to file work is required of students, and assessments are conveyed to the students by an initial written notice, followed by mid-session and end of session interviews.

Although some students have been asked to do extra work, and some have dropped the subject, no student has ever failed the clinical program. This is not an uncommon feature among North American clinical programs, many of which, like the one at the Centre, assess students on a pass/fail basis.

The fact that in ten years no student has failed is not itself a reason for reconsidering the basis on which the subject is assessed. The impetus to review assessment comes from a realisation that there have been no clear criteria by which the students have passed. Attendance alone, not unknown as a dominant criterion,²²⁷ may have been sufficient. Whenever it has been felt, either for some blatantly clear or for some vaguely undefinable reason, that a student ought not pass the subject, the subject has wanted for

²²⁶ for an assertion to the contrary, relying on students' apprehension at dealing with clients, see Aiken et al supra footnote 165 @ p.1051

²²⁷ ibid; Tribe D.M.R. & A.J., *Taking Skills Seriously - Skills Assessment for the 1990's* Paper to a symposium on Legal Skills and Competence held by the Legal Skills Research Group of the Institute of Advanced Legal Studies, London, February 1990, @ p.7

criteria on which to fail that student. Clearly stated assessment criteria, of which students have notice at the outset, are essential if the subject is to have academic credibility and the confidence of students.²²⁸

Having clear assessment criteria, and choosing not to grade but simply to pass or fail, are separate but related questions, both of which came up for consideration during the review.

Grading is an invidious exercise at the best of times. It is certainly problematic in a clinical subject. When passing, let alone grading, a student in a clinical program, what is being said? There is an endorsement of some sort, even if only as to punctuality. The first step therefore was to look to the statement of the subject's aims.

²²⁸ Catz and Tyler *supra* footnote 98 @ pp.611 and 613 respectively; Fisher M-L. & Siegel A.I., *Evaluating Negotiation Behaviour and Results: Can We Identify What We Say We Know?* (1986-86) 36 *Catholic U.L.R.* 395 @ p. 396

(i) *What is being assessed?*

The longstanding Statement of Objectives for the subject, submitted to the School each year, was the first place to look for assessable parts of the clinical experience. It was re-written and broken down into smaller parts, into the various activities in the Centre, and into the stages of conceptual and practice development a student goes through in progressing to an achievement of the objectives. This exercise was supplemented by a review of assessment procedures used in other clinics.²²⁹ Four principal areas of a student's time at the Centre were identified, as were important but not exhaustive aspects of each area:

1. Professionalism

- (i) **Maintaining files** in an ordered, accessible fashion; making proper and appropriate use of office systems, including the telephone.
- (ii) **Dealing with clients** in a considered and appropriate way, showing sensitivity to manner, dress and punctuality.
- (iii) **Allocating and controlling time** and effort efficiently, according to the needs and demands of clients.
- (iv) **Working co-operatively** with fellow students and staff, contributing to the efficient operation of the office.
- (v) **Seeking guidance**, and consulting with solicitors, after analysis, research and consideration of a problem.
- (vi) **Accepting responsibility** for the resolution of a problem and progress of a file.
- (vii) **Taking initiative** in the resolution of a problem and the progress of a file.
- (viii) **Acknowledging limitations** in knowledge and ability, and accepting guidance accordingly.
- (ix) Developing an awareness of and responses to:
 - (a) questions of **professional ethics**
 - (b) questions of **confidentiality** and **interest conflict**.

2. Analysis and Reflection

- (i) **Considering critically** the appropriateness of a legal remedy on the basis of considerations such as expense, time and efficiency.
- (ii) Considering the appropriateness and availability of **non-legal remedies**
- (iii) Developing and practising an appreciation of the social and cultural **context of your client**.
- (iv) Developing and practising an appreciation of the social, cultural, economic and practical **aspects of the legal process**.

²²⁹

Interim Report supra footnote 16; see the report on Springvale Legal Service at appendix 13

- (v) **Evaluating your own performance** in any task, and learning from that experience as a form of self-teaching.

3. Skills

Being able to-

- (i) **interview** clients,
- (ii) **negotiate** when necessary,
- (iii) **draft** letters and documents,
- (iv) use available legal and non-legal **referrals**,
- (v) conduct appropriate legal **research**,

all to an extent necessary to work at a reasonable level of proficiency in this legal office.

4. Class Performance

- (i) Attendance at Wednesday classes, and morning meetings.
- (ii) Contribution to and participation in group work and class activities.
- (iii) Attendance at 5 advice sessions.

These assessment criteria are accompanied by an explanation to students of the assessment process: *appendix 19*.

The adoption of these criteria reflect a concurrent resolve to assess students' overall performance on the basis of pass/fail, discussed below.

The identification of four principal areas, and of numerous aspects of each area came about because even when aims of the subject were clarified, it was still not possible to say which of all the activities, considerations and topics covered in a clinical program, could be promoted as the principal indicator of a student's achievement. Similar approaches in the United States are often distinguished by the emphasis on practice skills, although the identification of general and specific "competencies" is a similar process.²³⁰ A similar range of relevant assessment components has been arrived at elsewhere.²³¹ There is a rich source of discussion and relevant precedent in literature relating to social work field placements.²³²

At the Centre, unlike the concerted practice focus in many North American clinics, successful completion of the clinical subject reflects the fact that a student has addressed a range of matters which, but for class performance, are connected with each other only by their common association with legal practice. While this would seem to make 'proficiency in legal practice' the implication of successful completion of the subject, such a statement would, if made explicitly, be untenable.

Casework is the basic activity at the Centre, the means by which students are assessed. The students' performance is the immediately apparent aspect of their time in the clinical program, and certainly the clinical program insists that practice skills are taught, and are to be acquired, but only to the extent

²³⁰ Cort et al, supra footnote 98 passim; Fisher & Siegel supra footnote 228 @ p. 425

²³¹ see for example Redlich A., *Perceptions of a Clinical Program* (1971) 44 Sthn. Cal. L.R. 574 @ p. 601; Interim Report supra footnote 16 Parts 3.A7, 3.C4

²³² see for example Nichols M. & Cheers J., *The Evaluation of Practicum* (1980) 3 Contemp. Soc. Work Ed. 54 and the references there, and Smith N.J., *Fieldwork Education: Substance or Myth* (1981) 4 Contemp. Soc. Work Ed. 21; Akhurst C., *Assessment of Performance in Professional Practice in Social Work Courses* (1978) 4 Assessment in Higher Education 46 @ p.49

necessary to participate in the legal centre practice. The dominant aim of the subject is the reflective and analytical process that the students are encouraged to develop: see 2.1.1.

It has been said that: "there is no such thing as lawyering competency *per se*; there are just dimensions of performance that imply certain underlying structures of thought, knowledge, values and attitudes. Given the opportunity to learn specific content, characteristics of performance, different environments and different situations, these structures will manifest themselves in consistent levels of performance."²³³ A clinic focussed on practical skills will therefore assess performance as an indicator of underlying structures; in contrast, a principal aim at the Centre is to allow and assist students to identify those underlying structures, to be conscious of them and their effect on the performance of lawyers and the legal system.

It is not the performance but the factors relevant to performance that are highlighted for the students. Consequently, there is not at the Centre the need to assess performance for its own sake. What is being assessed is the student's willingness to see underlying structures, to inquire into their impact and relevance.

As a basis for assessing students' appreciation of the structures and forces of the legal system, case work is both appropriate and problematic, for the same reason: its unpredictability. It is appropriate because casework is the legal system in operation, its variety and spontaneity constantly confounding rules of law and practice, precedents, formulas for liability and categories of remedies, and challenging concepts of justice and equity in society. At the same time, that variety complicates attempts to give students an even and equitable exposure to the experience, and compromises any comparative assessments.

In the most controlled system of client intake possible, there will be vagaries that result in students having quite different demands made of them; in a clinical program that takes its clients from a general casework base, the variety is considerable. It does not at all follow from this characteristic that clinical teachers have neither the time nor the inclination to work out appropriate assessment strategies.²³⁴ The fluidity of the situation as an impediment to assessment only if the assessment is graded. This is discussed further below.

The differences in the working material aside, there will be practical approaches and skills which can be exhibited by students regardless of the demands of their files,²³⁵ and which can be assessed. In the context of continuing client work, however, those skills need not always be assessed in terms of results,²³⁶ but rather of performance and improvement.

Whether assessing skills or legal analysis, the exercise must be kept in perspective. Students attend one day a week for no more than seventeen weeks; that is all that the clinical teachers see of them, but for the occasions they make themselves available for court or extra file activities. As progress and development, rather than product and result, are the phenomena to be assessed, there is arguably too little time to come to any more than a tentative, or at least qualified, view of a student's response to the aims of the subject.²³⁷

(ii) *How are students being assessed?*

Many of those programs that similarly identify the reflective aspect as an important, if not the primary, goal of the clinical experience²³⁸ require written work specifically intended to have the students demonstrate their depth of thought about the legal process they have taken part in.²³⁹

²³³ Sammons supra footnote 98 @ p. 610

²³⁴ Cort supra footnote 98 @ p. 604

²³⁵ Ibid @ p. 605

²³⁶ see for example the discussion of skills evaluation in simulated exercises in Fisher & Siegel supra footnote 228

²³⁷ Catz supra footnote 98 @ p. 612

²³⁸ Interim Report supra footnote 16; Springvale Legal Service

One method is a diary, kept by students during their time at the clinic.²⁴⁰ The diary system was used at the Centre for a few years before being abandoned in 1990. The decision not to use the system any further was a rejection only of the way in which student diaries at the time, for want of clear guidance and support from the staff, were being maintained. At worst, the diary was a periodic account, in one case a minute by minute record, of a student's activities: '10.05: make tea; 10.17: call Bank; 10.25: check Tarsos file' ... etc. Certainly some diaries were insightful accounts of students' experiences, thoughts and impressions, but, without guidance, the system depended too much on a students' predisposition to record thoughts in writing.

An essay or research paper is an assessment option, but not an attractive one for students or teachers if the same information can be gleaned otherwise. In any event, an essay lacks spontaneity, and can be too easily written to give the response, in the general terms, that the student knows is sought. And there simply is not time to have a student both attend the Centre and write a research paper of any depth. Written work may however be project work, perhaps a product of non-litigious clinical activities: 2.2.9.²⁴¹

Steps are being taken at the Centre to shift client responsibility in large part to the students: 2.2 above, This will, to an extent, free the clinical teachers from constant casework demands so that they are available for individual discussion and supervision more often and for longer periods. At the same time, there is greater emphasis on the teachers having contact with the students daily in small groups. There is too an attempt to select more carefully that casework which will invite students to consider socio-legal questions. In this way, the reflective and analytical thoughts of a student can be gauged without resort to written work. More frequent assessment interviews are an opportunity to address such matters directly.

The introduction of detailed assessment criteria is part of an effort to realise another important concern in assessment: due notice being given to the student of progress or difficulties. This 'natural justice' provision takes the form of a three-stage assessment process over the four months of the subject.

After three weeks, the students are given a preliminary assessment, an opportunity to discuss their own feelings about settling in to the Centre, and any difficulties that the teachers or students have or anticipate.

In the seventh week, students are interviewed for their mid-session assessment. This assessment is a personal discussion with each student, followed by a written report²⁴² to the student noting relevant aspects of performance, suggestions for matters that could be considered and practiced, and progressive grades for each component aspect of assessment. The grades are a standard by which the students and teachers can judge progress towards achieving the aims of the subject. This system was arrived at after discussions with Mr. Doug Magin of the Professional Development Centre at the University of New South Wales.

There are then eight or nine weeks remaining in the session. The progress that students make over that period is monitored informally in group meetings, classes, and case supervision discussions. If there is concern that a student is not making progress, for want of effort, due to misapprehension, or because of external factors such as workload, or problematic files, a further personal assessment will be conducted in week ten or eleven.

The final assessment is in the last week of session, reviewing the students' time at the Centre, their progress in realising the aims of the subject, and the knowledge that they have gained. This is accompanied by a written report in which final grades, to be compared with the mid-session grades, are given for the various components of assessment, and a pass or fail is given for overall performance in the subject.

239 Of 468 clinical programs surveyed in the United States, only 16.5% examined students: *CLEPR Survey and Directory of Clinical Legal Education in the United States 1978-1979*, CLEPR, NY, 1979 @ Table 4; see also the report on the Monash programs at appendix 13

240 see the Interim Report Part 3.C4

241 see also the report on the Monash programs at appendix 13, and the attachments to it

242 see Levine M., *Towards Descriptive Grading* (1970-71) 44 S. Cal L. R. 496

There is no doubt that the process is time and labour intensive, and might be a candidate for a list of clinical teachers' activities that can be rationalised to save time and, arguably, expense.²⁴³ The time spent on one-to-one assessment, however, cannot be overvalued, and for the nature of the subject a personal interview is a more relevant and appropriate procedure than the abstract ticking off of tasks. There are a number of matters that can be reduced to format writing: attendance, completion of exercises, satisfactory performance in administrative assessment areas such as dress and telephone manner. Even so, experience at the Centre supports a concern that in a clinical setting there can be a vast amount of information about the students' participation in the Centre.²⁴⁴ This is so at the Centre even without having resort to videotaped interviews or recorded supervision sessions. The information available to the clinical teachers at the Centre includes client files, draft letters and documents, copies of client instruction sheets, notes of all teachers' personal supervision discussions with students, attendance records, class exercise results, notes of group meetings, and a report from the office administrator.²⁴⁵

An important method of reducing to an extent the time that is spent in personal assessment interviews is self-evaluation. This approach is, at the same time an important aim of the subject: see 2.2.5 above. It is already an informal part of the assessment interviews, during which students are asked for their own views on their progress towards achieving the subject's aims, but is not yet promoted explicitly in the classes or group meetings.

(iii) *Whether to grade the assessment.*

Whether graded or not, students might hold completion of the subject out as an endorsement of ability to practice. A system of grading will only compound this misuse of the subject, with students simply seeking a good grade on their academic record. The students' desire for practice endorsement has been neatly answered simply by attaching a narrative, ungraded assessment to the students' academic record.²⁴⁶ Similarly, the Centre provides students, on request, with a written reference which explains, to whom it may concern, the nature of the work done by the student. The real dilemma, for student and teacher alike, is how to encourage and acknowledge effort.

Teachers will often want to acknowledge a student's efforts or to confirm a student's lack of effort, and will feel frustrated at not being able to. This need not, of itself, result in the whole subject being graded. In the assessment criteria described above, the overall assessment is ungraded; the component assessments under each of the principal four headings are, however, graded. The student thus receives the teacher's expression of encouragement or concern, in particular areas that may or may not weigh heavily in the overall assessment.

If completion of the subject is not to be an indicator of proficiency in practice skills, which in some other clinical programs it might be, then grading for the benefit of third parties becomes considerably less important. Grading of the sub-parts of the subject, and non-grading of the subject as a whole, allows teachers to express a range of endorsements or criticisms to students, and students to receive encouragement or guidance, in a way that allows for progress according to standards without misrepresenting the assessment either as comparative or as an endorsement to practice.

Grading may nevertheless have the attraction of being perhaps an incentive for the student.²⁴⁷ As it happens, students respond to the demands of the clinical program in such a way that the effort is, to a large

²⁴³ see Amsterdam *supra* footnote 180 and associated text at 2.2.6

²⁴⁴ Cort *supra* footnote 98 @ p. 605

²⁴⁵ see the account of 'Sources of Information for Evaluation' when that evaluation is on a pass/fail basis, in Carr J. *Grading Clinical Students* (1974) 26 J.Legal Ed. 223 @ p.226

²⁴⁶ Osgoode Hall Law School: Interim Report *supra* footnote 16; see also Levine *supra* footnote 260

²⁴⁷ see reference to White in Fisher and Siegel *supra* footnote 228 @ p.399

extent, its own reward.²⁴⁸ This may sound a little glib, but it seems to have sustained a pass/fail assessment system at the Centre so far. In the survey of students conducted as a part of the review, almost 60% disagreed with a suggestion that graded assessment of the subject is preferable to pass/fail.²⁴⁹

There is nothing competitive in the clinical subject; students develop personally in their knowledge, understanding and awareness of law and legal systems. It is true that "grading policies are important determinants of what students learn from the course."²⁵⁰ This view is expressed in the context of negotiation simulation, in which competitiveness and pursuit of the best result are the goals, and the assessment is graded accordingly. On the same view, the grading policy of the clinical program at the Centre is, appropriately, not a competitive or comparative one, but one which gives each student personal reports and individual encouragement to improve according to standards that the student sets for herself/himself from week to week.

Because of what is being assessed at the Centre - the students' appreciation of underlying structures in the law, the legal system and in their own participation in the processes - and because of how they are being assessed - on the basis of the day to day to day activities on files and with clients, not necessarily with regard to outcome, and on the basis of discussions, impressions, comments and rapport - an often used reason for relying on a pass/fail assessment standard can be adopted: "difficulties in quantifying a student's performance in a clinical setting."²⁵¹ A challenge to this view, and an accusation that it is self-protective for clinical teachers,²⁵² is premised on a clinical program being a means for training students in 'lawyering competency', ie in practical skills, which certainly can be assessed, to large degree, objectively.²⁵³

The clinical subject at the Centre is assessing skills only in part and only to a necessary extent. More important is the analytical and reflective process. It is probably true that an ability to critically evaluate oneself and the legal system can be assessed on a comparative, graded basis. But because it can be does not mean it should be. A student's involvement in the clinical subject is to develop that student's approaches to law and legal analysis. There is no right approach, no level at which such an approach is better than another. Once the comparative element of the subject is removed, grading becomes considerably less important.

Certainly a crucial step to be taken, in any review by a Law School of its teaching methods, let alone in the determination of assessment criteria in one subject, is the need for assessment strategies to match the aims of the law course and the particular subject.²⁵⁴ Thus it is not true to say that because in a "regular course ... few teachers would give the C student who wrote a B exam an A grade because of his improvement", the same approach should be adopted by a clinical teacher. In a clinic concerned with conceptual development and continuing legal analysis, progress from one stage of development or awareness to the next is exactly what is being encouraged. Assessment in a clinical program comments on the progress from C to B, and on the student's awareness of the possibility of self-motivated progress from B after the subject is over, not on the fact simply of having attained B.

²⁴⁸ see similarly Leleiko S.H., *The Clinic and NYU* (1972) 23 J. Legal Ed. 429 @ p. 454

²⁴⁹ Student Survey supra footnote 36 @ Table 3.15; and see the UNSW Law School 1980 Curriculum Review supra footnote 6 @ para 44, in which the Working Party was divided on this issue.

²⁵⁰ Williams G.R., *Using Simulation Exercises for Negotiation And Other Dispute Resolution Courses* (1984) 34 J. Legal Ed. 307 @ p. 311, quoted in Fisher and Spiegel supra footnote 228 @ p. 406 fn. 38

²⁵¹ *Survey of Clinical Legal Education 1972-73* CLEPR 1973 quoted in Carr supra footnote 245 @ p. 223 fn. 3

²⁵² Tyler supra footnote 98 @ p. 614

²⁵³ Tribe supra footnote 227 @ p. 12

²⁵⁴ *Ibid* @ p.24, and the same authors in *Assessing Law Students* (1986) 20 Law Teach. 160

If pressure and incentive are what is being sought from grading a subject, the same will come, in a clinical subject, from the responsibility of acting for clients, as if the casebook is alive and looking you in the eye. A lengthy analysis of the pass/fail system,²⁵⁵ with an adverse conclusion,²⁵⁶ is premised on the nature of the pass/fail subject being "like other law school courses."²⁵⁷ The author notes in passing that the teaching method and material influences a student's approach to the subject,²⁵⁸ but overall he gives remarkably little weight to this possibility, preferring instead the pressure of grades as an incentive.²⁵⁹

If pressure and incentive in the subject derive from factors other than graded assessment, there is no doubt that the pressure students feel from their concurrent enrolment in other subjects has an impact on their work at the Centre. Students are coping with competing pressures, and there is no guarantee that those of the clinical subject should prevail; it is possible that the clinical subject does not get 'equal time' during mid-session and end of session because of a pass/fail assessment which can be fairly safely predicted and is uninfluenced by a little less work or commitment from time to time.²⁶⁰

The phenomenon is no more or less the problem that every teacher encounters when a student chooses assessment strategies that best suit their convenience if not their ability. There are be reasons, however, why the pressures of the clinical subject should prevail. The important point for the clinical program is that presence and commitment is a very large part of the teaching and learning, and that student responsibility is a key factor in the clinical experience. However, for as long as the clinical experience is a part, and a minor part, of the students' timetable, it is likely to tend towards the margin of many students' efforts during exam and assessment time.

2.2.12 Student Time Commitment

The educational goals of increasing student responsibility and reducing the need for intrusive supervision would be considerably enhanced by increasing the time spent by students in the clinical program from one to two days a week.

The basis on which the students attend the Centre is described above at 1.2.7. In short, students attend the Centre one full day a week, attend a class for two hours a week, and attend an advice session five evenings in a session. They spend a session of 15-17 weeks at the Centre, and receive the same number of credit points, three (3), as for any other one session elective; students usually undertake twelve (12) credit points a session.

Attempts to engender in students a sense of responsibility for the conduct of their files, referred to in 2.2.5 as an essential aspect of clinical teaching, founder on the limited time the students spend at the Centre. Not only do students spend only seventeen days at most at the Centre, those days are a each a week apart. There is little chance of any continuity in students' management of files, and every possibility that a clinical teacher will have to step in and carry out the bulk of the work before the students return for their next day-long dabble. A public holiday, illness, or a court or other commitment can mean that a student, unable to come down to the Centre other than on the timetabled day, will go for two weeks without attending to the filework.

The need for an introductory course is discussed at 2.2.10 above; that need is by no means met but would be alleviated to a degree if students simply spent more time at the Centre. Quite simply, students would be

255 Lempert R., *Law School Grading: An Experiment with Pass-Fail* (1972) 24 J.Legal Ed. 251

256 Ibid @ p. 284

257 Ibid @ p. 256

258 Ibid @ p. 269, quoting a student

259 Ibid passim especially @ pp. 271, 275, 278, 288

260 see Carr supra footnote 245 @ p. 233

exposed to and would be taught more things sooner, and the distinctive and demanding nature of involvement in the subject would become familiar to students some time before the end of session. The teacher's difficulty in measuring a student's progress over a short space of time²⁶¹ is only a function of the students' difficulty in settling in and developing over the same period.

For as long as the students' experience is predominantly observation and acting on supervisors' instructions, the frequency of their exposure to the experience is of less than paramount concern. It is the emphasis on a student's responsibility for learning that makes the time and frequency of the student's attendance at the clinic so important. None of the clinics visited or discussed or read of in the course of the review²⁶² offers its students as little as one day a week to take part in a clinical program.

Despite the adverse considerations discussed below, it is proposed that the students' time at the Centre be doubled. A significant difference in a student responsibly handling a file can be anticipated if the student was to attend on, say, a Monday and a Thursday of each week. The need for a supervising solicitor to intervene is immediately reduced, the opportunity to discuss file management and issues is increased, the continuity of student/client contact is improved, and the impact of the clinical experience is intensified. Practical and conceptual considerations can be practised and examined more immediately, and class discussions will more be in the context of a continuing process, and less in anticipation of the next day the student will be in.

The proposal proceeds on the assumption that the present worth of the subject, in time and content, is 3 credit points, and envisages that the further student time spent on the subject would, as discussed above, extend considerably the educational opportunities in the subject. As a result of doubling the students' time at the Centre, the credit points available to students for satisfactorily completing the subject ought be doubled, from 3 to 6.

At the stage of enrolment in the clinical program suggested above at 2.1.9, students are able to enrol in at least twelve points worth of electives. While problems with enrolment in any event are anticipated and discussed below, it is improbable that students would enrol in a two-and-a-bit day subject for only 3 credit points, even if they could fit 9 credit points (three subjects) into the remaining two days.

The timetabling of such a proposal is not difficult if the pairing of the two days is on the same basis as many of the Law School's other subjects: Monday/Thursday and Tuesday/Friday. Students would be enrolling in only two other subjects (6 credit points)

This allows Monday/Thursday students at the Centre to enrol in Tuesday/Friday classes for their other two subjects, and in the occasional classes which are timetabled on Wednesday/Friday.

Similarly, Tuesday/Friday students at the Centre can enrol in other subjects which have Monday/Thursday and Monday/Wednesday classes.

Wednesday mornings at the Centre would be student-free time for the clinical teachers, an invaluable opportunity for staff meetings, research or checking of student work, each of which is compromised to an extent by the continuous presence of students. Classes are not scheduled in the Law School on Wednesday afternoons, and that time remains available for the scheduling of the clinical class from 4-6 pm.

Apart from the educational value of the proposed new arrangement, the economic and resource benefit to the Law School is significant. As the clinical subject is offered over summer as well, the extra credit points

²⁶¹ Catz supra footnote 98 @ p. 612

²⁶² see the Interim Report supra footnote 16; see also the account of Canadian clinics in Goldring J. *Learning Law in Action : A Report on a Study Tour of Canada*, report to the Association of Commonwealth Universities, 1986

allocated to the subject result in three less classes, admittedly of a small size (25) having to be taught each year, a saving of 22 teaching credits.

There are some adverse considerations in this proposal. First, every increase beyond a full day in the time that a student spends at the Centre increases the demand on space. To double student time means, on current enrolments, taking up to twelve students a day at the Centre. The Centre has a comfortable physical capacity of five students a day. In practice, up to eight students at once are present from time to time: the three social work students are often all working at the Centre at once, or students from another day are attending to extra matters. More than five students in the office results in a crowded and noisy environment, with insufficient desk space, telephones and reference materials.

The problem of space can only be solved by introducing a further consideration which may be a short term burden on the Law School: the expense of refurbishing the Centre. The new licence agreement referred to at 1.2.5 above, giving the Centre access to the whole premises, is the opportunity for the Centre to expand. Without the expansion, no change in the current operation of the Centre is possible. The expansion has not yet been planned in detail, or costed, although the University architect is working on a draft proposal.

Assuming the Centre is able to accept students for extra time, it is possible that students, when enrolling, will not find the option attractive. It takes from them the opportunity to enrol in one further elective, and could define, due to a greater likelihood of a timetable clash, some electives that cannot be done. Students doing or who have done the subject are invariably enthusiastic about a suggestion that more time could be spent in the subject for more credit,²⁶³ but this response to the experience is obviously absent among those considering enrolment.

Student evaluations and the student survey discount the suspicion that students enrol in a pass/fail subject to get an 'easy' three credit points,²⁶⁴ so it is not at all clear that the offer of six 'easy' credit points would attract students.

If up to thirteen students are at the Centre at any one time, even with the appropriate space provision, there will be an increased demand at any one time on the one-to-one supervision time of the clinical teachers. Of five students at the Centre now, three may be waiting for one of the solicitors to get off the phone and be available for consultation; the thought of six or seven lurking about the door is oppressive. This prospect only adds greater weight to the considerations relating to supervisory workload discussed above.²⁶⁵ An increased emphasis on student responsibility, a reduced caseload and a concentration of supervision in the group meetings are all counter-mechanisms in the general approach to the clinical subject of which increased student time is a part.

²⁶³ 51% of those surveyed agreed with the more time/more credit proposal: Student survey supra footnote 36 @ para 3.5, Table 3.15. It can be assumed that the 43.4% who disagreed did not do so because they wanted more time/same credit; reasons for disagreeing were not sought.

²⁶⁴ 2 respondents of 159 gave this as one reason why they enrolled in the clinical subject: Student survey *ibid* @ Table 2.4; see the reference to this 'suspicion' in Pye supra footnote 182

²⁶⁵ at the text associated to footnotes 170, 171 supra

2.3 Recommendations

Note: The recommendations marked (*) are for the attention of the 1991 UNSW Law School Curriculum Review Committee.

2.3.1 File and client work

- A1. (i) That the community advice sessions remain a source of casework for the clinical program: refer *Parts 2.1.5; 2.2.1; 2.2.2; 2.2.3* of the report.
- (ii) That the casework derived from the advice sessions is selected on the basis that the cases:
- (a) best allow for maximum student involvement in and responsibility for the conduct of the files, and
 - (b) are likely to raise issues of social justice, professional responsibility and ethics, and/or substantive law; refer *Parts 2.1.5; 2.2.3* of the report.
- A2. That specific sources of referrals be sought, and procedures established, for the referral of clients from appropriate agencies: refer *Part 2.2.4* of the report.
- A3. That all clients, on attending the Centre, receive an explanatory notice, in a number of languages, regarding the student involvement in the management of client files at the Centre: refer *Parts 1.2.2 (iv); 2.2.5* of the report.
- A4.* That project files be introduced to promote productive and relevant activity in areas of research, reform, policy and community education: refer *Part 2.2.9* of the report.
- A5. That approaches be made to appropriate institutions and officers to establish a system of appearance rights for students: refer *Part 2.2.8* of the report.
- A6. That the system of allocating a number of files to students be retained, but that the students be allocated that number of files, and those types of files, that best allow for the considerations in Recommendation A1 (ii) above: refer *Part 2.2.5* of the report.
- A7. That students be encouraged to take joint responsibility among themselves for the conduct and resolution of files: refer *Part 2.2.5* of the report.
- A8. That students be required to complete an incoming summary, a fortnightly report, and a transfer summary in respect of their files: refer *Part 2.2.7*.

2.3.2 Teaching, supervision and assessment

- B1.* That the subject matter of the weekly clinical classes relate to skills training and case analysis: refer *Part 2.2.10* of the report.

- B2. That the students on each day meet, for up to one hour from 9 am, in a group meeting for a case discussion or other discussion, chaired by students and/or a clinical teacher, and minuted: refer *Part 2.2.10* of the report.
- B3. That the staff solicitors maintain an open door policy in relation to student supervision: refer *Part 2.2.6* of the report.
- B4.* That students' performance in the subject continue to be assessed on a pass/fail basis: refer *Part 2.2.11* of the report.
- B5.* That students be given progressive assessments in weeks three and seven, a progress assessment at the clinical teachers' option in week twelve, and a final assessment in the final week of the session: refer *Part 2.2.11* of the report.
- B6.* (i) That students be assessed on the basis of a formulated set of assessment criteria: refer *Part 2.2.11* of the report.
- (ii) That those assessment criteria be reduced to writing and made available to all students prior to enrolment in the subject: refer *Part 2.2.11* of the report.
- B7.* That the currently discontinued requirement that the students maintain a diary while at the Centre be reviewed, and be reintroduced if and when there is a recommendation to that effect from the clinical teaching staff: refer *Part 2.2.11* of the report.

2.3.3 Enrolment

- C1.* (i) That the preferred stage for enrolment in the subject be the penultimate year of a student's study: refer *Part 2.1.9* of the report.
- (ii) That enrolment in the subject is dependent on completion of, or concurrent enrolment in, certain other subjects: refer *Parts 2.1.8; 2.1.9* of the report.
- C2.* That enrolment procedures be varied so that the timetabling of a student's subjects allow for the full day necessary for attendance at the Centre: refer *Part 2.1.3* of the report.
- C3.* (i) That in the event that final numbers for enrolment in the subject exceed the physical capacity of the Centre, enrolment be by ballot: refer *Part 2.1.3* of the report.
- (ii) That further consideration be given to the possibility of interviewing prospective students as a pre-condition of enrolling in the subject: refer *Part 2.1.3* of the report.
- C4.* (i) That students be required to attend the Centre for a two full days each week, in addition to a weekly two hour class, five evening advice sessions, and case related attendances at court or conferences: refer *Part 2.2.12* of the report.
- (ii) That students therefore receive six (6) credit points for completing the subject: refer *Part 2.2.12* of the report.
- C5.* That an introductory course be made a pre-requisite for commencement in the subject: refer *Parts 2.2.10; 2.2.12* of the report.

2.3.4 Relationship with the Law School

- D1.* That a Clinical Teaching Committee be established in its own right or as a sub-committee of the Curriculum and Teaching Committee: refer *Part 2.1.2* of the report.
- D2.* That the role of the director of the clinical program encompass assistance to teachers wishing to introduce elements of clinical teaching to their subjects: refer *Part 2.1.8* of the report.
- D3.* That plans and proposals for the relocation of the Law School, or for construction of a new Law School, consider the incorporation of the clinical subject into the physical structure of the Law School: refer *Part 2.1.2* of the report.
- D4.* That the lecturer responsible for the subject have an office in the Law School: refer *Part 2.1.2* of the report.
- D5.* (i) That the two employed solicitor/teachers be invited to join the teaching staff of the Law School as Visiting Fellows: refer *Part 2.1.7* of the report.
- (ii) That such an invitation to the people employed from time to time in those positions be the practice of the Law School: refer *Part 2.1.7* of the report.
- D6.* That the availability of current files at the Centre be promoted among Law School academic staff for purposes of providing assessable activities for students in other subjects: refer *Part 2.1.8* of the report.
- D7.* That consideration be given to the rotation of staff into the clinical program from time to time: refer *Part 2.1.8* of the report.