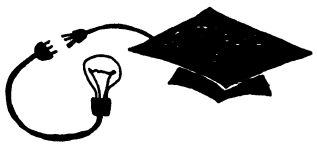
LEGAL EDUCATION

Planning a clinical legal education program: what are the issues?

Until recently only three Australian universities had clinical legal education programs based in community legal centres (CLCs): Monash, La Trobe and the University of New South Wales. With the plethora of new law schools across the country, there is renewed interest in clinical legal education and in particular establishing clinical programs within CLCs. When developing such a program it is important for all concerned to appreciate the different interests and aims which need to be accommodated.

The following discussion canvasses the issues and difficulties raised when seeking to satisfy an academic pursuit within a community service. There are many sites of potential conflict and tension. This tension can manifest itself in many practical issues. These issues are best settled in the process of formulating the legal education program. How these issues are resolved by the parties is usually reflected in the form and structure of the clinical legal education program eventually established. The style of program is often chosen to prevent or minimise problems from arising.



Overriding issues

The fundamental issue that needs to be addressed both individually and collectively by the university and the CLC is why embark on this course? What are the benefits of the program? What are the anticipated outcomes?

Each organisation will provide different responses to these questions. The aims of both parties are distinct although there may be some common objectives. The potential tension that could exist in a university-run clinical legal education program based in a CLC results from these differing aims: community service vs education of students. This translates into twin pressures: legal service practice vs student demand.

Different models of clinical legal education have developed with greater emphasis on one aim or the other. In particular, many of the programs currently operating in the United States focus exclusively on the education of the students. This is exemplified by the fact that they do not have 'live' clients.[1]

To minimise conflict there must clearly be agreement on the aims of the program, which can include both community service and education of the students, but these should be clearly stated.

Some practical examples of how this tension may manifest itself are:

- How do supervising solicitors reconcile their educational responsibility to the students with their professional responsibility to their clients?
- Do students deal with a volume of general cases (thus satisfying the community's demand) or do they work with only a small number of selected cases (enabling a more in-depth educational experience)?

The overriding practical issue for both the university and the CLC is, how much will a clinical legal education program cost to establish and run and who will pay for it? Clinical legal education is not cheap. It is resource intensive and not only in relation to staff.[2] There will be additional costs including the purchase of furniture, on-going costs of library, administrative support, telephone, mail etc. After the costs are calculated the issue remains: is the expenditure worth it and where will the funds come from?

Issues — the CLC perspective

For a CLC whose primary aim is community service, the types of issues raised in contemplating the involvement in a clinical legal education program are substantially different from those of the university. Clearly the issue of cost is a common interest for both. The issues of particular concern to the staff and management committee of a CLC include:

- Will a clinical legal education program substantially alter the aims and focus of the legal service? Will the focus be more on casework rather than law reform or community legal education?
- What sort of work will students do? Advice and referral only or will they have the conduct of files?
- Will the students reduce or increase the workload for current staff? Who will do the follow-up work generated by the students? Will it generate more casework? Who will meet the demand when the students are not there?
- Who will be responsible for the students and the work they do? How will they be supervised? Will the students be working within the legal practice of the legal centre? Consequently will the legal centre's supervising practitioner be the person ultimately responsible for the student work? If this person is not a university staff member, how will this arrangement work? Who will be responsible for professional indemnity insurance?
- How can the quality of service to the clients be guaranteed? Will the clients accept service from students?
- Where will the students sit/work?
- Will the volunteers be involved? How? If so how can you guarantee quality of teaching?

Issues — university perspective

The fundamental question for a tertiary institution embarking on establishing a clinical legal education program is why do it? Critics within academia will say that clinical legal education is only skills training and not academically rigorous, that universities are not vocational colleges and should not be involved in practical training. Over the last 20 years, experience and research at both Australian and North American universities has shown that pedagogically, clinical legal education has a valid role within the university setting.

Proponents of clinical legal education consider that it offers students opportunities and benefits different from those available in traditional university courses. Law in context takes on a new dimension. The students are able to reflect on their experience of legal practice, the legal profession and the values and dynamics of the legal system. A clinical program can address issues of public policy, law reform, social and moral questions and the provision of legal services in the public interest.[3] It

offers students the chance to integrate theoretical knowledge of law, based largely on appellate decisions learned in the classroom, with the everyday experience of legal practice and the legal system. Students discover that causes of action or remedies may not be available to a client for a variety of reasons including cost, delay, lack of evidence or enforceability.[4]

When support in principle is achieved there are many issues, both of a policy and practical nature, that need to be addressed by those establishing a clinical legal education program including:

- What control will the university have over the running of the course? What control will the university have over what goes on at the legal service? Should the university be represented on the Management Committee? What other mechanisms should be established to facilitate communication between the organisations?
- How can the university be assured of the quality of education conducted in the course? How can the educational experience of the students be guaranteed? If the students are to be supervised by non-academic staff, what control/accountability will there be for these staff? Would these staff undergo some training?
- How will students be assessed? Will the assessment requirements have to meet university and/or faculty requirements? Will non-academic staff have a say in the students assessment?
- How does this course fit into the curriculum? Will students receive additional credit because the subject is more time consuming? Do students undertake other subjects at the same time? Will there be any prerequisites? How will it fit into the timetable? Will it run over summer?
- What does it mean for staff involved? Are they seen as second class academics? Will they have the same status as 'normal academics'? How will full-time staff in the course get time to do research and writing? Will staff involved in course enjoy normal academic working conditions or have to spend 48 weeks supervising etc? Who will teach it over summer?

Conclusion

Clearly there will be specific issues arising from each new proposal to establish of a clinical legal education program. The aim of the above is to provide a starting point for discussion by highlighting the most obvious concerns.

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References

1. Two comprehensive surveys of relevant literature and discussion of issues are contained in: Evans, Adrian, 'Survey of International Trends in Clinical Legal Education and their Relevance to Australia', Report to the Dean, Faculty of Law, Monash University, February 1992; Rice Simon, 'Review of the Clinical Legal Education Program in the Law Faculty of the University of New South Wales', Final Report, June 1991.
2. The Australian Law Deans have resolved that the staff:student ratio in clinical legal education should be 1:8.
3. Rice, above, p.30.
4. Campbell Susuan, 'Blueprint for a Clinical Program', 1991 p.3.

Law reform column continued . . .

6. Statement of Principles and Objectives for Competition Policy and Utilities Reform, April 1994, Australian Federation of Consumer Organisations, Australian Council Of Social Service, Greenpeace, Australian Conservation Foundation, Australian Consumers' Association, New South Wales Council of Social Service, Consumer Law Centre Victoria, Public Interest Advocacy Centre, Consumer Credit Legal Service (Victoria), Consumer Credit Legal Centre (NSW), Communications Law Centre, Consumers Telecommunications Network.
7. See for example 'Consumer Utility Boards' paper presented by Dusanka Sabic at the Trade Practices Commission Conference *Consumers and the Reform of Australia's Utilities: Passing on the Benefits,* March 1994.

Review of Litigation Costs Rules

The Australian Law Reform Commission (ALRC) has been asked to consider whether any changes should be made to how costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction.

The costs rules are the laws and practices that determine how courts and tribunals apportion the costs of the parties that appear before them. In Australia the general rule is that the loser pays the winner's costs in addition to his or her own costs (the costs indemnity rule). This rule does not apply in all jurisdictions. For example, different costs rules apply in prosecutions and family law proceedings.

There is debate about how the costs indemnity rule and other costs rules affect access to the legal system and how litigation is conducted. For example, the extent to which the costs indemnity rule compensates the winner, deters 'unmeritorious' litigation and encourages settlement is not clear. The ALRC will examine the effects of the costs rules and of possible reforms in light of what the rules should achieve and the context in which they operate.

The ALRC will be considering a number of alternatives to the rule, including:

- that parties bear their own costs either generally or subject to certain exceptions;
- costs rules that allow only one party to recover his or her costs if successful (one-way fee shifting); and
- special costs rules for certain areas of litigation, such as an immunity from an adverse costs order for applicants in public interest cases.

The ALRC will also be looking at reforms that may alter the impact of the costs indemnity rule such as extending the use of indemnities against adverse costs orders.

An Issues Paper is available from the ALRC free of charge (tel 02 284 6325). Written and oral submissions are welcome. Consultations and hearings will be conducted in early 1995. The final date for written submissions is 17 March 1995 and the ALRC's final report is due on 30 September 1995. For further information contact Philip Kellow on 02 284 6314.

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