GLOBAL AGENDAS, CULTURAL CAPITAL AND SELF-ASSESSMENT OF CLINICAL LEGAL EDUCATION PROGRAMS

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I INTRODUCTION

Modern clinical legal education programs are rich in their diversity and ambition, so much so that it is often difficult to decide if a self-described clinical program meets the description of 'clinic' or is in reality something less than that, seeking to achieve academic acceptance without investing in faculty understanding of clinical pedagogy or the money needed to provide reasonable personnel and physical infrastructure. In most countries, there has been little effort to establish standards for clinical legal education through accreditation bodies. Given the dearth of national direction, most law school deans simply decide to let the description and definition issue remain obscure. They do so for many reasons: because national legal education system bureaucrats imperfectly understand or recognise clinical methods; because students' consistent requests for more experiential legal education are muted and respectful; because traditionally-educated legal academics are wary of bringing practice-related content into their doctrinal classes; because doctrinal content is relatively cheap to teach compared to clinical methods; and finally, because finding a definition for 'clinic' and then acting on it is not required in any international accreditation context and rarely in a national context.

Local systems' recognition of clinical method and pedagogy is slowly changing, especially in North America,[1] and the issue of international clinical accreditation will become important in this decade as bodies such as the International Association of Law Schools and the Global Alliance for Justice Education begin to think about comparative standards for law schools and justice education.

There is a wide geo-political context to the movement towards national standards in legal education that may soon assert pressure for international standards. The frustrated UN effort to improve global living standards[2] in the context of

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1 Two major and complementary US reports have galvanised US law schools' willingness to implement major curriculum changes in favour of clinical methods in the last 5 years. See William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) ('*Carnegie Report*'); Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Roadmap* (Clinical Legal Education Association, 2007).

2 See, eg, United Nations, *The Millennium Development Goals Report* (June 2011) <http://www.un.org/millenniumgoals/reports.shtml>.

over-population,[3] increasing carbon emissions,[4] declining natural resources and increasing species' extinction rates[5] has certainly focused attention on primary and manufacturing industries' practices, but very few tertiary or service sectors have been called upon so far to make a tangible difference to these mammoth problems.

Educational recognition of the scale of the challenges, where it has occurred at all, has been primitive rather than sophisticated, in the sense that the debate about all these issues is output-centred — for example, on reducing emissions — rather than input-aware. Little serious attention has yet been given to the effect *education* has on the priorities of the professionals who engineer and manage the policies that produce our global danger zones, and the regulators of these sectors are even less concerned with how their lawyers, accountants, financial planners and bankers choose to behave in these contexts. Even the 2008–09 Global Financial Crisis ('GFC'), partially credited to the technical experimentation of a few so-called banking professionals, their lawyers and their attendant lax regulation,[6] has led to output-based re-regulation rather than input-aware re-education.

There has been little real pressure on the key finance-related professions or on their respective tertiary education systems to make a 'justice-presence' felt, or to formally harness the effort of either sector in the interests of international contributions to these mammoth resource allocation problems. In the case of law schools, the issues seem rather stark. As a vast but I hope not too facile generalisation,[7] most law schools allocate disproportionally huge resources to graduating more commercial and corporate lawyers with similar priorities to those of the GFC progenitors and global industrial polluters. The notion that law schools ought to nurture justice-artificers as *the* global legal education priority is seen as too strong: it rings out the fear of socialism among first-world legal professions, but the global need for this type of lawyer will become socially more important nevertheless.

3 World population is estimated to have reached 7 billion on 11 July 2011: 7 Billion Actions <http://www.7billionactions.org>.

4 The Intergovernmental Panel on Climate Change <http://www.ipcc.ch> catalogues the relevant science.

5 The World Wide Fund for Nature publicises its overview of threatened and endangered species: WWF Global <http://wwf.panda.org/about_our_earth/species/problems>.

6 See, eg, the response of the accounting profession: International Federation of Accountants <http://ifac.org/financial-crisis>. See also Akira Kawamura, 'Trade in Legal Services and the Global Legal Profession' (Speech delivered at The Harvard Law School Conference on the Global Legal Profession, Harvard Law School, 12 April 2012) 3.

7 Many technically superior and sought-after law schools would strongly protest that their graduates are as concerned for justice as for their own wealth creation, but well-regarded reports such as the *Carnegie Report* acknowledge that the clear aim of US law schools (and law schools the world over, for that matter) is the same as in any professional education environment: development of 'specialized knowledge and professional identity': Sullivan et al, above n 1, 3. In earlier decades, the Critical Legal Studies movement advanced similar arguments. See, eg, Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591. There are also many other law schools the world over with national and international reputations which strive to produce lawyers who are aware of the socio-political challenges facing the planet and its species, but few if any, including every Australian law school, could or would claim convincingly to prioritise the placement of their graduates in careers that emphasise justice and the sharing of wealth, at the expense of those that promise financially lucrative careers.

In this article an effort is made to explore exactly what law schools could do, if they also thought that there is little time to waste, in adopting and resourcing real justice education priorities within clinics. Curriculum reviews will no doubt raise many other possibilities, but if a dean decides to go down this path with some rigour, then clinics and definitions of clinics have an important and leading role in this task. And if some deans have an eye to longer-term international accreditation, then they might wish to consider if future law curricula should prioritise courses that value wealth distribution rather than mere wealth creation and sustainable development over other understandings of property rights? In that event, clinical program directors will also need to look to achieve quite a lot over the next five years if they are to be ready for internationally credible processes and standards.

This article proceeds in six parts. Part II discusses why self-assessment of clinical programs is necessary in the above context. Part III deals with the relationship of pro bono and externship concepts to clinical pedagogy and assessment. Part IV discusses the social capital of the legal profession and its connection to clinical programs. Part V describes the political and economic contexts for clinical program assessment. Part VI enumerates some of the major debates which will arise in relation to the likely criteria for self-assessment of clinical programs: that is, relevant curriculum theory; program 'effectiveness'; supervision standards; student assessment; connection to the whole of legal education; clinician selection, training, monitoring and retention; and finally documentation. Part VII concludes the article by tabulating suggested criteria for self-assessment and assigning a numerical weighting to each criteria. These weightings are intended to provoke a discussion not just as to the usefulness of individual criteria, but also as to the degree to which variations within each criterion might indicate greater or lesser commitment to clinical legal education.

II SELF-ASSESSMENT, NOT PROSCRIPTION

There is a need for self-assessment by clinical programs and law schools, if clinical legal education is to continue to develop and play a role in strengthening legal educational and hence lawyers' contributions to major planetary problems. But this effort must be clear about what may or may not be properly called a clinic or clinical experience. While I address that effort more specifically in Part VI of this article, some background is necessary.

The need for a prescriptive effort is deliberate. Encouragement of change and development in clinical pedagogy may occasionally be better assisted by slight provocation than dispassionate observation. In that vein, there is also a sociological context that deserves early attention. As the clinical 'label' steadily builds educational esteem for its capacity to compel student engagement and deliver meaningful experiential and workplace learning, so also does it seem to attract some law schools to that label with insufficient regard to the required resources. In Australia, for example, some law schools seem happy to initiate

programs which provide no more than some practical legal training at best or at worst, mere observation and assistance to lawyers at community law centres and other placement sites. In other words, the emphasis is on some exposure to the practice of law but with insufficient emphasis on student learning. These programs are often listed in publications or reports that involve discussion of clinical methods or clinical programs, but the label is used rather loosely. It is as though listing allows some programs to achieve some measure of de facto clinical status and therefore to gain credence.

Consider for example, the listing published by the University of New South Wales, through its clinical arm, Kingsford Legal Centre, which publishes a thorough biannual guide to asserted clinical programs. Perusing this online guide is instructive. Of the 20 or so law schools with programs that have sought listing, perhaps half would have only a limited claim to a clinical appellation, with a great variety of conclusions open as to who's who and who's not.[8] For example, Flinders University appears to place more emphasis on the diversity and desirability of student placements than student learning;[9] the University of Notre Dame does not reassure readers that students enrolled in its 'Law in Context' unit are supervised in their placements according to reflective clinical practices;[10] and the University of Queensland describes its pro bono centre as responsible for its clinical legal education program.[11] Even established, putative clinical programs such as that operated by Monash University do not think it essential to demonstrate how each of their advanced clinics goes much beyond client service objectives.[12]

Despite clinicians' success in promoting 'good' clinical practice, that achievement can be undone easily enough if the corresponding readiness of others to apply the term 'clinic' to what is only work experience is allowed to gather momentum. To draw a longish bow by way of analogy: just as a nation's currency is devalued if it acquires too much sovereign debt, the reputation of legal education as a whole suffers where clinical nomenclature is loosely applied to programs that stretch the bounds of clinical description. For example, when any period of time in workplace experience, the equivalent of a summer clerkship experience or part-time law firm work during the school year, is called 'clinical' then well-structured law school in-house clinics and externship courses are devalued. The result will eventually be a loss of confidence in the overall capacity of clinical method and the law schools which champion it, regardless of the views of those deans who think clinic is superlative and an essential tool of the comprehensive law school.

One way to arrest that tendency and to prevent such a decline is to argue for a definitional imperative, even if the process involves a self-fulfilling effort to pull

8 See Kingsford Legal Service, *Clinical Legal Education Guide: Your Guide to CLE Courses Offered by Australian Universities in 2009 and 2010* (June 2009) University of New South Wales <http://www.law.unsw.edu.au/sites/klc.unsw.edu.au/files/doc/CLE_GUIDE_09_10.pdf>.

9 Ibid 11.

10 Ibid 35.

11 Ibid 36.

12 Ibid 21.

up clinical method by its bootstraps. This approach is partially self-serving, but it builds what might be called 'social capital' for clinical method along the way.

III CLINICAL PURPOSES v OTHER WORKPLACE EXPERIENCES

Understanding exactly what a clinical program is and what it is not is important to deciding what is properly assessable and what is not. If clinics can be described generally as supervised experiential encounters between clients and their legal advisors, in the interests of just case outcomes, the processes of law reform and political renewal, then it is likely that the pro bono placement program for students is not such a program. However, the externship is in an intermediate category: externships are sometimes no more than pro bono placements, but in many cases have all or most of the characteristics of a live-client, in-house program. If they fall into the latter category, then they are arguably within the clinical camp and deserve consideration as part of any self-assessment process.

A *Pro Bono Placements*

In the United States, American Bar Association Accreditation Standards require 'substantial opportunities for student participation in pro bono activities.'[13] In Australia, law deans have commenced a long-term effort to develop accreditation standards for law schools generally and the early stages of that initiative specifically encourage law schools to implement *pro bono publico* and clinical programs.[14] But it is important to distinguish here between clinical courses and pro bono opportunities, because it is probable that major advances to justice and law reform will not occur as a result of pro bono placement programs. Students' pro bono placements require relatively few resources and have a limited though entirely worthy aim of assisting deserving clients. Such placements have only secondary educational objectives compared to clinics,[15] do not generally seek to develop future lawyers' normative awareness and do not set out to strengthen wider legal education or law reform curricula, although both can awaken and sustain graduates' civic consciousness once they enter private or government practice. However, there is a risk that, because such awakenings represent a deep community resource of low or no-cost legal know-how that is still underutilised,

13 American Bar Association: Section of Legal Education and Admissions to the Bar, *2012–2013 ABA Standards and Rules of Procedure for Approval of Law Schools* (2012), 21 (Standard 302(b)(2), as explained by interpretation 302-10) <http://www.americanbar.org/groups/legal_education/resources/standards.html>.

14 See Council of Australian Law Deans, *The CALD Standards for Australian Law Schools* (November 2009) 3 (para 2.2.4) < http://www.cald.asn.au/resources>. Note also that the law school accreditation initiative of CALD, while likely to take some years, will necessarily involve quality assurance processes in a range of key law school programs, including clinics.

15 Les A McCrimmon, 'Managing a Culture of Service: Pro Bono in the Law School Curriculum' (2003–04) 14(1) *Legal Education Review* 53, 57.

pro bono and clinical experience can be conflated in public discourse and the distinction between them inadvertently and inappropriately blurred.

The former Director of the Law Discipline Based Initiative for the former Australian Learning and Teaching Council ('ALTC'), Professor Gary Davis, has inaccurately (though benevolently) characterised clinical programs as essentially high-end pro bono experiences.[16] But he also warned against inadequate structuring and weakness in assessment methods in either approach, factors which distinguish effective clinics from pro bono.

Furthermore, asserted clinical programs that exhibit a default concentration on apparently value-neutral practical skills training, with lip service to developing a critical and analytical (normative) consciousness of the social policy behind law, or do not employ sufficient clinical supervisors with those analytical qualities for enrolled student numbers, are also unlikely to encourage in their students a greater respect for the complexity of substantive law subjects and the transformative potential of legal education. It is worth observing that Professor Davis points to provision of adequate funding and identification of effective supervisory and assessment practices as the remedies.[17]

Since clinics and pro bono placements have different but compatible and worthwhile purposes, there is no suggestion that pro bono placements ought to be discontinued. The question is rather one of integration of clinics with a myriad of related pro bono initiatives. It is likely that a progressive, sequential relationship between clinics and pro bono placements constitute a wider, effective experiential approach without limiting student learning; similarly when they operate in parallel to one another within the same law school, provided they are not held up as serving substantially similar purposes.

B *Externships*

Properly structured, externships are no more or less than externally located live-client clinics.[18] If their focus is at least equally on the essential qualities of in-depth student learning, then they ought to be considered as a part of clinical method

16 See Gary Davis and Susanne Owen, *Project Final Report: Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment* (2009) Council of Australian Law Deans <http://www.cald.asn.au/docs/altc_LawReport.pdf>. See also ALTC Learning and Teaching Academic Standards: Law <http://www.olt.gov.au/resources?text=Law>, which detail the related Threshold Learning Outcomes ('TLOs') for Law. Professor Gary Davis, then of Flinders University, was a member of a reference group for the major ALTC project which has investigated the feasibility of prescribing Australian standards or best practices for clinical legal education. See 'Strengthening Australian Legal Education by Integrating Clinical Experiences: Identifying and Supporting Effective Practices', Priority Project 10-1603 (26 July 2011) <http://www.olt.gov.au/project-strengthening-australian-legal-ed-clinical-experiences-monash-2010>.

17 See comment by Gary Davis in 'Strengthening Australian Legal Education by Integrating Clinical Experiences', above n 16.

18 For example, the general practice and advanced clinics located at Springvale Monash Legal Service in suburban Melbourne are externships of the Monash Law School. See Kerry Greenwood, *It Seemed Like a Good Idea at the Time: A History of the Springvale Legal Service 1973–1993* (Springvale Legal Service, 1994).

and considered within a self-assessment process. Virtual (or online) clinics can fall into the same description. Providing law school control and supervision are adequate, their geography and the locus of their client advice and representation are often irrelevant. At the apogee of asserted clinical method — in terms of the most effective legal education outcomes obtainable — is a continuum of workplace experience throughout the academic phase of legal education,[19] as follows:

Observation and simulation in early years of law school →	Periodic doctrinal, normative, and reflective subjects that use case studies from the clinics & law firms →	Live-client general practice clinics, whether in-house or operated as externships →	Concluding with advanced live-client clinics, whether in-house or externship.

If the asserted clinical program is primarily for the purpose of student observation and provision of student assistance to admitted lawyers, then it is not clinical. If the externship experience is under the effective control of the law school and entrusts students with supervised case-handling involving a high degree of autonomy and normalised face-to-face client contact, then it is clinical in nature.

IV THE SOCIAL CAPITAL OF THE LEGAL PROFESSION AND ITS CONNECTION TO CLINICAL METHOD

While the grasp of lawyers on the 'knowledge turf' might have been enough for their professional validity in less critical times, it is now socially necessary for lawyers to also hold somewhat more of the moral high ground as well. Consider the idea of a service obligation, which for the legal profession as a whole, is progressively dissipating under the cultural weight of international mega-firms in their quest for partners' earnings. Even those law students who have no realistic hope of working for such firms aspire to these firms' expressed values — 'commercially aware and overwhelmingly client-focused' — and in the process, they are constantly conditioned to place earnings before morality. The fact that there are always significant and newsworthy exceptions to this reality does not deny it. As successive waves of commercially focused graduates join the sector, the biggest firms are forced to build 'reputation management' into their overall risk assessments, in order even to attract and retain professional indemnity insurance cover.[20]

19 In the manner of the University of Newcastle Law School in Australia and the Northumbria Law School in Newcastle-upon-Tyne, United Kingdom.

20 See, eg, Susan Saab Fortney, 'Legal Malpractice Insurance: Surviving the Perfect Storm' (2004) 28 *Journal of the Legal Profession* 41 and more generally, Susan S Fortney and Vincent R Johnson, *Legal Malpractice Law: Problems and Prevention* (Thomson-West, 2007).

Increasingly, the social esteem of lawyers is waning in proportion to the increase in their earning capacity. So there is now a need for the worldwide profession to entrench a new type of social esteem (or capital) — in other words, the ability to crystallise integrity and altruism in a variety of measures — not just to retain their insurance cover, but to preserve their traditional professional elitism and, critically, to help to maintain some social order per se.[21] But the profession does not seem to understand the urgency of this sort of assessment, even though there is little time to lose. Accordingly, it may be the task of law schools and of their most innovative and socially responsible arm — their clinics — to further develop the tools and reach of clinical method to the point where new lawyers can rediscover the importance of integrity, service and the social obligations of legal practice.

By analogy, it is worth briefly examining the development of the concept of lawyers' 'professionalism' for the insight which that history offers in efforts that might now be commenced to strengthen and 'assess' the concept of clinical method.

For present purposes, this history commenced earlier last century. Observers of the professions had for many years noted internal struggles between wealth creation and professional service as motivating forces, but largely acquiesced in the conflict. In 1939, Talcott Parsons[22] was happy to link capitalism, the certainty of the Rule of Law and all the professions as a mutually admirable club of like interests. But by 1960 William Goode[23] had taken a tougher view and argued that the specialised study of an abstract discipline, when combined with a service orientation or 'collegiality', identified the professional. Goode thought there were certain consequential features which resulted from professional status, particularly higher standards of behavior than were legally required.[24]

In Australia, several commentators[25] were clear that a professional culture — that is, benign attitudes, values, beliefs, skills, knowledge and behaviors — dictated 'a belief in the essential worth of the service that the professional group extends

21 John Western, Toni Makkai and Kristin Natalier, 'Professions and the Public Good' (2001) 19 *Law in Context* 21. The authors point out that, according to Australian Bureau of Statistics figures (1995), professions number 14 per cent of the Australian workforce compared with 9.5 per cent in 1965, but mere numbers are not enough. Service to the community may not just be an altruistic option. Western considers that lawyers' community service is an essential reality because of the crucial role they play in the justice system, so that the shaky 'rule of law' might not be even further degraded.

22 Talcott Parsons, *Essays in Sociological Theory* (Free Press, 1954) ch XVIII.

23 William J Goode, 'Encroachment, Charlatanism and the Emerging Professions: Psychology, Sociology and Medicine' (1960) 25 *American Sociological Review* 902.

24 Ibid. Goode argued that certain features, more characteristic of professions as compared with other occupations, flow from this. These features are: self-governance of education and training; students are socialised at a profound level; legal recognition via licensure is common; licensing is effectively controlled by members; most legislation concerning the profession is shaped by same; the occupation commands higher calibre students; income and status; relative absence of lay scrutiny; practice norms are more stringent than legal controls; members identify significantly with their profession and membership is more likely to be lifelong.

25 See, eg, Western, Makkai and Natalier, above n 21. Another commentator, Bruce Kimball, states that there were four professions by the 18th and 19th centuries: theology, medicine, education and law. See Bruce A Kimball, *The 'True Professional Ideal' in America: A History* (Blackwell, 1992) 6.

to the community.'[26] Such a pro-community priority has never died out, even when Magali Larson insisted in 1977 that 'professionalization' was no more than provider control of services in the financial interests of the provider only, preferably through a monopoly.[27]

Other commentators have taken professionalism analyses even further by observing that in all successful professions the embrace of change, rather than an emphasis upon increasing incomes, is a key factor in that success. Andrew Abbott, for example, has argued that the ability of each profession to effectively adapt its environment by a process of 'knowledge abstraction' (which redefines problems and tasks in abstract form, so that it conceptually moves ahead of its competitors) 'enables survival in the competitive system of professions.'[28] In other words, the *refinement* of expert knowledge down to its abstract essentials (not just its functional specialisation), allows re-packaging to meet new social conditions and expectations. If this is so, then these expectations might include a radical repackaging to re-emphasise a legal community obligation beyond what the pro bono movement has achieved.

According to Ingólfur Jóhannesson, who argues that 'Abbott … [has recognised that] professionalization processes might change with time; [but the professions] tend not to see the history of themselves as theoretical discourse',[29] there is strong support from Pierre Bourdieu that those professions who do *not* assume they are 'safe' are those which will survive the process of social competition. Bourdieu's

> theories of professionalism … [suggest that] professionalism is 'a folk concept that has been smuggled into scientific language …'[30] The concept has become 'real' as it 'grasps at once a mental category and a social category, socially produced only by superseding all kinds of economic, social, and ethnic differences and contradictions which make the "profession" of "lawyer," for instance, a space of competition and struggle'.[31]

26 Kimball, above n 25, 25. It must be stated that 'the worth of a service provided to the community' is no more than a culturally relative assertion. Though this illustration is macabre, consider for example the activities of inquisitors and interrogators who conscientiously torture as a part of service to dominant religious norms. However, to be fair, Western always places service in the context of other 'fundamentals that guide professional work':

> to reiterate, they are the view that professionals provide an important service to individuals/ and or the wider community, that a body of esoteric knowledge underlies the delivery of professional services, that autonomy is essential to the performance of professional work, and that material and psychological rewards flow from a combination of these.

See John Western et al, 'Characteristics and Benefits of Professional Work' (2006) 42(2) *Journal of Sociology* 165, 181.

27 Magali S Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977).

28 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* **(**University of Chicago Press, 1988) 8–9. Abbott defines professions loosely as 'exclusive occupational groups applying somewhat abstract knowledge to particular cases'.

29 Ingólfur Ásgeir Jóhannesson, 'Teachers Work and Theories of Professionalism: Conceptualizing a New Approach' (Presentation at the Annual Convention of the American Educational Research Association, New York, 8–12 April, 1996) < http://www.ismennt.is/not/ingo/TEAWORK.HTM>.

30 Ibid.

31 Ibid.

Pierre Bourdieu suggests we look at professions and 'professional' and expert work as a 'structured space of social forces and struggles',[32] a social field in which there is a competition for what counts as capital, or in other words where labour must be converted into 'symbolic capital'[33] if it hopes to become expert and allow its professionalised form to survive.

Accordingly, sociological thought about the professions identifies the notion of economic power available from further abstract conceptualisation of professional work as critical to professional survival and occasionally dominance. So far as the legal profession is concerned, the new or emerging abstract factor in lawyers' continued occupational success could well be a wider concept of ethics than has been accepted to date. It is axiomatic that external criticism of ethical function and a lack of social responsibility[34] are on greater display among post-modern lawyers.

If the sociological emphasis on the adaptation and refinement of abstract knowledge as a descriptor of successful professionalism is correct — and it is quite plausible — then the ability of lawyers to respond to criticism of their behaviour by acceptance of serious social and ethical accountability, ought not to be impossible. And in that response, the importance of clinical method may be pivotal because it motivates new lawyers to take their social responsibilities seriously. In this context, the elevation of clinical method inside law curricula, with its attendant emphases on developing normative awareness and accountability in future professionals, is a process of developing such shortly-to-be-required social capital.

In this article, such 'normative awareness' refers to the ability of a law student to articulate differing policy positions about contentious social and legal issues and

32 Ibid.

33 Abbott, above n 28, owed much here to Pierre Bourdieu's insights in *Homo Academicus* (Peter Collier trans, Stanford University Press, 1988). Bourdieu's 'symbolic capital' tool has been very influential. Arnold and Kay suggest, for example, that small law firms are structures which reduce the 'social capital' of the legal profession, as compared with large law firms, because they tend to exhibit characteristics such as self-employment (less external scrutiny), personal operation of trust accounts (less accounting expertise and more thefts) and the availability of fewer ethical mentors (more conduct complaints). See Bruce Arnold and Fiona M Kay, 'Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organisation of Law Practice and Professional Self-Regulation' [1995] *International Journal of the Sociology of Law* 321. Jóhannesson, above n 29, also cites Abbott as in strong support of the scientific impact on professional roles:

> Expert action without formalization is perceived as craft knowledge, not professional knowledge. Therefore professions need to formalize so that their members do not appear unprofessional. Formalization also helps to make the abstractions durable. … Science has become the fundamental ground for legitimizing professions and professional work. Bledstein (1976) has identified the move from a reliance on the character of the professional to a reliance on science. Science stands for logic and rigor in diagnosis, and it 'implies extensive academic research, based on the highest standards of rationality'. Thus, scientific knowledge has replaced mystical codes as a legitimizing theme.

See Abbott, above n 28, 103, 189.

34 Nicolson and Webb, who have agonised more than most about professionalism, comment that there is a need to consider how 'to counter the process of demotivation and disaffection … and how we motivate lawyers to behave professionally'. Donald Nicolson and Julian Webb, 'Editorial: Public Rules and Private Values: Fractured Professional(isms) and Institutional Ethics' [2005] *International Journal of the Legal Profession* 165, 169.

to determine and argue for a position of their own from that perspective. In highly simplified terms, a student with a normative position will regard the social and political contexts of a law as influential in determining its legitimacy, as opposed to the student with a positivist perspective, who tends to rely far more on the authority of the law giver as providing most if not all of its necessary justification.[35] The practice environment is ideal for encouraging the debates among students as to these often passionate differences in self-understanding, and such personal 'capital-raising' is logically a consequence of lawyers' formative experiences; a process which is directly and powerfully affected by clinical method. Hence the importance of continuous improvement in teaching, ideally through the self-assessment of clinical programs, methods and practices.

V CONTEXTS OF SELF-ASSESSMENT

Self-assessment by clinical program directors of their own standards will help both clinics and clinical teachers to contribute not just to the social re-capitalisation of the legal profession in the sense described above (by contributing to re-invigorated law curricula) but more immediately, to prepare for national and then international accreditation of law courses and law schools.

Most clinicians know that in well-regarded clinical courses, participating students acquire unparalleled additional technical capacities and ethically sensitive, pro-community attitudes, as well as an ability to think critically about the law, justice and the legal system, particularly from the perspective of disadvantaged clients. But most 'conventional' law academics do not know this or comprehend the detail behind these asserted outcomes. Consequently, neither wider academia nor the majority of deans, even those with explicit social consciences, are attuned to promoting clinical method *internally* as a tool to renew law curricula for the better. It is likely to be very much up to the clinicians and clinical directors in particular, to take the initiative and haul their clinical course profile up by its own bootstraps, if they and their courses are to be socially transformative and prepared for international accreditation.

There is an additional, sobering context for clinical directors to keep in mind. As the percentage of national resources available for legal education declines even further over the next decade, in consequence of perceived higher national priorities such as natural resource security, terrorism prevention, emissions trading and adequate health systems, the pressure on all universities and in turn, law schools to wring productivity gains from all program divisions will increase. Those law schools that can charge higher fees because of their market position will do well and those that are politically restricted in doing so will suffer in comparison. But even those law schools that are privately funded and are reasonably wealthy will be under institutional pressure to cross-subsidise other disciplines within

35 See, eg, the discussion on 'Right Action' at ethics, Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (Cambridge University Press, 2nd ed, 1999) 286–7.

their wider structures. There may be less money around for the majority of law schools than has historically been the case. Clinical programs have never been inexpensive because of their high staff-student ratio and their attractiveness to deans will always be conditional on adequate resourcing: consequently, clinical directors will rarely be showered with funds to improve legal education. The profession is increasingly less inclined to contribute to the education of future lawyers and, if all this is true, then there will be greater internal competition within law schools for available resources than has occurred to date.

Clinical directors know that when funding is the issue, there is frequently a complaint among non-clinical peers as to the 'worth' of the clinics,[36] leading to euphemistic 'reviews'[37] and political struggles in which the fallout is measured in declining staff morale and the departure of valued teachers, whoever 'wins'. The opportunity therefore for clinical programs to pre-emptively self-assess themselves according to reasonable criteria not only helps to keep staff confident that their program is moving forward, but also serves to reduce their vulnerability to these inevitable and periodic attempts in 'corner' protection.

Clinical self-assessment is however not straight forward. A clinical director cannot simply impose particular standards for criteria on their clinical programs and expect the process to be useful or credible among employed clinicians and students. 'Bottom-up' standards discussion and development is essential in clinics because *the process* of developing and agreeing on suitable measures of effectiveness is important to retention of staff and their engagement with the whole ethos of self-assessment.

Nevertheless, there are some fairly obvious potential criteria that a clinical director might suggest to their staff as suitable for a self-assessment exercise. These criteria cover the obvious agendas such as the requirements for good supervision, but they should begin with an examination of the bases for doing what clinics do, that is, with curriculum theory.

VI POTENTIAL SELF-ASSESSMENT CRITERIA

The following suggestions for particular standards and indicators are designed for self-assessment purposes only. Some readers may view them to be better suited to a Commonwealth rather than a North American socio-legal environment. Still others may criticise them as too specific or too culturally bound to a particular world view of law and legal process. However, I offer them as examples and emphasise that local adaptation would minimise those apparent shortcomings. I believe that any worthwhile effort at creating standards must take into account local norms.

36 See generally J P Ogilvy, with Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography* (2005) UK Centre for Legal Education, 13 <http://faculty.cua.edu/ogilvy/Biblio05clr.htm>.

37 See the discussion in Adrian Evans and Ross Hyams, 'Independent Evaluations of Clinical Legal Education Programs: Appropriate Objectives and Processes in an Australian Setting' (2008) 17(1) *Griffith Law Review* 52.

A *Curriculum Theory*

Within wider education discourse, there is a vast literature about the various bases that may be used to justify clinical method as a transformative technique within legal education. The question here is: what is a 'clinical program'? Clinicians will need to be explicit about which curriculum theory base or bases their programs adhere to in any quest for excellence or effectiveness, because excellence or effectiveness per se are not concepts that have any meaning except in the context of underlying educational values and objectives. It is therefore very important that a clinical program's specific curriculum theory — or values and objectives behind what is guided and learned in each program[38] — is understood and agreed by the teachers involved.

There are many value choices which to some extent compete for attention, for example, clinical experience might be said to exhibit a *Dewey* curriculum theory concern to produce graduates who can deal effectively with the modern world, but it might also be *social meliorist* in its focus on social justice and strongly *developmental or constructive* —'maximising potential' — in its concentration on uncovering and then strengthening future lawyers' emotional awareness and behavioural qualities.[39] It is also arguably vocational or professional (*instrumental*) because of its context, but is only ever likely to be truly effective if its academic (or *expressive*) dimensions are evident through constant connection to the substantial or 'black-letter law' curriculum. Finally, while there is something of the *master/student induction* theory[40] within the early stages of a clinical experience (something which is typically and ironically seen later on in the 'competencies' focus of *post*-graduate legal education), this *induction* framework rapidly recedes in the best clinical programs as law students' confidence in their own abilities grows and the lines blur between who is teaching and who is learning.

Different programs will seek to give priority to different theories and not all clinicians agree as to which should dominate and which are relatively insignificant in their structures. But it is important that the more *in*experienced a student is, the more necessary that there be closer supervisory oversight: that is, the degree of student autonomy given should be earned and progressive.[41]

38 It is not easy to define the concept of curriculum theory, except in a bland manner such as 'the theory of developing learning', or similar phrases. But it does seem to be central to the idea of curriculum theory that curriculum involves clarity about educational objectives and a willingness to be detailed in planning to achieve them. In this sense a theory without a plan for implementation is not very useful. See Mark K Smith, *Curriculum Theory and Practice* (2000) The Encyclopaedia of Informal Education <http://www.infed.org/biblio/b-curric.htm>.

39 Herbert M Kliebard, *The Struggle for the American Curriculum 1893–1958* (Routledge-Falmer, 1987); Michael Schiro, *Curriculum Theory: Conflicting Visions and Enduring Concerns* (Sage Publications, 2008). Note that the process of strengthening students' emotional awareness is not intended to be the same thing as promoting their normative awareness. Emotional awareness refers to an individual student's awareness of their own and others' feelings, not whether they can articulate differing policy positions about contentious social and legal issues.

40 James S Atherton, *Teaching and Learning; Curriculum* (2011) <http://www.learningandteaching.info/teaching/curriculum.htm>.

41 Email comment from Roy Stuckey to Adrian Evans, September 2011.

Possible Self-Assessment Indicator for Curriculum Theory: The first self-assessment criterion or indicator might therefore be whether there is an explicit and, if so agreed, base in curriculum theory to the program, and if so, is that base appropriate to current operations and projected objectives? It is not essential that there be only one agreed base theory as between a group of clinical teachers and often there will be several across the group, but if there is more than one theory shared by the group, it is not best practice to be in the dark about convergence or divergence and to merely hope that they are consistent with one another. It is also possible, though difficult in practice, for a group of clinicians working in the one program to be openly in disagreement about clinical curriculum theories, providing they can do so respectfully and can find a way to articulate their differences in front of their students that empowers rather than confuses or frustrates all involved.[42]

At this juncture, it's also important to appreciate that curriculum theories can be different to specific educational objectives. For example, a *developmental* approach within a clinic does not necessarily ensure that a graduate will be able to competently represent their clients in court by the time they leave the clinic, even if the ability to handle such appearances is an explicit objective of the program. When these questions are asked, it is possible to know what *is* the clinical program in each institution with some confidence.

B *Effectiveness of the Clinical Program*

Following on from the above discussion about values, a self-assessor might ask whether their own program offers an effective 'clinical experience' to students. Defining 'effectiveness' is the key problem here. There are many variations on clinical experience and most clinicians would consider their own offerings to be effective in achieving their objectives. But assessing effectiveness must include asking whether the projected program objectives are appropriate or whether a program achieves what it sets out to do.[43] And so the term 'effective' will often allow for a degree of achievement or involve a relative quality, although that does not mean that there are no irreducible minimum standards of the sort reflected in both the *Carnegie Report*[44] and the *Clinical Legal Education Association's Best Practices Study*.[45]

42 The respectful articulation of difference is a very powerful educational objective (and methodology) and ought to be a skill at which clinicians excel. It is only ironic that this reflective, verbalising capacity evidences developmental theory, in the sense that future lawyers need to develop an ability to listen to opposing points of view in the interests of representing their clients effectively, whether as litigators, therapeutic mediators or policy analysts.

43 In Stuckey et al, above n 1, the authors go to some effort to describe possible objectives of all experiential courses (121–31) and in-house clinical courses (138–45). Which of these objectives a course achieves effectively should be a part of program assessment and, as Stuckey observes, program goals need to be expressed in terms of program outcomes (40).

44 Sullivan et al, above n 1.

45 Stuckey et al, above n 1.

There is for example an argument that effective experience is best achieved in a live-client clinic and that the concept cannot be met with simulated experiences using role plays alone.[46] There is discussion as to minimum effective time periods for student clinical experience in weeks or months and much of this discussion appears to reflect the educational expectations of the clinicians concerned.[47] There is also a perennial and often tedious debate as to the merits of a law student-education centred as compared to a client-service centred program, with proponents on both sides prepared to go to some length in criticising the other perspective in terms of effectiveness, morality and occasionally social responsibility.[48] Equally, there are some who consciously attempt a synthesis of both objectives and do not think there is a need to separate out the two in precise language, as long as they are able to discern both elements in their mix.[49]

Aligned to the education versus service discussion there is sometimes a dichotomy between an inherent priority in some clinicians on their students' technical skills development and among others, on promotion of a normative/critical emphasis, even though many clinicians recognise that proficiency in technical skills necessarily involves some normative awareness and that the critical clinician requires a degree of technical capacity if their criticisms are to retain their policy 'edge'. This might explain why the best (effective) programs are commonly seen to do both.[50]

A jurisprudential bias, shared by the author, is that any law course including a clinical course which ignores the policy dimensions of law and the justice

46 For example, the University of California Los Angeles model distinctively focuses on simulations. See *University of California Los Angeles School of Law, Distinctive Features of the UCLA Clinical Program* <http://www.law.ucla.edu/centers-programs/clinical-program/Pages/distinctive-features.aspx>.

47 In the current investigation of proposed standards for Australian clinical legal education (see above n 16; Monash University, *ALTC Project 2010–2012* (26 September 2012) <http://www.law.monash.edu.au/about-us/legal/altc-project>), a range of views have been expressed by clinical teachers as to the necessary minimum periods of time that students ought to spend in a clinic. These views are generally reflective of clinicians' personal visions, funding constraints and the degree of insularity or connection to other clinicians.

48 See, eg, Stephen Wizner, 'The Law School Clinic: Legal Education in the Interests of Justice' (2002) *Fordham Law Review* 1929; Paul R Tremblay, 'Toward a Community-Based Ethic for Legal Services Practice' (1990) *UCLA Law Review* 1101; Justine A Dunlap, 'I Don't Want to Play God — A Response to Professor Tremblay' (1999) *Fordham Law Review* 2601. See generally Robert J Condlin, '"Tastes Great, Less Filling": The Law School Clinic and Political Critique' (1986) 36 *Journal of Legal Education* 45; Kimberly E O'Leary, 'Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics' (2004) 11 *Clinical Law Review* 335.

49 See Stuckey et al, above n 1, 145; Evans and Hyams, above n 37. As a generalisation, there appears to be a North American preference for student learning foci in live-client clinics and an Australian preference for a client service priority, or at least a conscious balance between the two. In relation to program effectiveness, the important thing is to identify where the true program priorities are and to measure outcomes against that identification.

50 See Sullivan et al, above n 1, 158–61; Stuckey et al, above n 1, 145.

effects of its actual practice in favour of purely positivist exposition,[51] runs a considerable risk of deficient structure and teaching and that accordingly, there is a defensible need to positively discriminate in favour of normative course structures in the clinical environment. That view will of course be disputed by many, but in the scale proposed in this paper, such discrimination is proposed as a serious contender for self-assessment.

A further variation on this theme is consciousness of the need for ongoing law reform and of community development techniques as legitimate clinical program objectives, but if the answer is 'yes', then the question becomes whether they are also necessary in the quest for effectiveness? Many collateral enquiries are spawned by this focus on educational sophistication and depth in normative understanding of law, for example:

> are program 'teaching vehicles' transaction-based — focusing on one client-one case at a time — or client-group systematic? That is, do they reinforce conventional case-based individual client outcomes or are they systemically (or structurally) analytical and transformative for students' understanding of the critical effect of law because they look at common causes for problems suffered by a group of clients?[52]
>
> for individual clients, does the program have a non-adversarial and/ or therapeutic justice focus or is it structured towards litigious dispute resolution, or is there a balance of approaches? In those programs with an avowedly litigious preparation objective, a critical issue may be whether there is a real or only a token opportunity for student appearances before courts or tribunals on behalf of live clients.
>
> is the clinic a stand-alone facility, or multi-disciplinary/ multi-professional/ or just co-located with other service providers? Are the latter two approaches more effective than the conventional single-discipline model? This last query is increasingly important as more and more North American

51 The debate in this area is as voluminous as any in jurisprudence. Well cited and relatively recent protagonists for various positivist perspectives include Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defence, a Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613; W Bradley Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363; Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Ashgate Publishing, 2009). On the other side of a low and increasingly ill-defined normative fence are writers such as Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999) 5; Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998); William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998); Robert W Gordon, 'A New Role for Lawyers? The Corporate Counselor after Enron' (2003) 35 *Connecticut Law Review* 1185; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007); and generally Susan D Carle (ed), *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York University Press, 2005) 371–84.

52 See, eg, Adrian Evans, 'Client Group Activism and Student Moral Development in Clinical Legal Education' (1999) 10(2) *Legal Education Review* 179.

> clinics delve into multi-disciplinary operation and the concept takes root in Australia.[53]

And at the end of these discussions, Stuckey observes that part of the effectiveness assessment should be student evaluation, to find out if clinical students believe that the objectives of the course or program were achieved; for example, did their skills improve, do they have a better understanding of normative values, are they more likely to provide pro bono work, and so on.[54]

Ultimately therefore, questions of effectiveness must come back to the relevant curriculum theory behind the clinical program under self-examination.

Possible Self-Assessment Indicators for Effectiveness: a first hypothesis, for which there is some empirical support,[55] is that effective clinical experiences will on average improve law students' assessment outcomes in all other subsequent law subjects, but there is still a need for a carefully controlled trial to demonstrate definitively that the connection is more than hypothetical. Secondly, effective clinical experience will generate positive student feedback as to the acquisition of specific skills, for example, the ability to draft an opinion and to explain coherently to a client the projected stages of a legal action.

C *Supervision Standards*

Within clinical supervision, determining whether formal standards are necessary has always been a vexed issue. In particular, there has been a pronounced debate within Australian clinics about whether initial legal advice should or must be given to clients only in the presence of a legally qualified supervisor.[56] Proponents cite client protection as paramount and their proper sense of concern for a particular type of quality can echo the perspective of the few who see 'moral' clinical programs as necessarily client-focused. But detractors point to insistence on this client protection mechanism as naive in not acknowledging the risk in all legal advice and in its denial of the possibility that supervisors can reasonably judge when their students are likely to exceed instructions or otherwise present an unreasonable risk to client security. The difference of opinion might have something to do with a particular clinic's attitude to risk management, that is,

53 See Mary Anne Noone, '"They All Come in the One Door" The Transformative Potential of an Integrated Service Model: A Study of the West Heidelberg Community Legal Service' in Pascoe Pleasance, Alexy Buck and Nigel J Balmer (eds), *Transforming Lives: Law and Social Process* (Stationery Office, 2007) 93–112.

54 Email comment from Roy Stuckey to Adrian Evans, March 2011. Stuckey also cautions that student evaluations are limited. They can be capricious, lack context or be unrealistically fulsome, but students who have progressed in their understanding of legal practice as a result of clinical exposure are likely to be critically informed consumers by the end of their experience and, as such, in a position to offer constructive commentary.

55 Josephine Palermo and Adrian Evans 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism' (2008) 17 *Griffith Law Review* 252**.**

56 See Jeff Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 3 *International Journal of Clinical Legal Education* 7.

whether some amount of risk-taking is inherent and desirable in both education and professionalism in order to advance both clients' outcomes and students' educational opportunities.

Importantly, there does seem to be a view (as yet unsupported empirically), that the imposition of too tight a rein on students' direct and trusted contact with clients will tend to stifle development of their confidence and growth in their sense of responsibility. This 'autonomy perspective' acknowledges, sometimes too formulaically, that very inexperienced students are a calculated risk to themselves and to others; a risk which has to be managed by initially tighter supervisory reins, but even proponents of students' 'first contact' autonomy would agree that there are precautions that should govern such contact, for example, precise pre-interview briefings as to acceptable exchanges between students and their clients and a requirement for post-interview, written records of the interview, signed off by the student and checked by the supervisor at day's end. The author has observed over some years that well-resourced clinics in the United States are increasingly video recording initial student-client interviews for later supervisory review.

Possible Self-Assessment Indicators of Supervision Standards: does the program permit its students to meet clients alone and at that time, convey their supervisors' initial legal advice to them?; does the program 'fence' inexperienced students' autonomy with appropriate supervisory precautions?

D *Assessment of Student Performance*

Within clinical scholarship there is consistent disagreement as to whether to assess students as merely 'competent/satisfactory' in their performance (that is, a pass/fail approach), or to grade their achievement at successively higher levels in the manner of most other courses and subjects.[57] The degree of dispute on this issue is significant and articulated sincerely, with considerably more potential to derail a self-assessment process than other issues. However, it is suggested that this debate is unnecessary for purposes of self-assessment because any difference of opinion on this issue is not in fact critical as to whether a program is clinical in nature and is operating effectively. Whether or not a student receives a grade may be important in some sense to the student but does not change the essential nature of the experience they are exposed to and undergo. Some may choose to be less engaged if their mark can only be 'pass' as opposed to a graded recognition of their achievements, but the educational design and delivery of the program itself need not be inferior for this reason alone. What is important is effective assessment, particularly formative assessment.[58] The use of reflective journals as tools of supervision and self-learning is far less contentious. Their measure of the

57 Simon Rice, 'Assessing — But Not Grading — Clinical Legal Education' (Macquarie Law Working Paper No 2007-16, Macquarie University, 1 December 2007); Ross Hyams, 'Student Assessment in the Clinical Environment — What Can We Learn from the US Experience?' (2006) 10 *International Journal of Clinical Legal Education* 77–96.

58 Email comment from Roy Stuckey to Adrian Evans, March 2011.

quality of reflection, the integration of content and experience and student growth in personal insight and self-awareness is now so widespread[59] as to demand their inclusion in any self-assessment process.

Possible Self-Assessment Indicators of Student Assessment: Mere attendance by students is insufficient. Student performance must be assessed, at the least, on a pass/fail basis if the program is to be considered clinical. If all students complete a reflective journal, then their attached program may be clinical. However, the lack of such a reflective process will indicate that the program is not clinical in nature.

E *Connection to Legal Education as a Whole*

It is common for a law school to operate a clinical program without integrating clinical techniques and learning outcomes into its other subjects and courses,[60] despite efforts from time to time to achieve same. Those that do achieve some measure of integration have approached the issue on a 'whole of law school' basis[61] rather than in an 'over the top' effort to dominate the law school with clinical method. The former approach is highly likely to be correct, particularly if the objective is to engage with so-called 'conventional' academic staff who are reluctant to practice law or to incorporate clinical methods into their mainstream courses. But this objective is elusive. Despite the clear desirability of comprehensive integration of all teaching programs in law schools, such achievements could be less common than might be expected in a post-*Carnegie* climate.[62] Academics tend to favour their pet teaching approaches over time and commitments to integrated methods seem to wane. Nevertheless, it is not fair to categorise standalone clinical programs as failures, provided attention is given to achieving some level of integration and that effort is self-assessed via (admittedly) secondary indicators, as follows.

Possible Self-Assessment Indicators of Clinical Connectivity: If all first year law students rotate at least briefly through a clinic,[63] there is some prospect that they will elect to enrol in later-year clinical electives, or participate more fully in compulsory clinical programs where they exist. If at least one third of all students enrol in clinical electives, then those electives are taken seriously by the wider law school. Further, there is evidence of 'whole of law school' integration if

59 The scholarship on this issue is extensive. See, eg, Gerald F Hess, 'Learning to Think Like a Teacher: Reflective Journals for Legal Educators' (2003) 38(1) *Gonzaga Law Review* 129; Ross Hyams, 'Assessing Insight: Grading Reflective Journals in Clinical Legal Education' (2010) 17 *James Cook University Law Review* 25.

60 For example, Monash Faculty of Law in Melbourne, Australia. Observations of the diversity of Australian approaches to clinical integration by the project team investigating best practices for clinical programs (see above nn 16 and 47) confirm this opinion.

61 For example, Griffith Law School in Queensland, Australia and Newcastle Law School, New South Wales, Australia.

62 The *Carnegie Report*, above n 1, 145–61 provides major impetus for this level of integration, but how is it to be measured in the absence of specific integration criteria?

63 In the manner of Kingsford Legal Service and the UNSW Law School.

clinical cases are used to illustrate doctrinal courses and the source of those cases is acknowledged; if clinical teachers' research output is supported by access to study leave and non-teaching periods to the same degree as conventional teachers; and if those clinical teachers who wish it have the same terms and conditions of employment as their conventional peers.

F *Clinician Selection, Training, Monitoring and Retention*

Clinical supervisors require many qualities: they must have sophisticated interpersonal sensitivity and emotional intelligence; have the ability to empathise with students but not to undermine their sense of budding autonomy; project sufficient confidence to allow students to make and recover from reasonable case-handling mistakes without taking over such cases from them; be willing to juggle cases between students with differing abilities, having regard to professional indemnity risks and potential claim reporting requirements; have self-awareness of their legal ethical methods and of their preferences for adversarial *or* alternative dispute resolution approaches; have a knowledge of experiential assessment and legal practice management experience; and finally, it is suggested, maintain their own research programs with a commitment to utilising law as a tool for social reform. This is a formidable list of accomplishments, but perhaps no more extensive than that required of modern academics in many disciplines.

In deciding which staff to recruit, clinics need to consider the desirable mix of educational insight and legal practice know-how that is likely to support such broad ranging capacities. Should clinical supervisors be required to have certain formal qualifications and experience (a practising certificate from their local Bar or law society seems unarguable), and if so, what are they and what are acceptable minimum standards? If clinical supervisors require certain standards and cannot always be recruited with highly developed standards, what are the most effective ways to train them to acceptable minimums? Clinical directors' intuition as to the best way to develop these qualities in their clinical staff will mature over time, but there are also several concrete indicators of the likely presence of such abilities and of staff resilience to cope with demanding supervision environments over at least the medium term. These indicators relate to selection criteria of new clinical staff, their induction and mentoring, the reasonableness of their workloads (in relation to staff-student ratios and research outputs) and their willingness to experience and contribute to conventional teaching.

A key issue in clinic stability is workload. Clinicians must operate intensively and even intimately with their students in order to develop their potential, all the time remaining alert to the boundaries that must be maintained. If they have too many students to supervise at any one time, they will tire in a year or two or their supervision will suffer. Accordingly, an appropriate staff-student ratio is required for the discussion and reflection process needed to ensure that students are making systemic connections between, for example, their drug-use client in their legal centre office and the social decision to deal with substance addiction as a criminal justice rather than socio-medical phenomenon. In law school subjects

which specifically draw on clinical experiences to study generalised systemic connections between social policy and the effectiveness of law,[64] higher than usual staff-student ratios are also needed to manage students' transfer of clinical insight to effective socio-legal policy recommendations and law reform.[65]

Possible Self-Assessment Indicators of Appropriate Clinical Selection: If clinical teachers also have 'normative credentials' — that is, their backgrounds include some periods of socio-legal or moral activism and ideally, publications evidencing that activism — they are likely to understand that clinical education is not just skills training. If that sort of background is a pre-condition for new staff selection, then the program is clinical. If new clinicians must have some experience — not necessarily extensive — of both academia and legal practice, then the program into which they are being recruited is clinical. If the program requires, for example, a minimum annual 'academic output' of its clinicians, it is clinical and not merely concerned with skills development. If staff are appointed on probation, are required to undergo assessable teaching education while on probation and are academically supervised on at least a six monthly basis (not necessarily by a clinical director), then the program is clinical.

If the staff-student ratio varies between 1:4–10 but no higher, then the program is clinical, is not a workplace exposure process and staff can be expected to handle workloads without threatening exhaustion. If the program requires new clinicians to undergo '360 degree'[66] psychological assessments in order to gauge their emotional maturity, then it is a clinical program. If the staff consensus is that such assessments are helpful and positive, then the program is likely to be relatively stable and well led. If the law school attempts to rotate a number of conventional teachers into and out of the clinic as resources allow, the program is clinical because it is deliberate about integration. Finally, if clinic directors are regularly relieved and rotated, allowing them access to study leave and limiting the possibility that they will simply grow tired or bored with their roles, then the program is clinical.

G *Documentary Audit Trails*

Since many criteria preferred and required for self-assessment processes involve an element of qualitative judgment rather than precise metrics, it is useful in any

64 See, eg, Monash University, *LAW5217 — Law Reform & Community Development* (18 September 2009) <http://www.monash.edu.au/pubs/2009handbooks/units/LAW5217.html>.

65 Liz Curran, 'Innovation in an Australian Clinical Legal Education Program: Students Making a Difference in Generating Positive Change' (2004) 4 *International Journal of Clinical Legal Education* 162.

66 '360 degree' assessments involve the collection and analysis of the opinions of colleagues, friends and even relatives as to various temperaments, attitudes and behaviors of an individual. The premise of such assessments is that the opinions of a diverse group of others who surround the individual, as to their strengths and weaknesses, will be both comprehensive and revealing, particularly in comparison to the individual's own self-characterisation according to the same criteria. See, eg, the product discussion at Centre for Creative Leadership, *Products — 360 Assessments* <http://www.ccl.org/leadership/assessments/assessment360.aspx>.

such process to also use criteria which contain in themselves a metric element. These criteria are sometimes described as transactional,[67] because they record and evaluate the transactions or documentary audit trails of criteria of interest. In clinical legal education, there are numerous transactions recorded in documents, for example, the description of training modules which clinicians should undertake and the quantitative assessments they receive in relation to their participation in such training, or the number of supervision 'items' which must be checked off in order to verify that student supervision standards are being achieved. The latter standards typically provide for minimum levels and preferred types of student accessible documentation in relation to learning objectives, formative feedback/assessment, reflective journals, summative feedback/assessment, types and intervals of clinical feedback and assessment criteria at all stages of student clinical progression.[68] If these standards exist in documentary form and they are transparently linked to metric assessment of each student against each standard, they represent evidence of clinical method.

The task very often is not to identify what the criteria of clinical method should be, but to decide: what are effective indicators for these criteria? The volume of potential indicators is considerable because the interface between clinical supervision and student performance involves more than the list immediately above; it goes on to cover students' levels of client sensitivity and communication, ethical awareness, intellectual grasp of substantive law-practical implementation, drafting, negotiation and advocacy skills, self-organisational ability, socio-legal awareness and comprehension of law reform processes. And all of these require at least some variation for different types of clinics, such as identified externships or virtual clinics. In other contexts, for example research into UK legal aid[69] and the assessment of US medical students' professionalism,[70] the rigour applied to developing transactional criteria has even extended to engaging 'dummy' clients or patients to assess lawyers' and doctors' performances from the consumer side, as it were. Such dummy client perspectives would undoubtedly be valuable, but the expense of their development and administration is such that they are probably impractical in the context of clinical self-assessment for any single law school.

Possible Self-Assessment Indicators of Audit Trails: If all supervision standards named above exist in tabular form and are transparently linked to metric assessment of each student against each standard, then clinical method is being observed. If the clinical program is periodically reviewed by an external team, according to the above criteria, then self-assessment will be occurring in a context

67 See, eg, the discussion about transaction criteria in Avrom Sherr, Richard Moorhead and Alan Paterson, 'Assessing the Quality of Legal Work: Measuring Process' (1994) 1(2) *International Journal of the Legal Profession* 135; Avrom Sherr, Richard Moorhead and Alan Paterson, *Lawyers — The Quality Agenda: Volume 1: Assessing and Delivering Competence and Quality in Legal Aid: The Report of the Birmingham Franchising Pilot* (HMSO, 1994).

68 See generally Stuckey et al, above n 1.

69 Richard Moorhead, Avrom Sherr and Alan Paterson, 'What Clients Know: Client Perspectives and Legal Competence' (2003) 10(1) *International Journal of the Legal Profession* 5.

70 See discussion in Transcript of Proceedings on 'Measuring Professionalism' (2003) 54 *South Carolina Law Review* 943.

of external scrutiny, each reinforcing the other and adding to the impact of the program as a whole.

VII TABULATED SELF-ASSESSMENT CRITERIA

In the discussion above an effort has been made to set out clinical self-assessment criteria in narrative form. This approach allows for justifications of different criteria, but is not ideal for tentative purposes of wider comparison and evaluation. In the table below, each of the above criteria (and others) are re-stated more precisely, with suggested gradations as appropriate. Criteria are accorded specific numerical values so that any self-assessment based on this table is capable of deriving a concrete 'score', for comparison against similar scores derived at later dates or, if desired, between different clinical programs in the same law school.[71]

Suggested Criteria[72]	**Proposed Numerical measures of credible Clinical Programs**			**Totals**
	No	**Yes**		
A clinical program is in existence	0	1		
The clinical program is periodically reviewed by an external team	0	1		
There is an explicit and agreed base or bases in curriculum theory to the program and that base or bases is/are appropriate to current operations and projected objectives	0	1	2 = curriculum theory base/s is/ are appropriate	
Is the clinical program law student-education centred, client-service centred or a *conscious* balance of the two?	1 = law student education centred	2 = client service centred	3 = some active and *conscious* balance of the two	
Does the clinical program focus on skills development or promote a normative/critical emphasis or both?	0 = unclear	1 = skills development or normative emphasis	2 = conscious balancing between the two	
The asserted clinical program permits its students to meet clients alone and, at that time, convey their supervisors' initial legal advice to them	0	1		

71 Stuckey points out that a law school might have various specific clinical courses, programs or clinics (these terms can mean different things in different jurisdictions) for which some of the above suggested assessments may differ. In further work that might occur, Stuckey suggests it would be sensible to produce two documents, one for each particular course or clinic and one for the overall clinical program of a particular law school. In the table of self-assessment criteria, the intention is to suggest criteria that apply to an overall program.

72 A number of these criteria are extracted from Adrian Evans, 'Normative Attractions to Law and Their Recipe for Accountability and Self-Assessment in Justice Education' in Frank S Bloch (ed), *The Global Clinical Movement* (Oxford University Press, 2011) 353.

The clinical program provides appropriate supervisory precautions to moderate inexperienced students' autonomy	0	1	2 = protocol to gradually reduce supervisor scrutiny of students as they merit greater trust	
A majority of completing students evaluate the program as developing some of a number of nominated skills (for example, the ability to draft an opinion or explain coherently to a client the projected stages of a case)	0	1	2 = *all* nominated skills are assessed as 'developed' by a majority of students	
A majority of completing students understand the distinction between normative (law must be understood in the context of its effects on justice) and positivist theories of law (law is justified only by its authority)	0	1	2 = there is debate between clinical students as to the merits of normative *v* positivist theories of law	
The asserted clinical program is primarily for the purpose of student observation and provision of student assistance to admitted lawyers	0 = unclear	1 = students primarily observe and assist lawyers	2 = students have substantial autonomy and responsibility	
Externship experiences, if any, are under the effective control of the law school and entrust students with supervised case-handling involving a high degree of autonomy and normalised face-to-face client contact	0 = unclear	1 = students have high degree of autonomy	1 = students have normalised face-to-face client contact	
All first year law students rotate at least briefly through a clinic, so defined	0	1		
Student performance is assessed on at least a pass/fail basis	0	1	2 = students are graded or there is a bias towards formative assessment	
All clinical students maintain a periodic reflective journal, which contributes to their assessment	0	1 = a reflective journal is maintained	2 = journal contributes to students' assessment	
At least 70% of all clinical students evaluate their clinical experience positively	0 = < less than 70%	1 = > 70%	2 = > 85%	
Clinical cases are used to illustrate doctrinal courses and the source of those cases is acknowledged in those courses	0	1		

Clinical teachers' research output is supported by access to study leave and non-teaching periods to the same degree as conventional teachers	0	1 = access to identical study leave	1 = access to identical non-teaching periods	
Clinical teachers have the same terms and conditions of employment as their conventional peers	0	1 = substantially the same conditions	2 = identical conditions	
As a group, clinical teachers have backgrounds which include some periods of socio-legal or moral activism and publications evidencing that activism	0	1 = experience of socio-legal/ moral activism	2 = publications which evidence activism	
New clinical supervisors have some track-record of personal pro bono activity	0 = none	1 = < 2hrs pw	2 = > 2hrs pw	
New clinical supervisors have normative views about the purpose of law and legal practice	0 = positivist views	1 = normative views		
New clinical supervisors have an awareness of the pedagogical debates concerning competing legal ethical perspectives	0 = not aware	1 = aware		
New clinical supervisors have qualifications to practise law (and therefore supervise in clinical legal practice)	0 = not qualified	1 = qualified	2 = qualified and currently licensed	
New clinical supervisors understand and agree with the importance of emotional intelligence to legal practice	0 = not aware or aware but dismissive	1 = aware & supportive	2 = undertaken EQ assessment	
Clinicians require a minimum annual research output	0	1		
Clinicians are appointed on probation, are required to undergo assessable teaching education while on probation and are academically supervised on at least a six-monthly basis	0 = no probation	1 = probation applies and clinicians are academically supervised	2 = required to undergo assessable teaching education	
The clinical staff-student ratio is no higher than 1:10	0 = >1:10	1 = 1:4–1:10	2 = 1:4 or less	
The program requires new clinicians to undergo '360 degree' psychological assessments	0	1		
The staff consensus is that such assessments are helpful and positive	0	1		
The law school has a policy of rotating conventional teachers into and out of the clinic as resources allow	0	1		

Clinical directors are regularly relieved and rotated	0	1		
All supervision standards named above exist in tabular form and are transparently linked to metric assessment of each student against each standard	0	1		
The clinical program is periodically reviewed by an external team	0	1	2 = if clear criteria are used	
New academic staff members are oriented for their awareness of the significance of these criteria	0	1	2 = if clear criteria are used	
For those law students with clinical experience, there is an average improvement in their assessment outcomes in all other subsequent law subjects	0	1		
Total				
Self-Assessor comments on exceptions and clarifications:				

VIII CONCLUSION

In Australia at least, the former ALTC and the Council of Australian Law Deans ('CALD') see that more and stronger, quality-focused clinical programs can continue the bridge-building between theory and practice.[73] But CALD also wishes to strengthen law schools' 'practice-related' curricula for two other reasons: professional and student pressure to increase graduate employability and a concern to renew and improve the ethical standards and professionalism of law graduates. The latter is in response to community and judicial perceptions of diminished ethics among legal practitioners.[74]

73 Davis and Owen, above n 16.

74 Chief Justice French has also showed concern on this point, commenting that:

> law schools should impart to students who wish to become legal practitioners, not only broad perspectives but also those skills which will help them to be effective members of their profession. This is not limited to practitioners of the kind who will rise quickly to become senior associates in large national law firms. It extends to those practitioners with a sense of social justice and a wish to make a difference in the world.

See Chief Justice Robert French, 'Swapping Ideas: The Academy, the Judiciary and the Profession', (Speech delivered at the Australian Academy of Law 2008 Symposium Series, Melbourne, 1 December 2008) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj1Dec08.pdf>.

Australian lawyers have for example been criticised extensively in relation to the destruction of documents necessary for litigation,[75] for abuse of process in commencing legal action without any real prospects of success,[76] and for deception of the UN Oil-For-Food program.[77] Similarly, lawyers in the United States and elsewhere have been implicated in financial crises as well as deception and litigation abuses. Each of these scandals has contributed to deterioration in the capacity of lawyers in general to make a credible difference to the massing problems of global survival and sustainability in the midst of immense and continuously accelerating population growth. There is little time to waste in the legal education sector (and in its vastly smaller sub-sector of clinical method), in contributing to a revitalised legal profession; one better able to contribute to solutions than to problems.

In this article I have suggested that maximising the impact of clinical methods to these great challenges depends on pedagogical rigour and academic strengthening in the clinical and conventional academy. Specifically, preparedness for this future may depend on clinical program directors and faculty taking the initiative in advancing their own quality standards by a metric-based self-assessment process. No one else will do this for them because clinical methods are unfortunately still a little too alien to conventional academia, even if the individual law school has a benign approach to their existence and has a vague, 'feel good' notion of contributing to social reform. 'Benign', by definition, does not equal 'engaged', even if clinical method represents one of the more promising means by which law schools can make a real difference to pressing social problems by producing committed and rule-of-law conscious graduates.

Fortunately however, international accreditation of law schools is coming and will inevitably include some attention to determining an acceptable approach to clinical teaching. This exposition of some of the possible accreditation criteria of clinical method will hopefully highlight what program directors can do to self-assess whether their programs will measure up to internationally credible processes and standards.

75 Jonathan Liberman, 'Do Judges Now Admire Corporate Connivance?', *The Age* (Melbourne), 11 December 2002, 17; Matthew Harvey and Suzanne LeMire, 'Playing For Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics' (2008) 34(1) *Monash University Law Review* 163.

76 *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.

77 Kath Hall and Vivien Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically' (2008) 11(2) *Legal Ethics* 137, 139.