

# **CLINICS: HOW TO TEACH THE ART OF “LAWYERING” – DOES IT HAVE A PLACE IN ACADEMIA?**

BY CHERYL GREEN\*

Learning the theory of law is and always will be of paramount importance, as students must understand that before they can go on to practice law. But how can we assist our students to make that transition from the theory to the practice of law? When and how is it most appropriate to undertake this? What are the challenges taking place today that we need to take into account and plan for?

## **I. INTRODUCTION**

What is required to produce a good lawyer capable of entering the realm of private or other types of law practice? Law is a profession and a business. From a professional and/or business perspective, a lawyer needs to meet the following requirements:

- (a) intellectual horse-power sufficient to excel in his or her role as a lawyer;
- (b) quality of work output – the ability to produce high quality work with attention to detail;
- (c) achievement of targets in day-to-day work – the setting of realistic objectives and priorities and the initiation of prompt corrective action if required;
- (d) meeting deadlines – the ability to complete work and to manage time effectively;
- (e) cost effectiveness – making optimum use of financial and other resources;
- (f) decision-making – an ability to make sound decisions based on fact and to take initiative; to accept responsibility for decisions. It is also about the ability to follow through and avoid procrastination;
- (g) problem-solving – analytical skill and the ability to develop effective solutions;
- (h) job knowledge – knowing and understanding his or her brief;
- (i) innovation/creativity – an ability to think creatively within the context of his or her own specialisation and to find original solutions to problems;
- (j) leadership – effective management of, and planning with, team members, including the delegation of jobs at an appropriate level;
- (k) team building – an understanding of group processes and the coaching and development of all team members;
- (l) relationships – an ability to generate and sustain appropriate professional relationships;
- (m) communication skills – oral – an ability to communicate logically, clearly and with conviction; and
- (n) communication skills – written – an ability to present documents in a clear, concise manner.

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Looking at this list it is clear that many of the qualities required are not based on legal principles or in fact in law at all. Therefore, whilst law students must still learn to research, write and analyse the law, students also get great value from learning how to think like lawyers, in particular, ones who learn how to learn from their own experience to ensure that their education does not end when they receive their degrees.

Arguably, law schools are in a position to encourage these types of qualities. One simple example is the requirement for meeting deadlines – how does the faculty deal with students on this issue? Certainly there are policies and rules that cover this but are they consistently applied and do they assist the students with understanding that while at the moment the only people they are letting down are themselves, students must certainly have an understanding of the consequences of missing deadlines when they practice law.

To help students achieve this, legal education must include a strong element of practical legal skills *as well as* the academic skills of researching, writing and analysing. One of Te Piringa’s strengths is the early incorporation of learning some of those skills by way of interviewing, mooting, negotiation, mediation and specialised advocacy assignments together with a focus on dispute resolution skills, which is one of the essential skills of a competent practising lawyer.

In particular, mooting exposure is given to students in Year One during Legal Method. Year Two provides for an option to moot in Administrative Law and Year Three has a moot in Dispute Resolution – all of which are assessed and marked. Teaching a law student to stand up and speak in such an environment provides essential skills which mirror exactly what a lawyer is expected and obliged to undertake on behalf of those he or she represents. Ultimately, it may not be in a courtroom setting, but the ability for a lawyer to properly represent the client is a professional obligation, not an option.

The practice of good legal drafting is incorporated into Te Piringa’s compulsory and optional curriculum.

## II. TRADITIONAL MODES OF TRAINING GRADUATES

In the article by Jennie Vickers “Being a Law Grad in 2012 – will it be terrific or traumatic?”,<sup>1</sup> the author analyses “millennials”, which are described as those born between 1980 and 2000, and looks at whether “we have a clear sense of how we actually manage, lead, mentor, and nurture our grads currently”, once those millennial graduates start to practice law. There is an interesting “Managing Millennials Model” incorporated into the article that describes some “traditional” learning models within law firms.<sup>2</sup> Some examples follow:<sup>3</sup>

*Revenge Seekers* – say things like:

- (a) I suffered so should you ...
- (b) You need to do the hard yards ...
- (c) It is so easy now in comparison ...

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1 Jennie Vickers “Being a Law Grad in 2012 – will it be terrific or traumatic?” *NZ Lawyer* (New Zealand, 24 February 2012).

2 At 25.

3 At 25.

*Deserters* – say things like:

- (a) I haven't got time to give you instructions but ...
- (b) The firm has never done this type of work but ...
- (c) Not a good effort but work out for yourself what you did wrong ...

*Ready, willing, but unable* – say things like:

- (a) We have never had a grad before what do you need? ...
- (b) What do they teach you in [professionals]? ...
- (c) My door is always open but don't get offside with my PA ...

*Empowerers* are those that attempt to depart from the above three categories and are prepared to put in a high investment effort with low control based on the premise that the best training is not telling and risking them forgetting, not showing and hoping they will remember, but *allowing them to do it themselves so that they will understand*.

The article lists some suggestions to help you become an Empowerer when training a student or graduate in the practice of law:<sup>4</sup>

- (1) Set realistic mutual expectations from the start *and deliver on them*;
- (2) Draw up an investment plan covering all the types of investment you are going to make and deliver on the plan;
- (3) Introduce a structured mentoring and coaching plan with robust two-way communication flows;
- (4) Look at your brand and test its integrity. If it does not match, fix it;
- (5) Get with the programme on technology instead of sticking with being a luddite, as a badge of honour it is not;
- (6) Get mentoring or coaching for yourself if any of this seems unachievable; and
- (7) Celebrate your success as you move into the green zone.

Shelley Dunstone, lawyer and consultant, who runs Legal Circles in Adelaide and is convenor of the groups “Thought Leadership for Lawyers” on LinkedIn and Martindale Connected, has written “Seven ways to accelerate on-the-job learning for lawyers”.<sup>5</sup> She suggests seven ways to impart wisdom and to make new lawyers productive sooner:<sup>6</sup>

- (a) *Build on Basics*: relating new ideas to existing knowledge;
- (b) *Think Aloud*: expose your thinking process;
- (c) *Ask Questions*: to help, you need to know what they are thinking;
- (d) *Seek Questions*: encourage your students or graduates to ask probing questions;
- (e) *Widen the Picture*: provide context and linkages;

4 At 26 (emphasis added).

5 At 26.

6 At 26 (emphasis added).

- (f) *Expose the Learning*: reflection on learning aids retention; and
- (g) *Work on Strengths*: nurture their individual style.

### III. LEARNING VERSUS KNOWLEDGE

In Dan Berrett's article "Harvard Conference Seeks to Jolt University Teaching", he observes that:<sup>7</sup>

[a] growing body of evidence from the classroom, coupled with emerging research in cognitive psychology and neuroscience, is lending insight into how people learn, but teaching on most college campuses has not changed much, several speakers said ... at Harvard University at a daylong conference dedicated to teaching and learning.

... Students should be made to grapple with the material and receive authentic and explicit practice in thinking like an expert ... [and a faculty] would need to provide timely and specific feedback, and move beyond lectures in which students can sit passively receiving information.

... [O]btuse writing and poor teaching both reflect what [one professor] called the “curse of knowledge.”

Having this curse means that a writer or professor often assumes knowledge the reader or student does not have. More important, the writer or teacher usually forgets that the reader or student is struggling to learn the material for the first time, which often was long ago for the teacher:<sup>8</sup>

It's hard to know what it is like for someone else not to know something that you do know . . . It's the chief driver of bad writing and, I would argue, bad teaching.

### IV. USE OF TECHNOLOGY TO ENHANCE PRACTICAL LEGAL SKILLS

There is no doubt that today the traditional way tertiary institutions teach is under challenge. In an article, Des Butler states that:<sup>9</sup>

Seminal reviews in the 1990s, both in Australia and overseas ... advocated a greater focus on “what lawyers need to be able to do, [rather than being] anchored around outmoded notions of what lawyers need to know”. ... In endorsing these observations, the Australian Law Reform Commission noted the advantages of combining the teaching of such skills within substantive law subjects, giving as an example the law of contracts, which provided opportunities for skills development in negotiation and the ethical considerations involved in negotiations.

The use of narrative in higher education is not a new concept. In legal education, the “law and literature” field of study draws connections between legal theory and literature, including William Shakespeare's *The Merchant of Venice*, Charles Dickens' *Bleak House* and Harper Lee's *To Kill a Mockingbird*.<sup>10</sup>

<sup>7</sup> Dan Berrett “Harvard Conference Seeks to Jolt University Teaching” *The Chronicle of Higher Education* (online ed, Cambridge (MA), 5 February 2012)

<sup>8</sup> Steven Pinker, quoted in Dan Berrett, above n 7.

<sup>9</sup> Des Butler “Second Life machinima enhancing the learning of the law: Lessons from successful endeavours” (2012) 28 Australasian Journal of Educational Technology 383 at 384 (citations omitted).

<sup>10</sup> At 391 (citation omitted).

According to Butler:<sup>11</sup>

A narrative learning environment can not only convey important information, but also provide contextual cues that facilitate recall of that information in situations in which it is likely to be applicable.

At the Queensland University of Technology (QUT) School of Law, two programs – *Air Gondwana* and *Entry into Valhalla* – employ machinima created using the *Second Life* virtual world to create authentic learning environments for the teaching of negotiation skills and legal ethics, respectively.

*Second Life* machinima such as that in *Air Gondwana* and *Entry into Valhalla* adds a new dimension to a narrative-centred approach to learning. Machinima was created using a virtual environment that can be used “as a means of facilitating and accelerating the creative story development and storytelling process”.<sup>12</sup>

Machinima simulations enable students to take an active, practical approach to their learning rather than a passive, theoretical approach. They engage students and allow them to appreciate the relevance of what they are learning to the real world, thereby helping to facilitate their transition from study to their working lives.

Another way that virtual worlds can assist learning is by going places it is physically difficult or costly to get to. Creating a virtual law court would be an example.

## V. PRESENT DAY NEW ZEALAND AND FUTURE PROPOSED CHANGES

### A. Post-Graduate/Preadmission Professional Legal Training

Currently the Professional Legal Studies Course is a compulsory post-graduate requirement prior to a person’s being admitted to the High Court of New Zealand as a barrister and solicitor, and subsequently obtaining a practising certificate. The course can be undertaken by 13 weeks’ full-time or 19 weeks’ part-time study with set requirements and assessments. This type of training has been in place since 1988. The Professional Legal Studies Course and Assessment Standards Regulations 2002 (2002 regulations) set out the aims of the Professional Legal Studies Course (PLSC).

New Zealand has one of (if not the) shortest professionals course in the world. There are currently two providers that deliver professionals in New Zealand: the Institute of Professional Legal Studies and the College of Law.

As well as universities and Professional Legal Services providers, New Zealand law firms play a crucial role in training soon to be lawyers. Law firms begin to shape the careers of law students in various ways and at various stages of their training including: school leaver scholarships, university scholarships, summer/winter clerk programmes and graduate programmes.

It can be strongly argued that it is not the role or responsibility of university law schools to prepare graduates for practice as lawyers. The New Zealand legal profession has an inherent interest in ensuring that young lawyers are competent and able to adequately service the public and uphold the profession’s reputation.

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11 At 391.

12 Leo Berkeley “Situating Machinima in the New Mediascape” (2006) 4 Australian Journal of Emerging Technologies and Society 65 at 75, as quoted in Des Butler, above n 9, at 391.

The introduction of a requirement that New Zealand law firms of all sizes and in all practice areas take responsibility for training graduates thoroughly, and in accordance with stipulated regulations, would arguably serve this interest and likewise benefit trainees. However, practice-based learning programmes are expensive to regulate and monitor, and put considerable pressure on the resources of training organisations. Small and medium-sized firms who do not have extensive HR resources would be the most heavily impacted were such programmes to be introduced.

Employers may also react negatively to having to employ graduates for any extended length of time without being able to have them undertake the work of admitted lawyers or bill their time. Lengthening the time taken to qualify after graduation is also likely to be met by trainees with some displeasure. The ability of graduates to qualify at all would also become dependent on their ability to obtain pre-admission employment.

An alternative could be an appropriate administrative body that could set standards for, and monitor the implementation of law firms' in-house training programmes. Given that current in-house training programmes vary in quality and depth and are not available to all graduates working in the legal field, this could improve the competency of young lawyers and help level the playing field in terms of training opportunities.

Of interest is the reaction of the legal profession to the current arrangements regarding the education and training of law graduates. In a 2011 NZLS survey, there was no surprise that, when looking at employing graduates, the emphasis is on the LLB degree and the grade average achieved by students, with the top 10 per cent of students being sought after by the "top 10" law firms.

However, general consensus was that masters and postgraduate degrees do not enhance employability, and for firms in the provinces, students with masters degrees are seen as over-qualified and likely to leave for better prospects elsewhere.

Whether changes such as those mentioned above, or others (for example, making PLSC longer and more comprehensive or designing a specific, compulsory course for barristers) are necessary or appropriate can only be satisfactorily determined following a comprehensive, empirical investigation into the adequacy of the New Zealand PLSC as it currently stands. It was recommended that such an inquiry be commissioned and undertaken.<sup>13</sup>

Regarding the future of professional legal training, it has been made clear that a stringent review of professional legal training as it currently stands is required and recommended.

The New Zealand Council of Legal Education has engaged the Right Honourable Sir Andrew Tipping to conduct a Professional Legal Studies Course Review. There are 8 terms of reference to the report, including:<sup>14</sup>

- (iii) Examining the extent to which other types of teaching and learning, for example lectures and seminars, should be integrated with a skills-based approach, and overall the extent to which other types of teaching and learning should be recognised in the Regulations.
- ...
- (v) Examining whether trainees are developing skills outside of the Professional Legal Studies Course, and the extent to which these may overlap with skills prescribed by the Regulations.

The report is scheduled for completion towards the end of 2013.

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13 Ali Van Ammers "Report on Professional Legal Training in New Zealand" (Report prepared for the law deans, 2011).

14 New Zealand Council of Legal Education "Professional Studies Course Review" (5 September 2012) at Terms of Reference.

Te Piringa will be looking at how clinics may be able to contribute to any future decisions made in this area.

### *B. Continuing Professional Development within the Profession*

At its meeting on 11 September 2009, the New Zealand Law Society Board received a paper on competency assurance issues including a section on mandatory continuing legal education (MCLE).

The Board agreed:

- (a) in principle, to the introduction of a new competency assurance scheme to include, in the first instance, some form of MCLE yet to be determined; and
- (b) to authorise the Executive Director to take all necessary steps to implement the scheme.

A paper incorporating a proposed scheme of Mandatory Continuing Professional Development (CPD) was produced by the New Zealand Law Society in 2012.<sup>15</sup> The paper was a careful analysis of the potential benefits and possible detractions of such a scheme together with comparisons to other similar schemes for lawyers adopted in Canada, Scotland, England and Wales. The following is a brief summary of part of that report.

On the positive side, MCLE was said to:

- (a) demonstrate the profession's concern about competency;
- (b) provide a positive incentive to lawyers to participate in CLE; and
- (c) provide a positive incentive to providers to develop more and better courses, in particular using technology in new and innovative ways.

On the other hand, only a small percentage of lawyers were incompetent. Most provided a good service to their clients and it would be unfair and inefficient to force all lawyers to comply with a programme designed to deal with the shortcomings of the small minority. Also:

- (a) There is no evidence traditional points-based MCLE schemes improves lawyers' competence and indeed, they might inadvertently decrease in some circumstances.
- (b) MCLE did not usually address the behaviours that typically led to complaints and findings of unsatisfactory conduct.
- (c) Traditional points-based MCLE went against accepted principles of adult learning. It was not lawyer-centred and focused on "inputs" not "outcomes" or results.

Some risks that could be associated with introducing MCLE included the possibility that:

- (a) MCLE might not improve the profession's competency and would thus add unnecessarily to the cost of practice to the detriment of the public and profession alike.
- (b) Practitioners from country districts might not be adequately catered for despite recent developments in technology.
- (c) Given the small size of the profession, some specialist groups would struggle to meet the scheme's requirements in a meaningful manner, particularly if "points" had to be gained by attending formal programmes.
- (d) Some lawyers might resent the fact the majority were apparently being made to suffer for the inadequacies of the small minority and might not support the programme for that reason.

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<sup>15</sup> New Zealand Law Society "A Proposed Scheme of Mandatory Continuing Professional Development (CPD)" (2012) <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

Nevertheless, the report concluded that despite the above risks and shortcomings, the potential benefits of an MCLE scheme outweighed the disadvantages and that MCLE should be introduced.

For various reasons (too numerous to refer to here<sup>16</sup>) it has been proposed that the requirements relating to ongoing legal education should refer to continuing professional development (CPD) rather than to mandatory continuing legal education (MCLE).

CPD could be defined as:<sup>17</sup>

...a mandatory programme of education and training designed to maintain and increase competency within the profession by requiring lawyers to identify their individual learning needs, to develop and expand their professional knowledge and skills, and their understanding of the law and of the practice of law, including the relevant rules of conduct and client care.

It was proposed that this definition be adopted.

The New Zealand Law Society's Council approved the current proposed Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education) Rules (CPD Rules) at its meeting in Wellington on 19 April 2013. The CPD Rules are in the process of being sent to the Minister of Justice for her approval as required by s 100 of the Lawyers and Conveyancers Act 2006. Provided this approval is given, the first CDP year will run from 1 April 2014 to 31 March 2015. 1 October 2013 to 31 March 2014 will be a transitional period.

The New Zealand Law Society has provided draft guidelines for the CPD Rules (available from the New Zealand Law Society's website) which are regularly reviewed and enhanced as feedback is received.

One of the crucial parts of the CPD scheme is what constitutes eligible activities. While eligible activities must still be verifiable in that participation must be confirmed by some form of documentation it is proposed that the range of permitted activities, providers and topics should be much broader than used to be the accepted practice.

The report proposed that *any person or organisation should be able to organise an eligible activity* and further that other activities that are not course-based may also be eligible, such as *certain distance and online learning activities, teaching, lecturing and instructing, and legal writing*.

Eligible activities may include:

- (a) courses or programmes that could be arranged by universities;
- (b) lecturing or teaching and preparing for law courses at a tertiary level;
- (c) instructing or demonstrating at skills workshops, speaking at conferences, discussion groups and the like;
- (d) preparing and updating materials and papers for the above activities;
- (e) writing law-related books and articles; and
- (f) preparing formal submissions on proposed reforms of the law or of legal processes and procedures on behalf of the law society or a legal association (but not for clients).

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16 See New Zealand Law Society, above n 15, at 10.

17 New Zealand Law Society, above n 15, at 11.

The report also proposed that there are a number of *non-eligible activities* in terms of CPD including:

- (a) assisting at Community Law Centres and taking part in pro bono activities; and
- (b) mentoring.

In general, any topic which the individual lawyer can show is relevant to their learning needs, and can justify, may count towards his or her CPD hours. The guidelines provide that lawyers must use their professional judgment to decide if an activity appears to align with their continuing professional development plan and record.

Once the CPD has been finalised and put into place, a skilful assessment of courses and/or programmes together with consultation with the local law practitioners will be undertaken by Te Piringa. The aim will be to encourage experienced practitioners to become involved in aspects of clinical teaching at a tertiary level, which would in turn provide the practitioners with some substantial CPD hours that comply with the requisite rules. One example could be overseeing the preparation of formal submissions by law students.

### C. Community Law Centres

The Ministry of Justice (MOJ) have spent the last 18 months looking at making fundamental changes to the way our Community Law Centres work and how they are funded. The rationale behind these changes is an acknowledgment by the MOJ that these services are a vital part of the community, but they want the centres to be smarter in performance on a national basis.

There are currently 26 Community Law Centres around New Zealand providing “variable services and quality”.<sup>18</sup> All of their contracts expired in June 2013 and originally that was to be the elected “point of change” from the Ministry’s perspective.

The MOJ is taking somewhat longer to incorporate the changes and currently the MOJ contracts for most Community Law Centres have been “rolled over” for a further year. The first proposed change is that the Ministry intends to redefine the monetary relationship with the centres from a funding model to a purchasing of services model. The second proposed change is that the Ministry is looking closely at the viability of reducing the number of nationally funded centres to a maximum of 10 to 15.

The aims of the MOJ’s new approach to purchasing community legal services are as follows:

- (a) increased access to services and better outcomes for vulnerable communities;
- (b) more consistency of services, and service quality, across the country;
- (c) recognition of the role of Community Law Centres in the continuum of publicly funded legal services: Maximise the contribution of community legal services to the prevention and early resolution of legal problems;
- (d) community legal services that are ready to meet demands by:
  - (i) modernising services;
  - (ii) maximising delivery channels;
  - (iii) leveraging off existing government services; and
  - (iv) collaborating to improve value for money;

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<sup>18</sup> Bryan Fox “Improve access to community legal services so that all New Zealanders are able to receive support” (Ministry of Justice presentation to Hamilton District Community Law Centre, April 2012).

- (e) effectively prioritised services nationally and locally;
- (f) demonstrated effectiveness and value for money;
- (g) a sustainable funding base for community legal services;
- (h) a shift in role for the Ministry from funder to that of purchaser of services, entailing compliance with the Government’s Mandatory Procurement Policy; and
- (i) compatibility with Government’s intentions for its role in provision of legal services.

The Ministry has also set out a list of what is likely to change with the introduction of this new “model” for Community Law Centres:

- (a) purchase of services guided by a *needs analysis* and services focused on areas of greater need;
- (b) a review of the definitions and scope of community legal services;
- (c) a range of services purchased that may change based on priorities;
- (d) *greater focus on services that steer matters away from the courts (early intervention and prevention);*
- (e) selection of providers by tender, including *consideration of a broader range of providers: including non-traditional Community Law Centres* – the focus will be on achieving aims;
- (f) a review of National Performance Standards;
- (g) a change in accountability and reporting against outputs – reporting against outcomes and quality standards;
- (h) *a change in the number of organisations contracted* – improved governance and better balance between governance and management effort and service delivery;
- (i) expanded channels of service delivery – more recognition of the role for other service portals for example CAB, Heartlands and Community Link Centres;
- (j) more co-ordination of some types and specialities of services;
- (k) an increase in services funded by purchasers other than the MOJ;
- (l) better information support to Community Law Centres through the NLIS (National Legal Information Services); and
- (m) improved focus on customers, with greater community ownership and perspective.

The timeframe within which all of this change was to take place was very tight and, ultimately, could not meet the MOJ’s proposed timeframe of July 2013.

The Ministry originally proposed to decide the geographical need and where to buy services; for example, they will tell the Centres what they are trying to buy and the skills needed. Tenders were to be classed as an “expression of interest”. In the original proposal, when the MOJ invites tenders for the services, all Community Law Centres were expected to tender for services but not exclusively – the tenders would also be open to other organisations. Restorative Justice is up for tender at the same time (and has always been separately tendered for) and an example might be that the Hamilton Community Law Centre could tender for that as well.

The Justice Department is encouraging centres to look at what they could “hook in to”<sup>19</sup> that fits that particular centre. They are putting an emphasis on local collaboration that can provide a triage type of situation that can give clients “fast entry” to other providers, for example budget services and mental health care.

Needless to say there have been some very urgent and detailed discussions at Community Law Centres, with other service providers and with Community Law Centres o Aotearoa to try and

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<sup>19</sup> Fox, above n 18.

ascertain the best outcome. At present such discussions are limited to the type of resolution that can be made until such time as the requisite information from the Ministry regarding geographical need and the purchasing of services is available.

With this collective approach being required there will be scope for Te Piringa to provide a collaborative approach with the local Community Law Centre and other associated organisations to assist not only with the transition of the new system but with the provision of services in a much more flexible way than is happening presently. This could vary from a paper analysing the changes to provision of law students to assist in a variety of clinical undertakings. Once the tenders have been made and the decisions of the Ministry made we will have a much firmer base on which to work on.

#### D. Pro Bono Legal Work

There has always been an expectation and undertaking of work done for free in the legal profession but the way it has been exercised in New Zealand to date has been mainly in an ad hoc manner with lawyers choosing what organisations, clubs, societies and so on to affiliate with and to what or whom the free legal services are applied. More recently, some of the larger law firms have been much more organised with pro bono work incorporating structures and budgets designed to reflect that as part of a practitioner's practice.

Internationally, pro bono work has been recognised as not a substitute for legal aid but a necessary supplement because unmet legal needs exist in every society no matter how robust a state's organised legal aid system. Governments usually have an obligation to fund and provide legal aid, and the availability of pro bono work should not be an excuse to reduce or eliminate a legal aid system. Governments should work closely with clearinghouses to ensure that unmet legal needs are addressed.

According to PILnet, the global network for public interest law:<sup>20</sup>

Law schools and law students can play a vital role in the future advancement of the pro bono community. In a 2009 survey conducted by PILnet of 148 lawyers in fifteen different countries, fifty-seven percent of all respondents said that the greatest impediment to pro bono work is that it is "not prioritised", and thirty-six percent indicated that pro bono work is not "respected or valued generally". Law students are sometimes taught that lawyering is just another type of business, and no information is provided to them about the social and ethical responsibility of the profession. To overcome these impediments, lawyers need to be educated on the value and benefit of pro bono practice early in their careers. If this education starts in law school, lawyers are more likely to appreciate the value of pro bono practice and it will gain respect and become prioritised in the legal community.

Law students are ideal candidates to conduct pro bono work (under the supervision of a suitably qualified lawyer). They are not constrained by the commercial pressures of an employer. Additionally, students that participate in pro bono programmes increase their knowledge and marketability, gain practical experience, develop skills and facilitate their involvement in the community. University-based clinical programs, specifically, are excellent ways for law students to take part in pro bono work.

Providing it has the approval and cooperation of the law faculty, it is possible for a clearinghouse to create a legal clinic at that law faculty.

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<sup>20</sup> PILnet: The Global Network for Public Interest Law and Advocates for International Development *Pro Bono Clearinghouse Manual – Resources for developing pro bono legal services* (2011) at 49.

### *E. How to Create a Legal Clinic (within the Context of a Pro Bono Clearing House)*

PILnet sets out the following stages:<sup>21</sup>

The first step is to find a key patron of the clinic, whose involvement and assistance may play a vital role in the attainment of subsequent objectives.

A patron will prove particularly helpful in obtaining the consent of the dean [of the faculty] to enter the legal clinic's program into the university curriculum. This is the very foundation for the clinic's future development.

The next task is to find an office and provide it with the necessary equipment, which is instrumental for the clinic to operate efficiently. If in the initial phase of clinic organisation problems present themselves in obtaining an adequate office at the university, one may arrange with the charitable organisations, which will refer clients to the clinic, to hold client conferences in their offices, thus limiting operations on the university premises to consulting opinions with supervisors and to holding weekly seminars.

Finance is necessary to secure the clinic's efficient operations. It is needed to pay for the running of the office and for an office secretary. Such means may be obtained from institutions [such as a University] and foundations such [as] local government. ... It should also be kept in mind that one should not assume that any of the [institutions initially funding the clinic] will continue financing the clinic indefinitely. The aim of the clinic should be to become incorporated in the curriculum and to build itself a strong position at the university law faculty and, ultimately, to obtain recognition in the form of financing from the university budgets.

It is important in the process of establishing a legal clinic to initiate close cooperation with charitable organisations from a given city (such as city social services, Caritas, the Red Cross, ... offices of members of parliament and parishes) so that such organisations may refer clients to the clinic. Such referral would translate into the lack of need to select cases within a specified type, or to verify the financial status of the clients.

The next step shall be recruiting students to work in the clinic, and the process of establishing the clinic should be concluded with the fulfilment of all standards of legal clinical operations[. This includes professional indemnity insurance,] the proper organisation of the clinic's secretary office, and the drawing up of appropriate sets of rules and forms which are going to be used in the clinic.

In conclusion – how do you create a legal clinic?

- (a) Find a patron for your clinic.
- (b) Obtain consent to incorporate the clinic in the curriculum.
- (c) Secure an office.
- (d) Research financing options.
- (e) Initiate cooperation with charitable institutions in your city.
- (f) Promote the clinic and assist with student recruitment.
- (g) Make sure that the clinic meets all standards from the onset of its operations.<sup>22</sup>

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21 PILnet, above n 20, at 108.

22 PILnet, above n 20, at 109.

Focusing back on to current practices in New Zealand, there is currently work underway to launch New Zealand's first pro bono clearinghouse. The intention of such a clearinghouse is to work with the entire profession to:

- (a) ensure that pro bono help reaches the most vulnerable members of our society;
- (b) strengthen the ability of non-profit organisations to serve their communities;
- (c) increase the capacity of Community Law Centres and other referral agencies;
- (d) supplement the services of the legal aid scheme and free legal advice organisations;
- (e) *contribute to law reform submissions and other initiatives for the public good;*
- (f) support the Government's commitment to universal access to justice;
- (g) educate individuals and non-profit organisations on legal issues;
- (h) develop the practical skills and general expertise of participating lawyers;
- (i) build a strong pro bono culture that involves all sectors of the legal profession;
- (j) *nurture future generations of lawyers to willingly shoulder their professional obligations;*
- (k) *provide university law schools with access to pro bono opportunities for their students;*
- (l) monitor, measure and evaluate the quantity and quality of pro bono in New Zealand; and
- (m) publicise and celebrate the pro bono achievements of our country's lawyers.

Such an institution could be a registered charity or charitable trust with its patron and governing board drawn from its stakeholder groups.

The creation of such a clearinghouse could be timely given that the MOJ are looking at changes in the way that Community Law Centres' funding is allocated in the future as outlined above. The changes could well put further pressure on the Centres' ability to provide ongoing representation across all legal areas and geographic locations. The aim of a clearinghouse should be to ensure that the profession's pro bono contribution is delivered in a way that complements existing free legal advice services and the legal aid scheme.

To further develop New Zealand's pro bono culture, the clearinghouse is looking at building strong relationships with New Zealand's law schools. They will look to assist the law schools to educate the students about their professional obligation to undertake pro bono work, and where possible to find opportunities for motivated students to participate in the clearinghouse's work. They will endeavour to involve law students from the first year of the three-year proposed pilot scheme and will place particular emphasis on students' participation as the clearinghouse develops specialist projects in Year Two and beyond.

This proposal is still very much at the developmental stage and yet to receive the requisite funding but it is certainly worth analysing the potential initiatives of such a proposal.

## VI. CLINICS WITHIN THE LAW CURRICULUM

Jeff Giddings has put forward the following description of clinical legal education:<sup>23</sup>

Clinical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal and related work for a client, whether real or simulated, in collaboration with a supervisor. Structures enable each student to receive feedback on their contributions and to take the opportunity to learn from their experiences through reflecting on matters including their interactions with the client, their colleagues, and their supervisor, as well as the ethical dimensions of the issues raised and the impact of the law and legal processes.

In his article, Giddings discusses how students are given the opportunity to consider how the theory-based learning they have done elsewhere connects with the practice of law. The type of integration required for a clinic is usually described in positive terms. What can often be missing is detail on *how* to make integration effective and sustainable.

Arguably, in order for clinical legal education to be a sustainable practice, it is likely to rely on multiple contributions from different participants and their appreciation of the benefits of working to integrate different interests. In other words:<sup>24</sup>

[G]oal alignment is critical to integrative relationships with parties sharing some common goals and objectives. Such relationships see parties focus on what they share while also recognising that they each bring valuable and distinctive contributions to a relationship characterised by trust and shared understandings and expectations. Commitment to a problem-solving framework also facilitates integrative approaches.

...

Law schools need to be realistic in setting objectives for clinical integration and focus on ensuring that effective practices are sustained in the long term.

...

Integration of clinical activities should encompass both the teaching and research dimensions of a law school.

...

Integration efforts should be focused on those areas of substantive law being addressed both in the clinic and in the classroom.

This involves more than an appreciation of the benefits of students learning in a practice setting.

I now return briefly to three of the subject matters set out previously in this paper and how each of them may have capacity to contribute to or become part of a clinic that is serving its community, the profession and the faculty itself.

### *A. Professional Legal Training and Postgraduate Students*

With regard to incorporating a law clinic within the requirements of professional legal training and postgraduate students, the task of developing a comprehensive clinical program as part of

23 Jeff Giddings “Why No Clinic is an Island: The Merits and Challenges of Integrating Clinical Insights across the Law Curriculum” (2010) 34 Wash UJL & Pol'y 261 at 265.

24 Giddings, above n 23, at 266, n 13; 288–289; 266; and 269 (citation omitted).

a law degree which also satisfies practice admission requirements must be carefully considered. This requires substantial planning efforts and care must be taken to ensure that those efforts are not solely focused on meeting the requirements of the admitting authorities (for example the New Zealand Law Society Council for Legal Education), with less attention paid to determining how to best integrate and sequence different forms of clinical teaching across the program.

### *B. Use of Technology to Enhance Practical Legal Skills*

Use of technology within a law school clinic can be used to enhance practical legal skills. In many cases, it is imperative that students can “practice” a skill before being sufficiently competent to be involved in a “live” clinic. Integrative approaches enable simulations to be utilised to provide students with frameworks they will need to deal effectively with the uncertain, dynamic nature of the person-to-person contacts that characterise real client clinic work. Simulations can at least raise student awareness of the complexities involved in relatively unstructured situations involving clients, supervisors, witnesses, bureaucrats, and other professionals. Technology is making these types of simulations a reality via programs such as *Second Life* Machinima and we are currently working on the production of such a programme for our Year Three Dispute Resolution course to utilise.

### *C. Continuing Professional Development*

Clinical teaching methods and insights can be constructively integrated into classroom-based courses. “Chalk and talk” teaching/lecturing can include references to clinics and when applicable can be taught by current clinicians/practitioners who bring their clinical insight with them. The law and legal process can be examined, analysed and critiqued with the client’s concerns and interests in mind. The benefit of clinical education as a teaching technique focuses on the learner and the process of learning. Clinical legal education has the potential to alleviate concerns regarding monotony and mental fatigue that can develop in any course governed by a single teaching methodology.

Integration efforts should be focused on those areas of substantive law being addressed in both the clinic and the classroom. One option is to develop clinical components to traditionally taught courses. For example, in a Torts course, with support from the colleague teaching the course, a clinician or practitioner could teach a class on negligence using, with the permission of the client, a current file. The preparation of the claim could be explained, engaging students with relevant legislation and case law. Students can then be subsequently briefed on the case outcome. With Continuing Professional Development about to be introduced by the New Zealand Law Society in the near future, law faculties will be able to form liaisons with local practitioners to undertake these tasks as one of the eligible activities required for CPD for example lecturing or teaching and preparing for law courses at a tertiary level.

## VII. PRACTICAL REQUIREMENTS OF CLINICS WITHIN THE LAW CURRICULUM

What is required to develop a curriculum that integrates a range of clinical methods and activities? Starting with the basics, the following three requirements will assist greatly in the effort to develop such integration:

- (a) the Dean’s support;
- (b) the practice of informally approaching a range of academic colleagues which in turn generated organisational momentum; and
- (c) enabling the development of simulated and real-client clinical components operating in parallel with substantive courses.

Also applicable is having a group of people working together, playing different roles, and working from different standpoints.

Another important factor of developing these types of programs is that they are of sufficient size to enable responsibilities to be shared and to emphasise effective integration to enable a group of academics and clinicians or practitioners to collectively take responsibility and provide leadership for the clinical program. Clinical programs are unlikely to find and retain individuals who, on their own, possess the range of skills and the inclination to effectively advance the multiple facets of their programme.

Healthy scepticism can work well with high-flying ideas regarding the creation of clinics. Good ideas can be examined by asking, “Yes, but how do you actually do it?” It is a balancing act and there is a need for ensuring that good ideas are tested and turned into something that is practical.

Conversely, what can hamper the development of such integration? Obstacles include:

- (a) “support” in theory only. This type of support is conditional. Support is provided only on the basis that it didn’t suck away what colleagues considered to be a disproportionate share of funds *and* they were not asked to go and work at or be involved with the clinic or with a clinician;
- (b) division of “camps” between clinicians and doctrinal scholars and overall isolation of the clinic;
- (c) student resistance based on inadequate academic credit for the amount of work required, for example it is designed to be tough in order to give it credibility but students hate it because it is a great deal of work for little credit;
- (d) under-resourcing of the project regarding both funding, and teaching staff and clinicians;
- (e) professors of relevant substantive courses not accepting skills education as legitimate, and in turn resisting a doctrinal course renovation; and
- (f) staff being expected to “wear too many hats”.

### A. Research Opportunities

Given the emphasis and expectations by universities to the pursuit of scholarly research, the research opportunities generated by effective clinical integration may promote the sustainability of clinical programs. Substantial research projects tend to require a breadth of knowledge and expertise best provided by a team of researchers. Clinicians are ideally placed to provide insights from their practising areas, emphasising the strengths and limitations of problem-solving approaches. They can contribute expertise related to client-centred models of legal practice, alternative dispute resolution, and access to justice, as well as insights relevant to research projects

involving colleagues, especially in areas well represented in clinical casework such as family law, criminal law, immigration law, and ACC law.

### B. *Law in Context in a Clinical Setting*

Considering that law in context is one of Te Piringa's founding principles, we need to look at how clinics can be aligned with and be part of that.

The Australian Government Office of Learning and Teaching has produced a Best Practices Australian Clinical Legal Education report. In their report the following was identified regarding law in context in a clinical setting:<sup>25</sup>

We assert that clinical "graduates" are among the more ethically responsible lawyers in the community. We further assert that they confirm the capacity of the legal education system as a whole to produce socially aware and responsible professionals who can contribute constructively to just and equitable communities. It is also plausible to suggest that students' (clinical) education represents a cost-effective strategy over time for the community and profession because their skills and ethical understanding are far more likely to be retained within legal practice than those without such law school experience. Clinical experience is a high-quality approach to legal education that needs to be shared nationally and not just championed in a relatively few schools.

The Report also noted the following:<sup>26</sup>

Through its immersion of students into real legal client work, clinical legal education (CLE) provides an extra dimension for studying law in context: teaching law students to think critically about law, rules and practices from a variety of perspectives and theoretical understandings of law. These perspectives include gender, race, disability, socio-economic, philosophical, cultural, Indigenous, political and other social constructs. Studying law in context also means analysing the role of power in shaping the law and legal system; and analysing the role of lawyers and how they perpetuate, challenge and reform structures, institutions, systems and relationships.

Teaching law in context is different from conventional "positivist" law teaching, which tends to allow students to accept that the law simply "is" as stated, and that its social context is irrelevant to understanding it. A clinical setting provides opportunities for students to see, analyse, reflect on and deal with the various ways in which law actually manifests in people's lives, and to consider the need for law reform.

### C. *Learning Outcomes*

In the Best Practices report referred to above, the authors incorporated a set of potential Learning Outcomes for CLE courses and programs in Australia, which could apply and be adapted to clinical programmes within a New Zealand law faculty. These objectives are that:<sup>27</sup>

- [u]pon completion of a clinical course, the clinical student will demonstrate:
- promoting critical analyses of legal concepts through reflective practice;
  - an ability to work collaboratively;

25 Adrian Evans and others *Best Practices: Australian Clinical Legal Education* (Australian Government Office for Teaching and Learning, September 2012) at 6.

26 At 15.

27 At 11.

- an ability to practice “lawyering” skills;
- developed interpersonal skills, emotional intelligence and self-awareness of their own cognitive abilities and values;
- a developing ability to “learn from experience”;
- an understanding of continuing professional development and a desire for life-long self learning;
- an understanding, and appropriate use, of the dispute resolution continuum (negotiation, mediation, collaboration, arbitration and litigation);
- an awareness of lawyering as a professional role in the context of wider society (including the imperatives of corporate social responsibility, social justice and the provision of legal services to those unable to afford them) and of the importance of professional relationships;
- a developing personal sense of responsibility, resilience, confidence, self-esteem and, particularly, judgment;
- a consciousness of multi-disciplinary approaches to clients’ dilemmas – including recognition of the non-legal aspects of clients’ problems;
- a developing preference for an ethical approach and an understanding of the impact of that preference in exercising professional judgment;
- a consolidated body of substantive legal knowledge, and knowledge of professional conduct rules and ethical practice; and
- an awareness of the social issues of justice, power and disadvantage and an ability to critically analyse entrenched issues of justice in the legal system.

#### *D. Clinics and Student Learning*

An important aspect of a clinic is the ability of the student to undertake reflective learning. The Australian report asserts:<sup>28</sup>

The practical and “live” nature of clinics coupled with their knowledge of the theoretical bases of reflection provide a valuable opportunity for students to better understand the role (and benefits) of reflection in legal practice and more generally. Therefore reflection within a clinical setting becomes the foundation for the developing “reflective practitioner” in each and every student. This in turn assists them in developing responsibility, resilience, confidence, self-esteem, self-awareness, courage and humility.

#### *E. Assessment of Students in Clinical Courses*

There are some quite legitimate differences of opinion as to whether clinical casework can be fairly graded and in some cases a hybrid approach is used but any such assessments must be valid (achieving its intended purpose), reliable (referenced to specific criteria rather than to the performance of other students) and fair.

Clinical assessment should be timely and constructive, and promote deep active learning, with explicit opportunities for students to gauge the extent of their learning. Assessment processes must be sufficiently documented to facilitate external review.

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28 At 20.

#### *F. The (Long and Winding?) Road Ahead*

In his publication “Best Practices for Legal Education – A Vision and a Road Map”, Roy Stuckey observes that there are three principles of best practices for legal education that are of particular importance:<sup>29</sup>

1. The school is committed to preparing its students to practice law effectively and responsibly in the contexts they are likely to encounter as new lawyers.
2. The school clearly articulates its educational goals.
3. The school regularly evaluates the program of instruction to determine if it is effective in preparing students for the practice of law.

One of the barriers to change in complex organisations like law schools can be institutional inertia. They do not move swiftly in any direction, and it is difficult to begin movement at all. Traditions can die hard, even when traditions are clearly out of step with best practices.

Te Piringa’s founding principles and relative youth provide an advantage in having the ability to constantly evolve and adapt to a range of teaching and assessment resources that reflect a way to move forward together. Law schools need to keep building a system of legal education that respects appropriate traditions and embraces sound educational practices to ensure that students have sufficient opportunities to acquire and develop skills and values they will need as 21st century practitioners.

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<sup>29</sup> Roy Stuckey and others *Best Practices for Legal Education: A Vision and a Road Map* (1st ed, Clinical Legal Education Association, Colombia (SC), 2007) at 210.