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## Clinics and Australian law schools approaching 2020

### Introduction

In this chapter, we consider the place of clinical legal education in Australian legal education generally.<sup>1</sup> We chart the countervailing currents set to influence the prominence and direction of Australian clinics as they approach 2020 with Australia's entire higher education sector facing very turbulent times. The chapter is designed to set the scene for the key aspects of clinical legal education addressed in subsequent chapters. We argue that clinics can and should make multiple contributions to Australian legal education, including fostering student commitment to concepts of justice and raising awareness of how the law and legal processes impact on people.

Law schools and their clinical programs are subject to a range of powerful influences.<sup>2</sup> The prospects for clinics, being part of the higher education sector, will continue to be shaped by the actions of regulators and by broader university agendas. The judiciary and legal profession have

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1 This chapter draws extensively on research undertaken by Jeff Giddings as part of his PhD study, 'Influential Factors in the Sustainability of Clinical Legal Education Programs'. See Jeff Giddings, *Promoting Justice Through Clinical Legal Education* (2013) Justice Press (cited hereafter as Giddings (2013)).

2 For an analysis of the range of influential factors, see Giddings (2013), Chapter 5. See also Margaret Barry, Jon Dubin and Peter Joy, 'Clinical Education for This Millennium: The Third Wave' (2000) 7(1) *Clinical Law Review* 1.

important roles to play in supporting the work of clinics. Economic challenges, such as those generated by the Global Financial Crisis in 2008 and, more recently, federal government policy shifts and budget cuts, appear set to slow the recent momentum that has seen many Australian law schools develop new clinical programs.<sup>3</sup>

## The contributions of clinical legal education

Experiential learning has the potential to contribute to achieving a range of objectives for students, clients and law schools. This generates both opportunities and challenges for those responsible for clinical programs. The capacity to both broaden and deepen student learning is central to clinical legal education. Students can benefit from a sustained experience enabling them to develop understandings and approaches that foster ethical and reflective practice. Academics, supervisors and students involved in clinical programs can make a broad range of research-related contributions, especially where projects require a breadth of knowledge and expertise.<sup>4</sup> Clinicians are also likely to be able to engage effectively with the public policy dimensions of research issues and identify ways to utilise knowledge from other disciplines. Importantly, clinical programs also provide law schools with a natural point of focus for community service, ethical reflection and professional engagement activities.

The service dimension of clinical legal education can generate substantial community benefits while promoting student awareness of social justice and commitment to *pro bono* values. These benefits are evident from the history of Australian clinical legal education, which reveals an enduring commitment to social justice and service.<sup>5</sup> Many Australian clinics continue

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3 Giddings (2013), Chapter 1. See also Kingsford Legal Centre, *Australian Clinical Legal Education Guide 2014–2015*, Kingsford Legal Centre.

4 For examples of student contributions to research, see Liz Curran, ‘Innovations in an Australian Clinical Legal Education Program: Students Making a Difference in Generating Positive Change’ (2004) 6(1) *International Journal of Clinical Legal Education* 162.

5 Mary Anne Noone, ‘Australian Community Legal Centres: The University Connection’ in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (1997) Ashgate, 267; Giddings (2013), 8–10, 46–47.

to view community service as an integral element of their programs.<sup>6</sup> Commitment to justice and client service can usefully be extended beyond clinics to inform other elements of the work of law schools, as we discuss in Chapter 5. A more recent connection between clinical methods and ethical practice is also emerging for law schools, as they seek to respond to broader community calls for lawyers who are ethically aware and resilient. We discuss the concept of ‘ethical infrastructure’, as it affects clinics, later in this chapter.

Clinical legal education and other forms of experiential legal education offer a more complete package than other pedagogies, but they do so with the cost of often intensive student supervision. At its most effective, Australian clinical legal education is distinguished from other forms of ‘learning by doing’ by its commitment to social justice and the structured approach taken to student supervision. As will be discussed later in this chapter, the focus of clinical legal education is more developmental than is the case for placement arrangements in the practical legal training (PLT) programs that law graduates must complete prior to professional admission. Clinical programs in Australia also tend to provide greater structure and require greater student responsibility than work-integrated learning experiences and student volunteer programs.

Clinical legal education and service learning share a strong commitment to social justice. As we discuss later in this chapter, service learning involves students and academics working on legal issues often generated by crisis circumstances.<sup>7</sup> The unpredictability involved in responding to crises tends to make it challenging to use such experiences as the centre point of an experiential learning framework. Service learning may have a more important role to play as a site for more advanced clinic-type experiences.

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6 *Identifying Current Practices in Clinical Legal Education, Regional Report: New South Wales and Australian Capital Territory*, 12–13 (at [perma.cc/FU7X-5TNN](https://perma.cc/FU7X-5TNN)); *Identifying Current Practices in Clinical Legal Education, Regional Report: Queensland and Northern New South Wales*, 8 (at [perma.cc/257Z-6EMR](https://perma.cc/257Z-6EMR)); *Identifying Current Practices in Clinical Legal Education, Regional Report: South Australia*, 7–8, (at [perma.cc/3MPF-5U5A](https://perma.cc/3MPF-5U5A)); *Identifying Current Practices in Clinical Legal Education, Regional Report: Victoria and Tasmania*, 7 (at [perma.cc/J562-X6GU](https://perma.cc/J562-X6GU)); *Identifying Current Practices in Clinical Legal Education, Regional Report: Western Australia and Northern Territory*, 6 (at [perma.cc/4EDN-5SZG](https://perma.cc/4EDN-5SZG)). See also Judith Dickson, ‘Clinical Legal Education in the 21st Century: Still Educating for Service?’ (2000) 1 *International Journal of Clinical Legal Education* 33.

7 Laurie Morin and Susan Waysdorf, ‘The Service-Learning Model in the Law School Curriculum’ (2011–12) 56 *New York Law School Law Review* 561.

Clinical legal education has potential to make a substantial contribution to legal education generally, through integrating practical insights and theoretical understandings in order to transcend the current doctrinal focus. But there remains a long way to go until this potential is embraced by the legal academy in Australia. Until this integrative potential is harnessed, clinics are unlikely to feature prominently in professional admission requirements and in the standards set for law schools. Those charged with developing clinical legal education face the significant challenge of building the level of awareness of these programs among public policymakers, members of the judiciary and the practising legal profession as well as within both their universities and their law schools.<sup>8</sup>

At the very time that many Australian law schools are responding to university agendas related to experiential learning,<sup>9</sup> the viability of current models of clinical legal education may be called into question by various factors. These include changes to how the legal profession and legal education are structured and regulated, along with dramatic growth in the numbers of law schools and law graduates seeking to enter the legal profession. These changes are examined in the next part of this chapter. We then consider the likely implications for clinical legal education of sector-wide developments, namely the promotion of work-integrated learning and capstone experiences. The chapter ends by addressing the relationship between student wellbeing, learning and service, and the potential for clinical legal education to contribute to the development of resilient legal professionals with an enhanced awareness of ethically appropriate behaviour.

## Dramatic growth in the number of law schools

Australia has seen a significant increase in the numbers of law schools and law students over the past 25 years, and this has fostered the development of a range of new clinical programs. Barker refers to an ‘avalanche of law schools’, with their numbers trebling since the Dawkins reforms to tertiary education in the late 1980s.<sup>10</sup> In 1998, Chesterman described the new

8 Giddings (2013), Chapter 11; Mary Anne Noone, ‘Time to Rework the Brand “Clinical Legal Education”’ (2013) 19 *International Journal of Clinical Legal Education* 341.

9 See Janice Orrell, *Good Practice Report: Work-integrated Learning* (2011) Australian Learning and Teaching Council.

10 David Barker, ‘An Avalanche of Law Schools, 1989–2013’ (2013) 6 *Journal of the Australasian Law Teachers Association* 153. See also Margaret Thornton and Lucinda Shannon, ‘“Selling the Dream”: Law School Branding and the Illusion of Choice’ (2013) 23(2) *Legal Education Review* 249.

‘third wave’ law schools as having filled some of the many gaps in legal education.<sup>11</sup> Lansdell refers to a dramatic increase in student numbers, from 11,254 studying law in 1984 to 36,331 studying law or legal studies in 2000.<sup>12</sup> More recently, Thornton and Shannon have argued that Australian law schools offer prospective law students an illusion of choice that emphasises employability and glamour. They are rightly critical of law school branding that pays insufficient attention to ‘the centrality of justice and critique’.<sup>13</sup> Their analysis could have usefully considered the potential of clinic-based learning and service to make a major contribution to the development of a justice-focused legal education.<sup>14</sup> Those involved in clinical legal education have long emphasised its potential beyond being merely a ‘head start’ program for those soon to enter the profession.<sup>15</sup> As we noted earlier, Australian clinical legal education continues to be strongly linked to various access to justice agendas.

The Dawkins reforms promoted the establishment of new law schools, but did so in a manner that generated financial pressures to maximise student numbers. Since 1991, the federal government has used a Relative Funding Model to allocate operating grants to universities. Law is placed in the lowest of five discipline funding clusters (along with economics, accounting and various humanities disciplines) with a weighting of 1.<sup>16</sup>

11 Michael Chesterman, ‘The New Law Schools: What’s New in Them?’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) Cavendish, 204. He identified the achievements of these new entrants in their emphasis on practical skills training and practical experience, integrating law with other disciplines and in distance learning, 205–06.

12 Gaye Lansdell, ‘Have We “Pushed The Boat Out Too Far” in Providing Online Practical Legal Training? A Guide to Best Practices for Future Programs’ (2009) 19 *Legal Education Review* 149, 151, note 11.

13 Margaret Thornton and Lucinda Shannon, cited at footnote 10, 251.

14 Margaret Thornton and Lucinda Shannon, cited at footnote 10, 261–63. Their criticism of experiential learning relates to how it is marketed ‘because it accords with the market’s demand for graduates with “job ready” skills—that is, the neoliberal imperative which favours “know how” over “know what”’.

15 Meredith Ross, ‘A “Systems” Approach to Clinical Legal Education’ (2007) 13 *Clinical Law Review* 779, 781. In her account of the history of the clinical program at the University of Wisconsin, Ross quotes (at 788) the founder of that program, Frank Remington, who criticised skills-focused courses as narrowing the clinical experience to a ‘head start program’ for people soon to join the profession.

16 Andrew Goldsmith, ‘Why Should Law Matter? Towards a Clinical Model of Legal Education’ (2002) 25(3) *University of New South Wales Law Journal* 721, 721–30. See also Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) Higher Education Group, Department of Science, Education and Training, 3–4; Les McCrimmon, ‘Mandating a Culture of Service: Pro Bono in the Law School Curriculum’ (2003–04) 14(1) *Legal Education Review* 53, 72–73; and Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26(4) *Sydney Law Review* 556.

By contrast, the top cluster (comprising medicine, dentistry and veterinary science) has a weighting of 2.7. Higher clusters received more funds per student enrolled. Consequently, and perhaps inevitably, less expensive ways of teaching were reinforced as the default approach in Australian law schools.<sup>17</sup>

While some law schools have recently created new experiential learning opportunities, the pedagogy informing some of these programs requires further development. Our research for *Best Practices* revealed considerable variation among clinical programs in terms of the responsibility given to students, supervisory processes and the classroom component accompanying the clinic experience.<sup>18</sup> Further, the resource-intensive nature of clinical programs has contributed to their remaining elective courses rather than becoming a compulsory part of the curriculum. In an effort to reduce costs, some law schools have relied on unpaid and unsupported external supervisors. While external placements have great potential to provide students with excellent learning opportunities, they require careful structuring in terms of the supervision arrangements and the academic component linked to the placement. Some of these newer programs may also be underperforming in any effort to inculcate a justice focus in their students. Unless close attention is paid to the pedagogy that underpins experiential learning, Australian law schools may end up in a ‘race to the bottom’ that emphasises the practice-oriented experience at the expense of the justice-oriented learning we discuss in Chapter 5.

## Regulation of law schools

The Council of Australian Law Deans (CALD) has adopted Standards for Australian Law Schools,<sup>19</sup> which address a range of matters related to the operation of law schools and law courses. The standards facilitated the establishment of the Australian Law Schools Standards Committee

<sup>17</sup> Giddings (2013), 121.

<sup>18</sup> *Identifying Current Practices in Clinical Legal Education, Regional Report: New South Wales and Australian Capital Territory*, 12–13 (at [perma.cc/FU7X-5TNV](https://perma.cc/FU7X-5TNV)); *Identifying Current Practices in Clinical Legal Education, Regional Report: Queensland and Northern New South Wales*, 8 (at [perma.cc/257Z-6EMR](https://perma.cc/257Z-6EMR)); *Identifying Current Practices in Clinical Legal Education, Regional Report: South Australia*, 7–8, (at [perma.cc/3MPF-5U5A](https://perma.cc/3MPF-5U5A)); *Identifying Current Practices in Clinical Legal Education, Regional Report: Victoria and Tasmania*, 7 (at [perma.cc/J562-X6GU](https://perma.cc/J562-X6GU)); *Identifying Current Practices in Clinical Legal Education, Regional Report: Western Australia and Northern Territory*, 6 (at [perma.cc/4EDN-5SZG](https://perma.cc/4EDN-5SZG)).

<sup>19</sup> Council of Australian Law Deans, The CALD Standards for Australian Law Schools, as adopted 17 November 2009 and amended to March 2013: [perma.cc/3EGK-LAW5](https://perma.cc/3EGK-LAW5).

(CALD standards committee). The committee is independent of CALD and has responsibility for certifying whether a law school complies with these voluntary standards,<sup>20</sup> a process that began in 2015.

It remains too early to say whether the CALD standards committee will produce meaningful change, but at least the standards refer to the potential contributions clinics can make to law school engagement with the wider community. However, it should be emphasised that they do so only in aspirational terms, as an example of experiential learning.<sup>21</sup> This lukewarm endorsement of clinics should be contrasted with the references to clinical legal education in the arguments made by CALD in efforts to reverse the history of underfunding of law schools. In its 2007 submission to the Review of the Impact of the Higher Education Support Act 2003: Funding Cluster Mechanism, CALD stated:

It is now widely accepted that legal education should have a clinical or industry placement component, with students having hands-on experience with real clients; yet clinical programs are so expensive that only a handful of law schools have been able to fund them adequately, usually with substantial external support, to which many law schools do not have easy access.<sup>22</sup>

Australian law schools have also faced other recent regulatory changes. The Tertiary Education Quality and Standards Agency (TEQSA) was established in 2011 with responsibility for ensuring compliance with the Australian Qualifications Framework (AQF). The AQF is the national policy that sets the specifications for regulated qualifications in Australia.<sup>23</sup> One of the key reference points for the operation of the AQF in terms of law studies is the Threshold Learning Outcomes (TLOs) for Law published in 2010 as part of the Learning and Teaching Academic Standards component of the AQF.<sup>24</sup> TLOs have been developed for a range of disciplines and are defined in terms of minimum discipline knowledge,

20 CALD Standards Introductory Context Statement March 2014: [perma.cc/M3XG-7H96](https://perma.cc/M3XG-7H96).

21 Council of Australian Law Deans, The CALD Standards for Australian Law Schools, Standard 2.2.4: [perma.cc/3EGK-LAW5](https://perma.cc/3EGK-LAW5).

22 See Council of Australian Law Deans, Submission to the Review of the Impact of the Higher Education Support Act 2003: Funding Cluster Mechanism, 26 February 2007, 2.

23 See [www.teqsa.gov.au](http://www.teqsa.gov.au). Accessed 16 September 2016.

24 Australian Learning and Teaching Council, Learning and Teaching Academic Standards Project, Bachelor of Laws Learning and Teaching Academic Standards Statement, December 2010: [perma.cc/X93F-GHM5](https://perma.cc/X93F-GHM5). TLOs have also been developed for Juris Doctor (JD) graduates. CALD has stated that the TLOs for JD studies are designed to ensure they reflect the AQF requirements for a Master's degree (extended) qualification. See [perma.cc/KD4J-VQXF](https://perma.cc/KD4J-VQXF)

discipline-specific skills and professional capabilities including attitudes and professional values that are expected of a graduate from a specified level of program in a specified discipline area.<sup>25</sup> Clinical legal education can make vital contributions to law students' achieving each of the following six TLOs:

- understanding a coherent body of *knowledge*;
- developing understandings and abilities related to *ethics and professional responsibility*;<sup>26</sup>
- developing relevant *thinking skills*;
- developing research-related skills;
- being able to communicate and collaborate; and
- being able to *self-manage*.<sup>27</sup>

The application of the sector-wide AQF to the law discipline has been strongly criticised. The University of New South Wales Law Dean, Professor David Dixon, described the AQF as providing 'a series of round holes into which our square pegs don't fit'.<sup>28</sup> The AQF specifications for Honours and Master's degrees were identified as likely to damage law programs without benefit, especially in relation to providing significant disincentives for international students to study law in Australia.<sup>29</sup>

The far-reaching higher education reforms announced by the federal government in the 2014 budget have the potential to impact dramatically on the number of law schools in Australia and their focus. The changes may also see the emergence of new private providers in the legal education market with programs designed to fill perceived gaps in the market.

The globalisation of legal education may generate further regulatory requirements for Australia. In a 2011 report, Flood referred to the influence of factors that include the greater mobility of lawyers, technological developments, greater specialisation and outsourcing, and

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25 The former Australian Learning and Teaching Council (ALTC) implemented the Threshold Learning Outcomes project. See [www.olt.gov.au/system/files/altc\\_standards.finalreport.pdf](http://www.olt.gov.au/system/files/altc_standards.finalreport.pdf).

26 See Chapter 5 of this book.

27 See Learning and Teaching Academic Standards Project, 'Bachelor of Laws Learning and Teaching Academic Standards Statement, December 2010', at [perma.cc/X93F-GHM5](http://perma.cc/X93F-GHM5), at 10. See also Chapter 4 of this book on course design.

28 David Dixon, 'The Regulatory Threat to Australian Legal Education', Centre for Law Markets and Regulation, UNSW, at [perma.cc/MMP4-EEL2](http://perma.cc/MMP4-EEL2). Accessed 4 February 2017.

29 See David Dixon, cited at footnote 28.

noted ‘an inexorable move in the world towards the Americanisation of legal education, in the form of the widespread adoption of the JD degree over the LLB’.<sup>30</sup> Flood’s report referred to the significance of the American Bar Association (ABA) Law School Accreditation Standards and its recent moves to ‘liberalize legal education by permitting more online instruction, less security for faculty, and various other changes’.<sup>31</sup> The ABA Standards include requirements for provision of clinical legal education opportunities for students as well as safeguards for the status and employment of clinicians.<sup>32</sup> It is likely that Australian law schools wishing to develop and maintain their place in the developing ‘Global JD’ market may need to provide their students with clinic-based experiences comparable to those offered by United States law schools.

## Practical legal training and preparation for reflective practice?

There have also been dramatic changes in the professional training required of law graduates in order to gain admission to legal practice in Australia. Across Australia, the traditional articles of clerkship have largely been replaced with PLT programs (offered by law schools and private providers) and workplace traineeships.<sup>33</sup> While these PLT programs can generate considerable educational benefits,<sup>34</sup> the placement experiences offered to students vary considerably in terms of duration, currently from three weeks<sup>35</sup> to 16 weeks,<sup>36</sup> and nature. Some programs rely on the student to secure their placement, and almost all permit students to claim

30 John Flood, ‘Legal Education in the Global Context: Challenges from Globalization, Technology and Changes in Government Regulation’, Report for the Legal Services Board, 1 at [perma.cc/N37K-H5TX](http://perma.cc/N37K-H5TX). Accessed 13 September 2016. Flood is referring to the Juris Doctor degree.

31 See John Flood, cited at footnote 30, 17.

32 Giddings (2013), 43–44.

33 Allan Chay and Frances Gibson, ‘Clinical Legal Education and Practical Legal Training’ in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds), *Excellence and Innovation in Legal Education* (2011) LexisNexis Butterworths, see Chapter 18, 511.

34 For a comprehensive analysis of the merits of PLT programs, see John De Groot, *Producing a Competent Lawyer: Alternatives Available* (1995) Centre for Legal Education. See also footnote 33.

35 See *Tasmanian Legal Practice Court Handbook* (2017), 13, at [www.utas.edu.au/legal-studies](http://www.utas.edu.au/legal-studies). Accessed 7 February 2017.

36 See Jeff Giddings and Michael McNamara, ‘Preparing Future Generations of Lawyers for Legal Practice: What’s Supervision Got to Do With It?’ (2014) 37(3) *University of New South Wales Law Journal* 1225.

credit for previous practice-based experience.<sup>37</sup> But the placement process is not without its challenges, and in a range of instances the placement appears not to be effectively integrated with other program components.<sup>38</sup>

The Competency Standards for Entry Level Lawyers that frame the content of PLT programs are concerned with competencies developed principally, if not entirely, through classroom-based programmed training.<sup>39</sup> For the vast majority of students, the classroom is a virtual one, with most PLT programs engaged in online delivery. Lansdell has plausibly argued that programs that blend classroom-based work with online study will be more effective than those that are solely online.<sup>40</sup> This analysis could usefully be extended to include making full use of the learning potential of placement experiences. The current standards make no reference to workplace experience requirements, while the standards that came into operation on 1 January 2015 require a workplace experience of only at least 15 days.<sup>41</sup> It is conceivable that these days will be more widely separated than in the past and involve a wider range of placement sites. If accreditation arrangements were to move beyond requiring students to complete a prescribed number of hours of activities, and were to focus instead on key experiences that students must successfully undertake in collaboration with a skilled supervisor, then there might be reduced emphasis on the number of days while enabling recognition of the added value of clinic-based learning.<sup>42</sup>

## Playing ‘pass the parcel’: Confusion in Australia’s legal education framework

The place of clinical teaching methodologies in Australian legal education is left uncertain by the continuing lack of clarity around the functions of the different stages of the legal education process. In many instances, the academic stage of legal education provided by law schools and the professional (or vocational) stage provided by PLT programs operate as

37 See Jeff Giddings and Michael McNamara, cited at footnote 36, 1232–35.

38 See Jeff Giddings and Michael McNamara, cited at footnote 36, 1232–36.

39 Allan Chay and Frances Gibson, cited at footnote 33, 519. Chay and Gibson refer to classroom and online learning environments in which students can gain ‘some or all of the benefits of experiential learning’.

40 Gaye Lansdell, cited at footnote 12.

41 Law Admissions Consultative Committee, *Practical Legal Training Competency Standards for Entry Level Lawyers, Requirements for Each Form of PLT*, 4.1(b)(ii).

42 This is discussed further in Giddings (2013), 257 and 343.

disconnected parts of an uncoordinated system. The most prominent exceptions to this *ad hoc* approach have been the clinic-focused Professional Program pioneered by the University of Newcastle Law School in the 1990s<sup>43</sup> and the integrated PLT programs at the law schools of the University of Technology Sydney (UTS) and Flinders University, but even these programs lack clear alignment with the supervised legal practice period required of all newly admitted practitioners.

Unfortunately, some involved in legal education continue to conflate clinical legal education with the PLT requirements that law graduates must complete prior to admission to practice. As we discuss in Chapters 4 and 5 in this book, the focus of many undergraduate clinical programs is on critique, exploration and the development of real-world judgment, rather than on the need to meet competency requirements. It is a matter of concern that legal education authorities have not taken up the challenge of finding ways for these phases to work constructively together. However, this task may now have become culturally and logistically easier with the advent of uniform regulation of legal practice across Victoria and New South Wales in 2015.

The superior courts in each Australian state and territory play a central role in setting requirements for admission to legal practice. In accrediting law degrees, the focus of the admitting authorities in each state and territory, and of the Law Council of Australia's Law Admissions Consultative Committee, has been on ensuring coverage of particular areas of substantive law with limited attention to the approaches used to foster student learning.<sup>44</sup>

The only regulatory requirements for law students to learn in a practice setting involve requirements in PLT programs, and in most instances they require only an unstructured placement in a legal workplace. Australian regulators should recognise the value of giving law students opportunities to engage in 'learning by doing and reflecting' prior to undertaking their PLT. As discussed earlier, focusing on practical skills development leaves

43 For an account of the development of the University of Newcastle Law School Professional Program, see Giddings (2013), Chapter 8.

44 In 2004 Keyes and Johnstone highlighted that the nationally unified requirements for admission to the legal profession are preoccupied with issues of content rather than pedagogy. Minimal attention has been paid to addressing graduate attributes, skills and theoretical perspectives: Mary Keyes and Richard Johnstone, cited at footnote 16, 538. See also Vivienne Brand, 'Decline in the Reform of Law Teaching?' (1999) 10 *Legal Education Review* 109, 125–26; and Richard Johnstone and Sumitra Vignaendra, cited at footnote 16, Chapters 1 and 2.

the full educational potential of clinical legal education unfulfilled. Rather, clinics should be recognised for their capacity to develop students' ability to learn from experience, and to connect their classroom learning to the practice of law. Clinical legal education can make a major contribution to law students' ability to develop their understanding of the ethical dimensions of the law and legal processes.<sup>45</sup> This is particularly the case with undergraduate and JD clinics, where the students can be engaged in understanding and exploring key concepts, rather than in meeting competency standards as is required in PLT programs.

Greater use of experiential learning models, and their integration across the academic and professional stages of legal education would, of course, have resource implications for law schools. Regulators have an important role to play in encouraging universities and governments to address the historic inadequacy of resources committed to legal education.<sup>46</sup> In the face of limited resources, such requirements are unlikely to be voluntarily developed by law schools themselves. The United States' experience of accreditation standards imposed by the ABA provides a valuable example of a regulator fostering law school engagement with clinical methods.<sup>47</sup> If accreditation requirements are to be used to promote the broader use of such methods, then it will be valuable for such arrangements to recognise the additional benefits students derive from participation in effectively structured and supervised clinical experiences as compared to other less coherent forms of exposure to legal practice. Students are likely to learn much more when engaged in collaborative work with an experienced supervisor who will harness the learning potential of clinical experiences.

Limited availability of clinical placements, and the underdeveloped nature of clinical pedagogy in Australia, mean there is heavy reliance on graduates learning 'on the job' without being effectively prepared for the rigours of professional life during their legal education. Often these graduates have had little or no exposure to practice-based learning designed to enhance their capacity for reflective practice, and reliance is placed on up to two years of 'supervised legal practice' that must be completed by newly

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45 Giddings (2013), 59–61.

46 See Giddings (2013), 121.

47 See Giddings (2013), 43–44.

admitted lawyers before they can hold a full practising certificate.<sup>48</sup> Despite this reliance, only limited guidance is provided in relation to the meaning of supervision and appropriate supervision practices. In particular, there is no guidance on the training and development function of supervision and its place in the overall legal education framework. Nor are there any legislative references to the importance of the concept of reflection and its role in law students' learning. It is noteworthy, however, that the Australian Government Productivity Commission's 2014 *Access to Justice Arrangements Inquiry Report* contains a recommendation for the Australian Government to conduct a holistic review of the current status of the three stages of legal education in consultation with the state and territory governments, jurisdictional legal authorities, universities and the profession.<sup>49</sup>

The disconnection between, and confusion around, the respective roles of each phase of legal education and the place of clinic can be eased by greater 'clinic fluency'. By this we mean the familiarity of people with the characteristics of clinical learning in law.<sup>50</sup> Fluency involves a close familiarity with the range of clinical models available (see Chapter 3), the strengths and limits of each, and the value of integrating and sequencing the use of various clinical models in tandem with other teaching methods.<sup>51</sup> Such fluency enables understanding of the great potential of experiential learning, while also tempering unrealistic expectations around what can be achieved with only limited resources. It also entails an appreciation of the potential for insights from clinical legal education to inform the broader law curriculum.

One of the distinctive contributions made by students having the opportunity to learn through supervised work with clients is the development of frameworks for personal reflection. Chapter 6 examines the learning opportunities generated by supervision arrangements that

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48 *Legal Profession Act 2006* (ACT) s 50; *Legal Profession Act* (NT) s 73; *Legal Profession Act 2007* (Qld) s 56; *Legal Profession Act 2007* (Tas) s 59; *Legal Profession Act 2008* (WA) s 50. In South Australia, this is a requirement pursuant to r 3 of the *Rules of the Legal Practitioners Education and Admission Council 2004*; in NSW (*Legal Profession Uniform Law Application Act 2014*) and Victoria (*Legal Profession Uniform Law Application Act 2014*, Schedule 1, cl 49), the requirement is two years if practical legal training is undertaken, or 18 months if a law firm traineeship is completed.

49 Australian Government Productivity Commission, *Access to Justice Arrangements Inquiry Report* (2014), Chapter 7, 254. See Recommendation 7.1.

50 See Giddings (2013), Chapters 1 and 2.

51 See Chapter 4 of this book.

systematically assist students to ‘learn how to learn from experience’.<sup>52</sup> These circumstances make it more important for both law schools and PLT providers to make informed choices about the design and delivery of experiential learning opportunities. The development of supervision arrangements that enable students and their supervisors to effectively harness the learning potential of practice experiences requires sustained engagement with the pedagogy of experiential learning.

These changes in legal education and legal practice in Australia have created serious and unresolved tensions around how to best prepare current students and recent graduates for the effective and ethical practice of law. As noted earlier, opportunities for law graduates to participate in a closely supervised transition to professional practice appear to have diminished.<sup>53</sup> At the very time that the importance of close supervision is being more clearly recognised, it is no longer uniformly available to law graduates. Some law graduates seek to enter the legal profession with little in the way of direct experience of legal work, and without structured support to assist them in making sense of the exposure to practice they have had. This has the potential to place greater expectations on clinics to play a more substantial role in the preparation of students for the practice of law.

## Broader university agendas

Interest in clinics has been generated by a range of sector-wide developments in tertiary education. These include the growing emphasis on ‘work-integrated learning’ and the importance attached to providing graduates with a capstone experience.<sup>54</sup> Both of these trends are linked to developing graduate attributes and employability skills.<sup>55</sup>

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52 See Chapter 6 of this book.

53 Joe Cantanzariti, ‘The Future of the National Legal Profession’, Speech to the Opening of Law Summer School 2013, University of Western Australia, Perth, 22 February 2013. The emergence of larger national law firms and, over the past decade in particular, the internationalisation and digitisation of legal practice have further challenged the structures that have traditionally been used to prepare trainee and junior lawyers.

54 Capstone courses are designed to assist students to develop their professional identity and their transition out of university into work and professional life. See Sally Kift, Des Butcher, Rachael Field, Judith McNamara, Catherine Brown and Cheryl Treloar, *Curriculum Renewal in Legal Education: Final Report 2013*, Office for Learning and Teaching at [perma.cc/KH3P-93QR](http://perma.cc/KH3P-93QR).

55 Carol-joy Patrick, Deborah Peach and Catherine Pocknee, *The WIL [Work Integrated Learning] Report: A National Scoping Study* (2009) Australian Learning and Teaching Council, 3.

## Work-integrated learning (WIL)

Within universities, efforts have been made to institutionalise WIL ‘as a teaching and learning approach which has the potential to provide a rich, active and contextualised learning experience for students which contributes to their engagement in learning’.<sup>56</sup> Orrell’s 2011 Australian Learning and Teaching Council (ALTC) *Good Practice Report: Work Integrated Learning* refers to WIL as ‘a chameleon term with a problem of definition’, describing programs involving student engagement with workplaces and communities as a formal part of their studies with the expectation of ‘gaining new knowledge, understandings and capabilities, and mastering skills considered essential to particular workplace practices’.<sup>57</sup>

The 2008 report of the Bradley Review of Australian Higher Education, and the federal government’s response to the report, both acknowledge the need for universities to prepare graduates for the world of work, increasing the interest of the sector in WIL as an educational approach.<sup>58</sup> While law as a discipline has not been central to this agenda,<sup>59</sup> the setting of institutional goals is likely to increase pressure on law schools to make workplace learning opportunities readily available to their students.<sup>60</sup> Clinics appear to be seen by law schools as the easiest way to address such pressure despite their different orientation.

As we have noted earlier, clinical legal education in Australia is distinctive in its focus on social justice concerns. Such concerns are more prominent in Australian clinical legal education than in WIL-related activities in other disciplines.<sup>61</sup> In addressing equity, access and social justice in her *Good Practice Report*, Orrell’s concern was with the participation of students rather than with the ethos of the programs.<sup>62</sup> WIL programs also tend to be less structured, with limited focus on linking the experiential aspects

56 See Carol-joy Patrick and others, cited at footnote 55.

57 Janice Orrell, cited at footnote 9, 5.

58 Denise Bradley, Peter Noonan, Helen Nugent and Bill Scales, *Review of Australian Higher Education: Final Report* (2008) Department of Education, Employment and Workplace Relations.

59 The WIL literature features little about the particular requirements and operational context of law as a discipline. See Patrick and others, cited at footnote 55; and Janice Orrell, cited at footnote 9.

60 See Melinda Shirley, Iyla Davis, Tina Cockburn and Tracey Carver, ‘The Challenge of Providing Work-Integrated Learning for Law Students – the QUT Experience’ (2006) 9 *International Journal of Clinical Legal Education* 134.

61 See Giddings (2013), 121–22; see also Janice Orrell, cited at footnote 9, 19.

62 See Janice Orrell, cited at footnote 9, 19.

to an academic component. Clinics need to be able to demonstrate the additional learning opportunities generated by a structured practice-based experience if they are to avoid being confused and conflated with WIL.

## Capstone experiences

Australian universities have shown increasing interest in developing so-called ‘capstone’ experiences for students as part of a broader agenda to develop graduate attributes. Capstone courses are generally completed in a student’s final year or final semester. They have been defined as a crowning experience, ‘with the specific objective of integrating a body of relatively fragmented knowledge in a unified whole’. They enable undergraduate students to ‘both look back over their undergraduate curriculum in an effort to make sense of that experience, and look forward to a life of building on that experience’.<sup>63</sup>

Clinical legal education has great potential to address the set of curriculum design principles identified by a Queensland University of Technology (QUT)-led project on capstone experiences in legal education.<sup>64</sup> The following principles were identified by the QUT project team:

- supporting transition by promoting self-management, developing professional identity and supporting career planning and development;
- providing integration and closure;
- responding to diversity by enhancing students’ capacity to engage with diversity in professional contexts;
- promoting professional engagement;
- recognising the experience’s culminating nature by requiring students to make appropriate use of feedback and to reflect on their own capabilities; and
- being regularly evaluated.<sup>65</sup>

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63 Robert Durel, ‘The Capstone Course: A Rite of Passage’ (1993) 21(3) *Teaching Sociology* 223.

64 See Kift and others, cited at footnote 54.

65 Kift and others, cited at footnote 33, Chapter 5.

Clinical courses in a student's final year have often fulfilled many of these features. By default, many clinical elective courses are capstones. It remains to be seen whether clinical programs can be extended to enable all law students to engage in this type of capstone experience. Resource issues would present the most serious challenge to any such proposal.

## Learning and service

Recognition of the capacity for clinical legal education to serve multiple purposes generates the need to balance student learning and community service, as well as the legal professional responsibilities of clinic supervisors.<sup>66</sup> Similar challenges are also raised by other models of engagement such as service learning and *pro bono* work.

### Service learning

Service learning has been identified by United States clinicians as having great potential to enhance the potential for law students to serve their communities. A United States review of the literature on service learning emphasises the importance of students being directly involved with the service users while engaging in classroom discussion and activities designed to foster reflection.<sup>67</sup> Although it is not prominent in Australian higher education, service learning has been recognised as aligning with Deci and Ryan's self-determination theory that emphasises the basic human needs of autonomy, competence and relatedness.<sup>68</sup> This theory is considered important in the developing literature on wellbeing in the legal profession, an issue we address later in this chapter.

Morin and Waysdorf have written about service learning as a form of experiential learning that involves responding to humanitarian crises, emphasising its focus on community service, with students receiving

66 Gavigan sums up this tension very effectively in her account of the Parkdale Clinic operated by Osgoode Hall Law School: 'Put most baldly, the unspeakable question has been: are law students ... learning on the backs of the poor? Put more politely, the question was framed not infrequently as one of "service vs. education".' See Shelley Gavigan, 'Twenty-five Years of Dynamic Tension: The Parkdale Community Legal Services Experience' (1997) 35(3) *Osgoode Hall Law Journal* 443, 457. See also Giddings (2013), Chapter 2.

67 Chantal Levesque-Bristol, Timothy Knapp and Bradley Fisher, 'The Effectiveness of Service-Learning: It's Not Always What You Think' (2010) *Journal of Experiential Education* 208.

68 Richard Ryan and Edward Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being' (2000) 55(1) *American Psychologist* 68.

little, if any, academic credit.<sup>69</sup> They provide an account of a special service learning project involving students responding to needs generated by Hurricane Katrina in the United States. The project was service-driven, while recognising the learning potential such work presents. Behre provides another interesting example involving student volunteers responding to legal needs generated by a tornado.<sup>70</sup> The divide between service learning and clinical legal education appears to relate most particularly to the voluntary nature of student contributions, the limited classroom component, and the principal focus on service rather than student learning.<sup>71</sup>

### *Pro bono*

Clinics are often identified as important sites for fostering student commitment to making *pro bono* contributions.<sup>72</sup> Evans has identified the interest of many clinicians in ‘proving that a “clinical experience” in law school will direct law students towards public interest lawyering’.<sup>73</sup> However, establishing such a link with hard data remains a challenge. Sandefur and Selbin have reported on the clinical legal education dimensions of the Beyond the JD Research Project, a national longitudinal study of early-career United States lawyers.<sup>74</sup> They found ‘surprisingly little empirical evidence about the relationship between clinical legal education and the practical and professional development of law students’.<sup>75</sup> Their data indicate that early-career lawyers value clinical experience more highly than any other aspect of the formal law school curriculum in preparing them to make the transition to the profession.<sup>76</sup> However, their analysis addresses the contributions made by clinical experiences in a

69 Laurie Morin and Susan Waysdorf, cited at footnote 7, 574.

70 Kelly Behre, ‘Motivations for Law Student Pro Bono: Lessons Learned From the Tuscaloosa Tornado’ (2013) 31 *Buffalo Public Interest Law Journal* 1.

71 Valverde has argued that clinic teachers can harness many of the insights and teachable moments generated by service learning in clinical programs. See Jennifer Rosen Valverde, ‘Hindsight is 20/20: Finding Teachable Moments in the Extraordinary and Applying Them to the Ordinary’ (2013) 20 *Clinical Law Review* 267.

72 For a review of these sources, see Giddings (2013), 64–67.

73 Adrian Evans, ‘Efficacy Beyond Reasonable Doubt?’ (2001) 19 *Law in Context* 89.

74 Rebecca Sandefur and Jeffrey Selbin, ‘The Clinic Effect’ (2009) 16 *Clinical Law Review* 57.

75 Rebecca Sandefur and Jeffrey Selbin, cited at footnote 74, 58. They go on to state that the existing research ‘does little to reveal, explain or otherwise inform our understanding of the relationship between clinical legal education and the practical and professional development of law students’.

76 Rebecca Sandefur and Jeffrey Selbin, cited at footnote 74, 58–59; see also Table 1, at 85.

stand-alone sense; it would be interesting to consider whether additional contributions can be made through integration of clinical insights across the broader law curriculum.<sup>77</sup>

Law student *pro bono* schemes have developed in Australia through the work of the National Pro Bono Resource Centre<sup>78</sup> and Pro Bono Law Students Australia.<sup>79</sup> Such schemes have the potential to provide pathways for valuable student contributions, provided they are effectively coordinated and resourced. In Chapter 6, we address issues related to the importance of effective supervision and structure in enabling students to maximise their learning from clinical experiences.<sup>80</sup>

## Wellness and depression in legal education and legal practice

Awareness of issues related to the mental health and wellbeing of law students has grown dramatically in the past decade. The work of the Tristan Jepson Memorial Foundation<sup>81</sup> and the Wellness for Law Forum<sup>82</sup> in particular has been important in publicising the difficulties facing both law students and lawyers.<sup>83</sup> The 2009 *Courting the Blues* project reported that 35 per cent of Australian law students recorded elevated levels of psychological distress as compared to 13 per cent of the general population. Almost 40 per cent of those students with high or very high levels of psychological distress reported distress severe enough to warrant medical or clinical intervention. The research concluded that the problem of 'law student distress' was not confined to the United States.<sup>84</sup>

77 While such contributions would be difficult to measure, Sandefur and Selbin refer to the Carnegie Report recommendations regarding a curriculum that integrates the cognitive, skills and civic dimensions of legal education. See Rebecca Sandefur and Jeffrey Selbin, cited at footnote 74, 70.

78 See [www.nationalprobono.org.au/](http://www.nationalprobono.org.au/). Accessed 12 December 2014.

79 Sebastian De Brennan, 'Rethinking Pro Bono: Students Lending a Legal Hand' (2005) 15 *Legal Education Review* 25.

80 See Chapter 5 of this book.

81 See Council of Australian Law Deans, *Promoting Law Student Well-Being Good Practice Guidelines for Law Schools*, September 2014, at [perma.cc/V8YP-RYAW](http://perma.cc/V8YP-RYAW).

82 See [www.wellnessforlaw.com/](http://www.wellnessforlaw.com/). Accessed 13 September 2016.

83 See also the work of National Teaching Fellow, Dr Rachael Field at [www.olt.gov.au/altc-teaching-fellow-rachael-field](http://www.olt.gov.au/altc-teaching-fellow-rachael-field). Accessed 12 December 2014.

84 Norm Kelk, Georgia Luscombe, Sharon Medlow and Ian Hickie, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers* (2009) Brain and Mind Institute.

A 2010 study of law students at The Australian National University (ANU) found that students entered law school with rates of wellbeing no lower than those among the general population but that levels of psychological distress rose significantly in first-year law.<sup>85</sup> Research involving students from Melbourne University Law School has subsequently produced findings consistent with those of the ANU study.<sup>86</sup> The Melbourne University Law School study has also questioned the extent to which these wellness issues are confined to legal education, suggesting the challenges may relate to higher education more generally.<sup>87</sup>

Colin James from the University of Newcastle Legal Centre leads the work of Australian clinicians in addressing issues related to the wellbeing of law students and lawyers.<sup>88</sup> His research has investigated the experiences of law graduates in their transition to practice, and has identified a range of strategies to safeguard law students against depression and enhance their experience of law school.

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85 Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149.

86 See Wendy Larcombe, Letty Tumbaga, Ian Malkin, Pip Nicholson and Orania Tokatlidis, 'Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) 35 *Sydney Law Review* 407; and Wendy Larcombe and Katherine Fethers, 'Schooling the Blues? An Investigation of Factors Associated With Psychological Distress Among Law Students' (2013) 36(2) *University of New South Wales Law Journal* 390. For a cautionary view of the concerns raised by the ANU and Melbourne University Law School research projects, see Christine Parker, 'The "Moral Panic" Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response' (2014) 37(3) *University of New South Wales Law Journal* 1102.

87 Wendy Larcombe, Sue Finch and Rachel Sore, 'Not Only Law Students: High Levels of Psychological Distress in a Large University Sample', Presentation to the 2014 Wellness Network for Law Wellness Forum, QUT, February 2014. See [www.wellnessforlaw.com/wp-content/uploads/2014/03/Wendy-Larcombe\\_Not-only-law-students.pdf](http://www.wellnessforlaw.com/wp-content/uploads/2014/03/Wendy-Larcombe_Not-only-law-students.pdf).

88 Colin James, 'Law Student Wellbeing: Benefits of Promoting Psychological Literacy and Self-Awareness Using Mindfulness, Strengths Theory and Emotional Intelligence' (2011) 21(2) *Legal Education Review* 217; Colin James, 'Lawyer Dissatisfaction, Emotional Intelligence and Clinical Legal Education' (2008) 18 *Legal Education Review* 123; Colin James, 'Seeing Things as We Are: Emotional Intelligence and Clinical Legal Education' (2005) 8 *International Journal of Clinical Legal Education* 123.

Larry Krieger is among the United States clinicians who are prominent in the therapeutic jurisprudence literature.<sup>89</sup> Krieger's research, in collaboration with Kennon Sheldon, has emphasised the importance of promoting supported autonomy as part of efforts to overcome the 'corrosive effect' of United States legal education on the 'well-being, motivation and values' of law students.<sup>90</sup> Krieger and Sheldon draw on Ryan and Deci's self-determination theory<sup>91</sup> that explains the need people have for 'regular experiences of autonomy, competence, and relatedness to thrive and maximize their positive motivation'.<sup>92</sup> In the context of their longitudinal study of the wellbeing of United States lawyers, they identify a 'specific, cost-effective strategy' for improving wellbeing as 'the provision of autonomy-supportive, rather than controlling, teaching, mentoring and work supervision'.<sup>93</sup> Clinic-based experiences, with their developmental focus and emphasis on supervision and collaboration, clearly have a valuable contribution to make to improving understanding of models of positive lawyering and reducing students' levels of stress and anxiety.<sup>94</sup>

A final characteristic of the well-rounded law graduate, not just a clinical graduate, is the degree of their ethical sophistication. Law schools must teach ethics and professional responsibility, but the extent to which such courses penetrate students' ethical consciousness is not well understood.<sup>95</sup> Arguably, almost no one emerges from an Australian law school with a real consciousness of ethical realities if they have not benefited from a clinic, but the truly resilient law graduate may be best developed through clinical experience of legal ethics, particularly that which exposes students to a thoroughly conceived ethics awareness program. Such programs can be summed up by the term *ethical infrastructure*; a concept that clinics are uniquely able to champion.

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89 See Susan Brooks, 'Practicing (and teaching) therapeutic jurisprudence: importing social work principles and techniques into clinical legal education' (2004–05) 17 *St Thomas Law Review* 513; Marjorie Silver 'Supporting Attorneys' Personal Skills' (2009) 78 *Revisita Jurídica Universidad de Puerto Rico* 147; and Ann Juergens, 'Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching' (2005) 11 *Clinical Law Review* 413.

90 Kennon Sheldon and Lawrence Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33(6) *Personality and Social Psychology Bulletin* 883.

91 Richard Ryan and Edward Deci, cited at footnote 68.

92 Kennon Sheldon and Lawrence Krieger, cited at footnote 90, 885.

93 Lawrence Krieger and Kennon Sheldon, 'What Makes Lawyers Happy?: Transcending the Anecdotes With Data From 6200 Lawyers' at [perma.cc/8ZCT-HUW8](http://perma.cc/8ZCT-HUW8).

94 See Chapter 6 of this book.

95 See the equivocal results of an investigation of students' ethical awareness in Adrian Evans and Josephine Palermo, 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism' (2008) 17 *Griffith Law Review* 252.

## Ethical infrastructure

Although the culture of a clinic tends to be visible in the ‘atmosphere’ of the site after a short visit, there is a further intangible aspect to clinic that is harder to pin down but which is equally important to its reputation and sustainability. The ethical infrastructure, that is, the culture, attitudes and policies of the clinic to ethical practice, is critical to clinic sustainability and graduate resilience. We are not just talking about recognition of fiduciary obligations<sup>96</sup> and minimising the risk of client complaints, although these are very important. More fundamentally, does the clinic as a whole understand, recognise and deal with the need for each of its supervisors to reconcile their views on the appropriate balance of the clinic between these duties to clients and the more important duty to the administration of justice? The contrast in approach reflects a similar discussion in Chapter 5 below, concerning the technical skills versus law-in-context objectives of a clinical program. But the focus here is on legal ethics.

The debate is commonly summed up in the difference between zealous advocacy and responsible lawyering.<sup>97</sup> To take one example, the zealous advocate who is presented with a police prosecutor who forgets to tell a magistrate about the very significant prior convictions of their client, will commonly feel quite justified in staying silent when it comes to sentencing the client for his assault on his wife. The result can be that a violent man with a history of violence is returned to his family. But the responsible lawyer may take the view that such silence is too big a risk to the safety of that woman and will speak up to ensure the court has full information before it makes a decision. The professional conduct rules do not necessarily assist, because they typically support either perspective, depending on the circumstances. Inside a clinic, if one supervising solicitor has a zealous advocate approach and instructs their student to stay silent in a plea should this situation occur, then another supervisor who hears of this and takes the protective responsible lawyering view will likely become very upset, if not angry. If these jurisprudential differences are simply allowed to continue and are not resolved then, in an extreme case such as this, the ethical infrastructure

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96 Lawyers are ‘fiduciaries’ (trustees) in the sense that clients place their trust and confidence in their lawyers to manage and protect property or money. This obligation is founded in equity, i.e. separate to any obligations under the lawyer–client retainer.

97 See e.g. Christine Parker, ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’ (2004) 30 *Monash Law Review* 49.

of the clinic will be compromised over time and the clinic grapevine will ensure that everyone knows. Students may begin to doubt the integrity of the learning process and, eventually, referring agencies, other practitioners and the law school will get to hear of the problems.

It is common in all legal practices for different views to be held as to the priority between these two perspectives, but they are particularly difficult in clinics because there tends to be a wider range of views than typically occurs in private legal practices. In addition to the primary divide between zealous advocacy and responsible lawyering, there are two other common categories of ethical preference that tend to resonate strongly for clinic supervisors: moral activism and the relationship of care. Moral activists tend to be public interest lawyers concerned to achieve substantive justice and law reform. They are more commonly found in the community legal centres that host clinics than in other legal practice settings; they may not think it is a lawyer's role to automatically support the adversarial justice system and will be content to apply whichever of zealous advocacy or responsible lawyering is necessary to achieve their goals as law reformers. On the other hand, lawyers who see the relationship of care as dominant (they are often family lawyers or those involved in the child welfare system) take a moral dialogue approach and consider the social and political role of lawyers to be irrelevant. They see their primary obligation as ensuring that their client(s), their colleagues, their family and even themselves, survive the legal system and legal practice.

Students need to recognise their clinic values in this four-part framework and, after a while, be able to identify their own preferences. Ideally, their exposure to this categorisation will be taught with coherence across the clinic. The clinic ought not just leave it to the law school's ethics classes. On the whole, these are still instructional in tone and too driven by adherence to a view that cases and conduct rules provide all that is needed to found good legal ethics.

To address again the question of resilience, the clinic needs to go back a step or two and accept the proposition that it, as an entity, needs to work through its fundamental values and ethical preferences. Obviously, this has to be done in the context of the whole of the clinical program, but there are several stages:

- Identifying and strengthening personal values among clinicians and students.<sup>98</sup>
- Accepting that there is such a thing as a corporate moral identity and that the clinic, just as a good law practice, needs to know what that identity is.
- Assessing whether the law school's dominant legal theory position, which is likely—but not always—to be generally positivist or associated with a 'thin' rule of law<sup>99</sup> is consistent with the directions set for students having regard to the clinic's moral identity.
- Setting down the clinic's views on its moral identity<sup>100</sup> in an accessible location. In the context of the discussion above about a court's awareness of a defendant's prior family violence, is it a clinic that believes always in getting the best result for each client regardless of the methods used (consequentialism), or does it, as an entity, think that the means to the end (that is, notions of fairness) are at least as important as the outcome and do not justify misleading the court about prior violence (Kantianism)? Or is there among the supervisors a significant discomfort with both these moral identities and a considered view that the strengthened character of each clinical supervisor is the best way to ensure moral behaviour in representing clients (virtue ethics)?<sup>101</sup>
- Identifying students' preferences for different lawyering types—in particular, dealing with the impact of the usually dominant zealous advocacy *versus* other lawyering models, recognising that all of these preferences are valid in certain contexts and that the key issue is to help individual students/supervisors understand their preferences with accessible scale tests,<sup>102</sup> in the context of the moral identity of the clinic and the wider clinical program.

98 For example, by using the resources in Christopher Peterson and Martin EP Seligman, *Character Strengths and Virtues: A Hand book and Classification* (2004) Oxford University Press, 130–32. This book contains a list of positive human strengths rather than a catalogue of deficits and disorders.

99 See, generally, Jeremy Bentham, *A Fragment on Government; or, A Comment on the Commentaries* (1823) W Pickering, 2nd ed; John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (1954) Weidenfeld and Nicholson; HLA Hart, *The Concept of Law* (1961) Clarendon Press; Joseph Raz, *The Authority of Law* (1979) Oxford University Press.

100 For example, those that engage well known general moral categories of consequentialism, Kantianism and virtue ethics. See Adrian Evans, *The Good Lawyer* (2014) Cambridge University Press.

101 Adrian Evans, cited at footnote 100, Chapters 3 and 4.

102 See e.g. Adrian Evans and Helen Forgasz, 'Framing Lawyers' Choices: Factor Analysis of a Psychological Scale to Self-Assess Lawyers' Ethical Preferences' (2013) 16 *Legal Ethics* 134.

Only after all of this work occurs can a clinic be said to have developed its ethical infrastructure, cemented its longer-term sustainability and contributed significantly to the growth of resilient legal professionals.

## Clinical scholarship

Heavy teaching and service responsibilities have often made it challenging for clinicians to prioritise research scholarship in the way some other legal academics do. Chavkin used the image of Rumpelstiltskin spinning straw into gold when characterising the challenge for clinicians, facing expectations of a ‘generally hostile academic community’ to take on escalating teaching demands while also dealing with ‘increasing collateral demands to participate in governance; to be the visible presence of the law school in the external legal community; and to produce scholarship’.<sup>103</sup> In Australia, as we noted above, much work remains to be done to foster clinic fluency within law schools.

The longstanding issue of managing these expectations has now become an imperative as those clinicians who are employed as academics are expected to improve both the quality and quantity of their research. There is little prospect that these expectations, faced by all academics, will moderate. Clinicians also face challenges regarding the merit and scope of their scholarship.<sup>104</sup> The ‘odd one out’ nature of clinical scholarship—‘writing outside mainstream legal disciplinary boundaries’—has seen such scholarship described as difficult to evaluate.<sup>105</sup> Clinicians also face unique

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103 David Chavkin, ‘Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton’ (2003) 10 *Clinical Law Review* 245, 247.

104 Neil Gold and Philip Plowden, ‘Clinical Scholarship and the Development of the Global Clinical Movement’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Change* (2011) Oxford University Press, Chapter 21; Peter Joy, ‘Clinical Scholarship: Improving the Practice of Law’ (1996) 2(2) *Clinical Law Review* 385; and Peter Toll Hoffman, ‘Clinical Scholarship and Skills Training’ (1994) 1(1) *Clinical Law Review* 93. Bergman describes clinicians as ‘strangers in a strange land’, arguing that clinical education is ‘increasingly out of synch with the worldview of many US legal academics’ who come to law school with little experience or interest in legal practice: Paul Bergman, ‘Reflections on US Clinical Education’ (2003) 10(1) *International Journal of the Legal Profession* 109, 109–10.

105 Joseph Tomain and Robert Solimine, ‘Skills Skepticism in the Postclinic World’ (1990) 40 *Journal of Legal Education* 307, 312–13.

challenges in relation to the ‘tension between the individual lawyer-professor’s academic freedom and professional responsibility to clients and the law school’s decision-making authority’.<sup>106</sup>

On the positive side, many clinicians have the capacity to contribute to multidisciplinary research as well as to research with the practising profession. Practice-related research may foster the further development of clinical programs, especially as universities intensify their research focus. In their analysis of the merit and potential of clinical scholarship, Gold and Plowden refer to the insular nature of much clinical scholarship and call for greater recognition of the shared nature of many of the concerns of the global clinical community.<sup>107</sup> They do not make a case for broader law-related research collaboration, let alone cross-disciplinary research. Grimes states: ‘The client base provides a ready resource for legal research and socio-legal study, and generates related legal research, policy and reform initiatives.’<sup>108</sup>

As well, clinicians can contribute expertise related to client-centred models of legal practice, litigation processes, alternative dispute resolution and access to justice, emphasising the strengths and limitations of problem-solving approaches. Clinicians can also contribute to research projects involving academic colleagues, especially in areas well represented in clinical casework. For example, human rights, environmental law, family law, criminal law, migration law, discrimination law and alternative dispute resolution.

## Conclusion

The importance of experiential education in law is being recognised in many countries.<sup>109</sup> Clinics have real potential to advance multiple objectives related to student learning, community service, professional engagement, research and policy development.<sup>110</sup> They also have a

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106 Robert Kuehn and Peter Joy, ‘Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility’ (2009) 59 *Journal of Legal Education* 97, 99.

107 Neil Gold and Philip Plowden, cited at footnote 104, 320.

108 Richard Grimes, ‘Reflections on Clinical Legal Education’ (1995) 29(2) *Law Teacher* 169, 174.

109 Frank Bloch (ed), cited at footnote 104; William Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007) Jossey Bass, Chapter 1; Roy Stuckey and others, *Best Practices for Legal Education: A Vision and a Road Map* (2007) Clinical Legal Education Association, 175.

110 Giddings (2013), Chapter 3.

distinctive capacity to provide a bridge between different groups interested in legal education—linking both law schools and law students to the practising profession, judiciary and government as well as connecting law schools with their local communities.<sup>111</sup>

Clinics face uncertain times, but it should be remembered that it was also in turbulent times that clinics emerged.<sup>112</sup> Clinics are now more broadly recognised and better understood by their law schools, but still have a long road to travel. The expectations placed on clinical programs by students, universities, regulators and the practising legal profession appear likely to continue to grow. Clinicians need to respond effectively to calls for them to offer intensive, morally accountable and constructive clinic experiences to increasing numbers of students.

This mixture of factors and expectations has led to a lack of effective arrangements to assist Australian LLB, JD and PLT students and junior lawyers undertaking supervised legal practice to make the best use of experiential learning opportunities. Clinical legal education has an important contribution to make in responding to this dilemma. Clinics provide important opportunities for linking law student learning to notions of professionalism. Few learning opportunities can be as powerful and immediate as collaborating with a skilful, ethical supervisor-practitioner, to advise and assist clients.

The greater use of clinical teaching methods in Australian law schools is yet to be matched by a strong understanding of the pedagogical choices required to make the most of this powerful teaching method. This lack of strong engagement with the pedagogy of clinical legal education was one catalyst for the *Best Practices* project, the results of which underpin much of this book.

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111 Jeff Giddings and Jennifer Lyman, 'Bridging Different Interests: The Contributions of Clinics to Legal Education' in Frank Bloch (ed), cited at footnote 104, Chapter 15. See also Jeff Giddings, 'Two Way Traffic: The Scope for Clinics to Facilitate Law School Community Engagement' in Patrick Keyzer, Amy Kenworthy and Gail Wilson (eds), *Community Engagement in Contemporary Legal Education: Pro Bono, Clinical Legal Education and Service Learning* (2009) Halstead Press, 44–50. Fiona Cownie has characterised parties interested in legal education as stakeholders, identifying students, academics, the profession, feminists and the state. See Fiona Cownie (ed), *Stakeholders in the Law School* (2010) Hart Publishing, Chapter 1.

112 See Giddings (2013), Chapter 1, especially 8–10.

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