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Course design for clinical teaching

Introduction

In this chapter, we provide extensive detail to support an overall point: clinical course design is a complex, serious, pedagogical task that can too readily be overlooked or treated lightly. Many clinical courses are established with enthusiasm for innovative and novel legal education combined with public service provision. Although these can drive and sustain a clinical course for a while, there is a risk that longer-term sustainability and credibility will be compromised if the course is not designed and developed on a sound pedagogical basis.

Coverage

We first define course aims, or objects, and suggest a number of possible aims that a clinical course might pursue. We then spell out the nature and interrelationship of course aims and learning outcomes—often poorly understood—and point out the wide range of available outcomes for a clinical course. As we discuss, the model of clinic on which the course will be based should follow from the course design, although the excitement of establishing a clinical course often puts the choice of the model first. Once established, a clinical course must deal with issues such as student selection and course content, course timing and length, all of which we canvass in this chapter.

Naming a ‘course’

Throughout this chapter, the term ‘course’ is used to refer to what is also called a ‘subject’, a ‘unit’ or a ‘module’. A student will enrol in a number of law courses (or subjects or units or modules) in an academic semester or year, counting towards the award of a law degree. A course is, for example, assigned a code by the university administration, and is named according to its content (for example, Evidence, Contracts, Administrative Law, etc).

Course aims and learning outcomes

The fundamental importance of course aims

Course design does not start with the teaching method. The first question is: what are the aims (or ‘goals’) of the course? We use the terms ‘aims’ and ‘goals’ to describe the same thing, although a case can be made for giving them distinct meanings;¹ our point is to ensure that the larger aims or goals are established as a base for learning objectives. Only then is it possible to think about what teaching method will best meet those aims. As Stuckey reports Bellow saying in the United States over 40 years ago, ‘clinical courses are only justified if they are accomplishing educational objectives that cannot be achieved by other, less expensive, methods of education’.²

There is often confusion over the nature and place of educational aims,³ and enthusiasm for clinical teaching risks bypassing this basic issue (‘Let’s run a clinic!’) or leads to reverse engineering (‘We have a clinic! What will we do with it?’). In 2007, Stuckey reported the persistence of a phenomenon Bellow had complained of over 30 years earlier: ‘a tendency, within clinical programs, to subordinate the question of what should be taught to the demands of what students are actually doing’.⁴ Even though clinical

1 See e.g. M Le Brun and R Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (1994) Law Book Co., 153.

2 Roy Stuckey, ‘Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses’ (2006–07) 13 *Clinical Law Review* 807, 808.

3 Mary Jo Eyster, ‘Designing and Teaching The Large Externship Clinic’ (1998–99) 3 *Clinical Law Review* 347, 348.

4 Roy Stuckey, cited at footnote 2, 808.

legal education is a powerful teaching method, there must be educational rigour associated with it if it is to be taken seriously over time, and that rigour requires course design that starts with clearly stated course aims.⁵

It is fundamental to course design that the course aims are clearly articulated. Not only the teaching method, but topics, reading, and assessment (see Chapter 8) will be framed by—and be directed towards achieving—the course aims:

proper evaluation and proper grading will only occur if the teacher and the student are aware of the clinic's goals and expectations, and if the teacher's recorded comments about their interventions and the student's performance are keyed to the goals and expectations that we have conveyed to students at the beginning of the clinic.⁶

Referring to an externship clinic in particular, Smith illustrates the planning process well:

As the faculty member considers potential educational goals, she should compare the extern method with other available methods of instruction and ask whether a field placement (with a related academic component) is the best way to achieve those goals.⁷

Once established, the course aims will at least imply, if not mandate, an appropriate teaching method. Aims do need to be revisited periodically; an ongoing process rather than something engaged in once or sporadically.⁸ A disincentive for continual review of educational aims, however, is the considerable investment that will have been made in the clinic: arrangements are not as easily put to one side as they can be for a standard course. But a review of educational aims should not be avoided for fear of discovering that the clinic is no longer an apt educational method. Rather, the review should be embraced as an opportunity to

5 See e.g. Jeff Giddings, *Promoting Justice Through Clinical Legal Education* (2013) Justice Press, Chapters 3 and 4 (cited hereafter as Giddings (2013)).

6 Wallace J Mlyniec, 'Where to Begin? Training New Teachers in the Art of Clinical Pedagogy' (2011–12) 18 *Clinical Law Review* 505, 577.

7 Linda F Smith, 'Designing An Extern Clinical Program: Or As You Sow, So Shall You Reap' (1998–99) 5 *Clinical Law Review* 527, 547.

8 Kimberly E O'Leary, 'Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics' (2004–05) 11 *Clinical Law Review* 335, 339. See also Adrian Evans and Ross Hyams, 'Independent Evaluations of Clinical Legal Education Programs: Appropriate Objectives and Processes in an Australian Setting' (2008) 17 *Griffith Law Review* 52.

As we discuss in Chapters 6 and 7, clinical legal education is characterised by supervision, reflection and student responsibility, with a focus on social justice issues (see Chapter 5). It operates intensively, in one-on-one or small group interactions, and allows students to apply legal theory and lawyering skills to solve legal problems that are real: students are in professional legal settings, working on real legal matters. Consistently with the ‘spirit of inquiry’ promoted by Dewey curriculum theory¹² and the power of experiential learning, the focus of clinical experience is to engage students with law as it operates, in context.¹³ Although clinical legal education has a vocational context, its educational effectiveness depends on its dynamic relationship with the substantive, doctrinal curriculum.

Clinical legal education has, however, the capacity to address some of the shortcomings of the Dewey approach in which the teacher is in control of the classroom dynamic and of the opportunities for student inquiry. Taking a lead from the radical education theories of Paulo Freire, it is possible in clinical legal education to address the interests of the poor and, in so doing, to engage students in critiquing power structures and relations and their resulting injustices (see Chapter 5).¹⁴

With these distinctive features of clinical legal education in mind, it is apparent that the aims of some courses will be better supported by clinical legal education method than others.¹⁵ Stuckey has proposed what he believes to be ‘the five most important educational objectives that can be accomplished in clinical courses’: developing problem solving skills; becoming more reflective about legal culture and lawyering roles; learning how to both behave and think like a lawyer; understanding the meaning of justice and lawyers’ responsibility to strive to do justice; and discovering the human effects of the law.¹⁶

12 John Dewey, ‘The educational situation (orig. Chicago, 1906)’ (2002) 17(2) *Journal of Curriculum and Supervision*, 104, 119.

13 Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Mary Anne Noone, Simon Rice and Ebony Booth, *Best Practices: Australian Clinical Legal Education* (2013) Government of Australia, Office of Learning and Teaching, 15, at perma.cc/2J6E-ZMQX.

14 Paulo Freire, *Pedagogy of the Oppressed* (1970) Herder and Herder; and see e.g. Alan Singer and Michael Pezone, ‘Education for Social Change: From Theory to Practice’, at perma.cc/JKA9-B9UM.

15 Some examples are drawn from, but are not the same as, The Australian National University law courses.

16 Roy Stuckey, cited at footnote 11, 50–51. Similar goals are described for clinical education in Kenya: see TO Ojienda and M Oduor, ‘Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya’ (2002) 2 *International Journal of Clinical Legal Education* 49, 57.

Stuckey does not offer evaluative criteria that support these as the ‘most important’ aims of clinical legal education. In listing possible aims, it is worth keeping in mind Failinger’s caution that, in light of all that clinical legal education can achieve, aims should be modest: ‘a small handful of realistic goals for many law students ... or an ambitious set of goals for very few students’.¹⁷ Goldfarb points out that it is exactly the large promise of clinical legal education that requires ‘clinical teachers to abandon some portion of what ideally [they] strive to achieve’.¹⁸

Legal doctrine as a course aim?

It is common that a doctrinal course has as its aim that students will, for example, ‘understand the core concepts and principles underpinning contracts/torts/criminal/public law, and to comment critically on the outcome and reasoning in cases’. Clinical method is not necessary to achieve these aims. However, the immediacy of the clinic can enable students to deepen their understanding of doctrine. Related aims may, for example, be for students to ‘identify the considerations of policy that may underpin cases and legislation’, ‘to apply learned rules and principles to practice’, ‘to identify the practical implications of legislation’, ‘to understand current issues’, and ‘to identify weaknesses or gaps in the law’. For each of the related aims, an integrated clinical component to otherwise doctrinal courses would be apt.¹⁹

Legal theory as a course aim?

Some courses do not aim to focus on pure legal doctrine, the law as it relates to particular social issues or communities, or substantive law with practical contexts, but will aim instead to explore larger issues of law, legal theory, legal policy and the operation of law in society. Course aims might be, for example, for students to ‘assess the adequacy of feminist legal theory as an explanation for aspects of the criminal justice system’, or ‘to evaluate the effectiveness of public legal services in meeting unmet legal need’ and, in each case, clinical legal education will be an appropriate teaching method.

17 Marie A Failinger, ‘A Home of its Own: The Role Of Poverty Law in Furthering Law Schools’ Missions’ (2007) 34 *Fordham Urban Law Journal* 1173, 1779–80.

18 Phyllis Goldfarb, ‘Back To The Future Of Clinical Legal Education’ (2012) 32 *Boston College Journal of Law and Social Justice* 279, 306.

19 See e.g. Jonny Hall and Kevin Kerrigan, cited at footnote 10, 25.

Legal and professional skills as a course aim?

Some courses on substantive law may have aims that are quite explicitly skills-based; aims with which clinical legal education is more obviously aligned. This skills/clinic alignment is deceptive, however, and needs to be kept in perspective. Although clinical legal education is an effective method for teaching skills—as shown by the experience in the United States in particular—its primary focus is more analytical and reflective than the vocational aim of ‘how to’ that characterises practical legal training (PLT) or work-integrated learning (WIL).²⁰ While legal practice skills are taught in clinical legal education and used for the delivery of legal services, they are at the same time subjected to analysis and reflection, and the apparently value-neutral nature of such skills are critiqued to develop in students a consciousness of the value-laden nature of legal practice (see Chapter 5 for a more detailed discussion of this).

Courses such as, for example, litigation, civil and criminal procedure, evidence, succession or corporations, address subject matter that relates closely to, or is often well illustrated by, legal practice requiring particular skills such as drafting, negotiation, advocacy and interviewing. A dispute resolution course, for example, has skills potential when it aims for students ‘to appreciate the context of litigation practice and procedure’ and ‘to know the technical and strategic skills necessary to mediate a dispute and conduct litigation’.

Examples from the United States, where law is studied as a graduate degree with a strong vocational focus, tend to skew an appreciation of possible educational aims for clinic away from a broad range of possibilities towards preparation for legal practice.²¹ For many early clinical programs “‘clinical’ ... became synonymous with “skills-focused” education’.²² However, in jurisdictions other than the United States, where law students are not necessarily as focused on an immediate legal career²³ and could be studying other disciplines in concurrent degree programs, clinical legal education can demonstrate its capacity to meet a much broader scope of educational

20 Adrian Evans and others, cited at footnote 13, 4–5.

21 See e.g. the warning to this effect for clinic in the United Kingdom, in Lydia Bleasdale-Hill and Paul Wragg, ‘Models of Clinic and Their Value to Students, Universities and the Community in the post-2012 Era’ (2013) 19 *International Journal of Clinical Legal Education* 257, 265.

22 Linda F Smith, cited at footnote 7, 530.

23 See e.g. Lydia Bleasdale-Hill and Paul Wragg, cited at footnote 21, 265, making the point for legal education in the United Kingdom.

aims. Since the early 2000s in Australia, however, this characterisation has been changing to an extent, with the growing popularity of graduate ('JD') law programs in which students have a more definite bent towards preparation for legal practice.

Where clinical legal education focuses on legal skills training, it should do so with a focus on 'students' development of a professional identity that contributes to a sense of purpose in their lives'.²⁴ Legal skills that are taught in a clinic's practice context include 'accepting and assuming responsibility for matters of great importance to real clients', 'improving problem-solving abilities', 'collaboration', 'discovering facts and figuring out how to turn them into admissible evidence', and 'traditional skills' such as 'interviewing, case planning, investigating facts, counselling, legal writing, witness examination, and oral argument'.²⁵ More broadly, clinical legal education is a teaching method that can meet aims of personal and professional development such as, for example, 'cross-cultural awareness', 'the role of emotions', 'creativity', 'exercising authority' and 'learning to learn'.²⁶ Clinical legal education can teach legal doctrine,²⁷ doctrinal analysis,²⁸ and policy perspective on doctrine,²⁹ and is a way of teaching legal professionalism, such as values and ethics,³⁰ promoting a willingness to engage in law reform and *pro bono* services,³¹ and strengthening students' emotional awareness and sense of ethical behaviour.³²

24 Leah Wortham, Catherine F Klein and Beryl Blaustone, 'Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance these Critical Educational Goals' (2012) 17–18 *International Journal of Clinical Legal Education* 105, 113.

25 Philip G Schrag, 'Constructing A Clinic' (1996–97) 3 *Clinical Law Review* 175, 180–85; see also Peter Toll Hoffman, 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical Law Review* 93; Special Edition *Clinical Law Review* (2001); Adam Babich, 'The Apolitical Clinic' (2004) 22 *Tulane Lawyer* 10.

26 Philip G Schrag, cited at footnote 25, 182, 184, 185.

27 Philip G Schrag, cited at footnote 25, 180.

28 Linda F Smith, cited at footnote 7, 531.

29 Linda F Smith, cited at footnote 7, 530.

30 Philip G Schrag, cited at footnote 25, 183–84; see L Curran, J Dickson and MA Noone, 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' (2005) 8 *International Journal of Clinical Legal Education* 104; Kevin Kerrigan, "'How do you *feel* about this client?" A commentary on the clinical model as a vehicle for teaching ethics to law students' (2007) *International Journal of Clinical Legal Education* 7, 37; Anna Cody, 'What does legal ethics teaching gain, if anything, from including a clinical component?' (2015) 22(1) *International Journal of Clinical Legal Education* 1.

31 Linda F Smith, cited at footnote 7, 530.

32 Anna Cody, cited at footnote 30.

Social justice as a course aim?

Perhaps the most pervasive educational aim for a clinical course, apart from skills training, and certainly the most distinctive, is to attune students to issues of social justice,³³ a course aim for students that is ‘beyond being just practice ready’.³⁴ It is the contextual nature of clinical legal education, supported by supervision and reflection (see Chapters 6 and 7), which makes it particularly effective in focusing on lawyers’ roles in achieving social justice (see Chapter 5).

There is a long and strong tradition in clinical legal education of aiming to inculcate social justice values that transcend mere legal service provision, and that ‘produc[e] lawyers who will go on to change the nature and function of legal practice in the interests of more humane social values, and the advancement of the poor and disadvantaged’.³⁵ Such a conscious effort to promote social values may be warranted in light of research in Australia, which suggests that students who arrive at law school with ‘[a] desire to engage in social justice or public interest practice’ lose that desire as they continue their studies,³⁶ and students in their final year of legal studies are least likely to agree that law has ‘the power to bring about positive social change’.³⁷ Indeed, a tendency to cynicism has been observed among law students,³⁸ who may tend to be, at least, uninterested and ‘ignorant about critical idealism and wider social perspectives’.³⁹

33 See e.g. Jo Dubin, ‘Clinical Design for Social Justice imperatives’ (1980) 5 *Southern Methodist University Law Review* 1461; Jane H Aiken, ‘The Clinical Mission of Justice Readiness’ (2012) 32(2) *Boston College Journal of Law and Social Justice* 231; Stephen Wizner and Jane Aiken, ‘Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice’ (2004) 73 *Fordham Law Review* 997; Margaret Martin Barry, Jon C Dubin and Peter A Joy, ‘Clinical Education for This Millennium: The Third Wave’ (2000) 7 *Clinical Law Review* 1; Shuvro Prosun Parker, ‘Empowering the Underprivileged: The Social Justice Mission for Clinical Legal Education in India’ (2013) 19 *International Journal of Clinical Legal Education* 321; Lydia Bleasdale-Hill and Paul Wragg, cited at footnote 21, 267 and the articles referred to therein at notes 29 and 30.

34 Jane H Aiken, cited at footnote 33, 232.

35 Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (1997) Ashgate, 5; Frank Bloch and Mary Anne Noone, ‘Legal Aid Origins of Clinical Legal Education’ in Frank Bloch (ed), *The Global Clinical Movement: Educating Lawyers for Social Justice* (2011) Oxford University Press, 153.

36 Tamara Walsh, ‘Putting Justice Back into Education’ (2007) 17(1) *Legal Education Review* 119, 131.

37 Tamara Walsh, cited at footnote 36, 132.

38 Kim Economides, ‘Cynical Legal Studies’ in Jeremy Cooper and Louise Trubek (eds), cited at footnote 35, 26 and 29.

39 Kim Economides, cited at footnote 38, 26.

Many courses are concerned with the law as it relates to particular social justice issues, such as housing, social security and discrimination law, or to particular communities such as Indigenous peoples, poor people,⁴⁰ women, children and refugees. These issue-specific courses are very contextual, and clinical legal education would be an effective method for meeting course aims that students will, for example, ‘understand domestic legal issues affecting Indigenous peoples’, or ‘assess the effectiveness of legal remedies for human rights violations against Indigenous peoples’.

Public service as a course aim?

Most forms of clinical legal education in Australia bring with them their own necessary aim, that of providing legal services to a section of the public.⁴¹ This is a separate process that means ‘understand[ing] the legal needs of the community and of the population the clinic hopes to help’,⁴² and brings with it the perennial dilemma in clinical legal education of how to meet the related but often competing goals of student education and client service: ‘sensitivity to the balance between student needs and client needs must be considered at every decision-making juncture’,⁴³ although in Reed’s view ‘the traditional emphasis [is] placed on the service goal rather than the educational goal’.⁴⁴ As we noted in Chapter 3, the Australian experience is that the joint aims of providing both student learning and client service can be accommodated.⁴⁵

40 See e.g. Marie A Failing, cited at footnote 17, 1173; Lois Johnson and Louise Trubek, ‘Developing a Poverty Law Course: A Case Study’ (1992) 42 *Journal of Urban and Contemporary Law* 185.

41 Philip G Schrag, cited at footnote 25, 180.

42 Kimberly E O’Leary, cited at footnote 8, 342; and see Shuvro Prosun Parker, cited at footnote 33, 322–23.

43 Kimberly E O’Leary, cited at footnote 8, 339.

44 Stephen F Reed, ‘Clinical Legal Education At A Generational Crossroads: A Self-Focused Self-Study Of Self’ (2010) 17(1) *Clinical Law Review* 243, 249.

45 Judith Dickson, ‘Clinical Legal Education in the 21st Century: Still Educating for Service?’ (2000) 1 *International Journal of Clinical Legal Education* 33; Giddings (2013); Anna Cody, ‘Clinical Programs in Community Legal Centres, The Australian Approach’ (2011) 4 *Spanish Journal Education and Law Review*.

Legal policy and law reform as a course aim?

A clinical course that aims to attune students to issues of social justice is likely to incorporate advocacy for changes to law and policy as a complementary course aim. It has been argued for some time that there is, in fact, an ethical obligation on legal education, and perhaps clinical legal education in particular, to pursue changes to law and policy in the public interest.⁴⁶ A ‘law reform’ aim complements aims of teaching both doctrine and professional skills: doctrine, simply because a conventional critical analysis of law should generate options for reform; and professional skills because conventional lawyers’ skills of research, drafting, negotiation and advocacy are necessary for effective law reform.

Student wellbeing and engagement as a course aim?

Increasing attention is being paid to law students’ mental health and wellbeing.⁴⁷ The dissonance between students’ justice aspirations and the actual law curriculum, noted above, is a significant factor in students’ distress, as is the intensely competitive nature of law school.⁴⁸ Complementing, say, the social values and social justice aims mentioned above, a clinical course can aim to meet a student’s aspirations to work for justice, and can promote a collaborative and supportive work environment. An explicit aim of wellbeing may be particularly important for students from other cultural or legal traditions, such as Indigenous students,⁴⁹ who risk feeling quite alienated from any real sense of law’s role in society.

46 See e.g. Stephen Wizner, ‘The Law School Clinic: Legal Education in the Interests of Justice’ (2001–02) 70 *Fordham Law Review* 1929; Sameer M Ashar, ‘Law Clinics and Collective Mobilization’ (2008) 14 *Clinical Law Review* 355; Donald Nicolson, ‘Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice’ (2013) 16(1) *Legal Ethics* 36.

47 See e.g. Massimiliano Tani and Prue Vines, ‘Law Students’ Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?’ (2009) 19 *Legal Education Review* 3; Molly O’Brien, Stephen Tang and Kath Hall, ‘No time to lose: Negative impact on law student wellbeing may begin in year one’ (2011) 2(12) *International Journal of the First Year in Higher Education* 49; Molly O’Brien, ‘Connecting Law Student Wellbeing to Social Justice, Problem-Solving and Human Emotions’ (2014) 14(1) *QUT Law Review* 52.

48 See e.g. 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, citing Nancy J Soonpaa, ‘Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students’ (2004) 36 *Connecticut Law Review* 353.

49 Anna Cody and Sue Green, ‘Clinical legal education and Indigenous legal education: What’s the connection?’ (2007) 11 *International Journal of Clinical Legal Education* 51.

Student aims?

In addition to teacher-determined aims, a clinic can aim to meet students' own goals. While these will often be the same as the standard goals, they will sometimes be more personal,⁵⁰ which may be difficult to incorporate into a planned curriculum other than through the reflective element of clinical legal education, and which risks seeing students' 'career placement goals [being] elevated above educational goals'.⁵¹

A conflict 'between the student's individual ambitions and the larger social aims of the clinic'⁵² may have to be resolved. The student is on notice for the clinic, as for any conventional course, of the intended aims and will have to reconcile their own aims with those of the course they have chosen, thereby 'resisting' student-led design.⁵³ More constructively (but requiring more work), '[c]ooperative learning theory posits that the role of the professor is to engage in "the spirit of mutuality" of learning between students and instructors',⁵⁴ such that 'clinic students themselves can determine the subject matter and the political focus of their lawyering tasks'.⁵⁵ However, this does carry the risk that 'inexperienced law students' motivation and excitement to tackle a social problem might lead to overly ambitious projects that could in turn lead to considerable frustration during implementation'.⁵⁶

Clinical learning outcomes

The aims of a clinical course are, effectively, a statement by the law school of why it is offering the course. From a different perspective, 'learning outcomes' are a statement by the law school of what a student will be able to show they have learnt from a course:

50 Philip G Schrag, cited at footnote 25, 185–86; and on the 'novelty of relying on students to dictate the goals of an academic program', see Mary Jo Eyster, cited at footnote 3, 354–58.

51 Linda F Smith, cited at footnote 7, 537.

52 Lydia Bleasdale-Hill and Paul Wragg, cited at footnote 21, 266.

53 Lydia Bleasdale-Hill and Paul Wragg, cited at footnote 21, 266.

54 William Wesley Patton, 'Getting Back to the Sandbox' (2011) 16 *International Journal of Clinical Legal Education* 96, 103–04, citing Fran Quigley, 'Seizing The Disorienting Moment: Adult Learning Theory And The Teaching Of Social Justice In Law School Clinics' (1995) 2 *Clinical Law Review* 37, 58–59.

55 William Wesley Patton, cited at footnote 54, 104.

56 William Wesley Patton, cited at footnote 54, 114.

Simply put, learning outcomes are the skills and knowledge which it is intended that students should be able to demonstrate by the time the assessment processes for the course have been completed. The intention of learning outcomes is to give students more idea of what is expected of them during the course they are undertaking ... objectives state what the teacher plans to achieve, outcomes state what it is that the student should achieve.⁵⁷

Learning outcomes are central to course design; they affect ‘course content, practical experience and assessment’.⁵⁸ As a matter of best practice, a clinical course is ‘designed to promote specified student learning outcomes’. Materials, class time and activities are directed towards achieving the learning outcomes, casework is selected to support them, academic and practical content is designed to support them, assessment tasks align with them, and infrastructure investment is defined by what is necessary to achieve them.⁵⁹ Literature on clinical legal education supports the central role of learning outcomes: they ‘provide the framework for ... teaching and methodology’,⁶⁰ they are ‘important in the choice of suitable clinical models’⁶¹ and they are the focus of an assessment regime. ‘The main purpose of assessments in educational institutions is to discover if students have achieved the learning outcomes of the course studied.’⁶²

Even if statements of learning outcomes do not encompass everything a student might learn in the course, they ‘force us to think more carefully about what we believe are the most important purposes of our courses and guide us in designing the delivery of the promised outcomes’.⁶³ Learning outcomes may not, however, be wholly at the discretion of the teacher,

57 The Learning Institute, *Good Practice Guide on Writing Aims and Learning Outcomes* (2011) Queen Mary, University of London, 4.

58 Adrian Evans and others, cited at footnote 13, 48.

59 Adrian Evans and others, cited at footnote 13, throughout.

60 Rachel Spencer, ‘Holding up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education’ (2012) 17–18 *International Journal of Clinical Legal Education* 181, 186.

61 See Giddings (2013).

62 Roy Stuckey, ‘Can We Assess What We Purport to Teach in Clinical Law Courses’ (2006) 9 *International Journal of Clinical Legal Education* 9, 10.

63 Roy Stuckey and others, cited at footnote 9, 199–200.

and may have to be articulated so as to conform to externally imposed outcomes required by, for example, the Australian Threshold Learning Outcomes (TLOs) for Law.⁶⁴

Terminology for learning outcomes

In drafting learning outcomes there is an important difference between merely describing what a student will have learnt and stating what a student will be able to do to show what they have learnt:

useful learning outcomes are those which describe what the typical student will be able to do by the time the course has been completed, and which can be assessed to measure to what extent students have achieved these outcomes ... a less useful outcome would describe the understanding that students are expected to have developed, whereas a more useful one would outline how they can articulate, or demonstrate this.⁶⁵

Useful learning outcomes incorporate verbs that suggest activity on the part of the student. The Centre for University Teaching at Flinders University, for example, suggests verbs to follow the statement ‘On successful completion of this (assignment/topic/course) students should be able to’:

analyse, apply, appreciate, classify, collaborate, compare, compute, conduct, contrast, define, direct, derive, designate, demonstrate, discuss, display, evaluate, explain, identify, infer, integrate, interpret, justify, list, name, organise, outline, report, respond, solicit, state, synthesise.

The Australian TLOs for Law specify, in relation to ‘Thinking Skills’ for example, that graduates ‘will be able to identify ... articulate ... apply ... generate ... engage in ... and think creatively ...’.⁶⁶

Clinical legal education scholarship often sets out learning outcomes of the ‘less useful’ type, such as: ‘I want my students to be able to ...’; ‘I want my students to understand ...’; ‘I want my students to learn the

64 Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010* (11 February 2011) Australian Learning and Teaching Council, at perma.cc/RP3A-PWRQ. See also e.g. James Marson, Adam Wilson and Mark Van Hoorebeek, ‘The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective’ (2005) 7 *International Journal of Clinical Legal Education* 29, 32, discussing learning outcomes required by the United Kingdom Quality Assurance Agency for Higher Education.

65 The Learning Institute, cited at footnote 57, 8.

66 Sally Kift, Mark Israel and Rachael Field, cited at footnote 64.

doctrine of ...'.⁶⁷ These are not invalid, but they are less useful because it is difficult for both teacher and student to measure progress towards achieving them, and they are less amenable to assessment. More useful clinical learning outcomes are, for example: 'On completion of this course, students should be able to: explain ... reflect ... evaluate ... identify ... articulate ... discuss ... demonstrate ...',⁶⁸ and 'Students should be able to plan ... develop ... organise ...'.⁶⁹

In *Best Practices* we proposed the following possible learning outcomes for clinical legal education:⁷⁰

Upon the completion of a clinical course, the clinical student will demonstrate:

critical analyses of legal concepts through reflective practice

an ability to work collaboratively

an ability to practise '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

67 Carolyn Grose, 'Beyond Skills Training, Revisited: The Clinical Education Spiral' (2012–13) 19 *Clinical Law Review* 489, 503.

68 Rachel Spencer, cited at footnote 60, 186.

69 Cath Sylvester, Jonny Hall and Elaine Hall, 'Problem-Based Learning and Clinical Legal Education: What can Clinical Educators Learn from PBL' (2004) 4 *International Journal of Clinical Legal Education* 39, 58–59.

70 Adrian Evans and others, cited at footnote 13.

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.

Whether, on completion of a clinical course, a student can in fact demonstrate these learning outcomes, is a matter for assessment (see Chapter 8).

Choosing the type of clinic

As we said above, it is only after the course aims and outcomes are established that the appropriate model of clinic can be determined. In Chapter 3, we discussed the different possible models of clinic. Most of the possible learning outcomes that are mentioned above as best practice⁷¹ are achievable in all of the models. A good reason to distinguish among the models is the degree of control that a law school can exercise over the clinic. Both in-house and external live client clinics have students working with clients under supervision, but the greater control that a law school can exercise over the work done by an in-house clinic gives scope for pursuing a wide range of learning outcomes. For an external live client clinic, the organisational goals of the agency can limit the range of possible learning outcomes, and so an agency should be selected with those constraints in mind. This is so to an even greater extent for externships, where the learning outcomes are achievable only within the bounds of the placement agency's own, independent goals, which places greater emphasis on the complementary content of the classroom, discussed

71 Adrian Evans and others, cited at footnote 13.

below. Differently from any of these models, a substantive law course that has clinical components to it will have its own intended learning outcomes—often knowledge of doctrine—and the clinical method has been chosen within the established aims of that course.

When deciding on the type of clinic that will best achieve the intended learning outcomes, significant considerations are the nature of the work that the students will do, the practice methods that are used, the social contexts in which the work is done, and the issues that are commonly addressed. These are considerations that the law school will have in mind when deciding whether it needs to exercise more or less control over the clinic and, so, whether to work with an in-house clinic, an external clinic or a placement agency for externships (see Chapter 3).⁷² Eyster makes the point clearly, in relation to a placement clinic:

[T]he availability of particular placement opportunities should not completely govern the structure of the clinic. Rather, goals should be established for the program, and curricular decisions (including size; seminar topics and format; nature of placements; faculty involvement in supervision; and other factors) should derive from those goals ... It simply does not make sense to decide where to place students, what to teach in the seminar, whether and how to train and supervise field instructors, without first having a clear understanding of the goals of the program.⁷³

Consider, for example, a learning outcome that ‘the student will demonstrate an understanding, and appropriate use, of the dispute resolution continuum’.⁷⁴ The externship model allows the flexibility of choosing a range of placement sites whose work offers a student the opportunity to engage with a continuum of dispute resolution mechanisms, in areas of debt, employment or family law rather than, say, criminal law or domestic violence protection, and the opportunity for students to learn from other student experiences about dispute resolution. Consider another possible learning outcome: that a student will demonstrate ‘an awareness of: lawyering as a professional role in the context of wider society; the imperatives of corporate social responsibility, social justice, and the provision of legal services to those unable to afford them; and the importance of professional relationships’.⁷⁵ For this outcome, the student

72 See e.g. Philip G Schrag, cited at footnote 25, 191–92, who makes this goal-oriented point in the more specific context of case selection in a legal practice clinic.

73 Mary Jo Eyster, cited at footnote 3, 352.

74 Adrian Evans and others, cited at footnote 13.

75 Adrian Evans and others, cited at footnote 13.

needs to be exposed to something other than conventional legal practice. Many externships with private or public legal practices will not offer the diversity of practice methods, contexts and issues required for this learning outcome, while an association with a community legal centre—whether in an in-house clinic, external clinic or externship—is likely to do so.

Selecting students

Student demand for clinic often outstrips available places, necessitating the invidious task of selecting (and excluding) students. It is good practice to ensure that the selection process for students is administered by the university, not by the teacher, in a transparent and non-discriminatory manner, subject only to prerequisites that are clearly articulated.⁷⁶ Within these process requirements, there is a wide diversity of methods, ranging from ballot to interview, as we note below. Few of the accounts of methods for student selection say anything about the criteria, and few of the possible criteria have any real relationship with what a clinic will expect of a student. After an overview of the many possible methods for student selection, we examine possible valid criteria.

Processes for selection

A national survey of clinic selection methods reports the many ways that students can be selected in Australia:⁷⁷ ballot, priority of application, preference to final- or penultimate-year students, academic merit, ‘suitability’ to meet a clinic site’s needs, student interest and desire, experience, prerequisite subjects, social justice experience, previous volunteering, level of other commitments, and previous academic conduct. Methods used elsewhere include a simple sign-up sheet, a lottery, criteria-based selection, written applications, essays,⁷⁸ volunteer contributions,⁷⁹ interviews⁸⁰ and grade-point averages.⁸¹

76 Adrian Evans and others, cited at footnote 13, 51.

77 *Identifying Current Practices in Clinical Legal Education*, Regional Reports, cited in Chapter 1 at footnote 6; Adrian Evans and others, cited at footnote 13.

78 Frank Dignan, ‘Bridging the Academic/Vocational Divide: The Creation of a Law Clinic in an Academic Law School’ (2011) 16 *International Journal of Clinical Legal Education* 75, 80.

79 Lawrence Donnelly, ‘Irish Clinical Legal Education *Ab Initio*: Challenges and Opportunities’ (2008) 13 *International Journal of Clinical Legal Education* 56, 61.

80 Maureen E Laffin, ‘Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report’ (1997–98) 33 *Gonzaga Law Review* 1, 11.

81 Philip G Schrag, cited at footnote 25, 210.

Frustratingly, these accounts describe mere processes, and no account is given of the criteria that are applied to make those processes useful. A wide range of considerations are, notoriously, taken into account when selecting students for clinic but none is obviously valid for clinical legal education generally, and the most that can be said is that some, in some circumstances, may be a rational basis for selection and exclusion.

Common criteria for selection

It may be thought that, because of the particular demands of clinical legal education, students are more or less 'suitable' to participate, having regard to, for example, prior experience in legal practice, levels of emotional maturity, or their having reached a later stage in the law degree program. In fact, the extent to which a student needs to 'know law', or to demonstrate 'maturity', will vary according to the aims of the course, the model of clinic and the type of work that is done. Bleasdale-Hill and Wragg (who usefully distinguish the vocationally oriented nature of clinical legal education in the United States) discuss student selection considerations that arise, in their case, in the United Kingdom, and that are true for similar legal education systems such as that in Australia.⁸² They express some sympathy for a view that preference could be given to students with a stated intention to practise law, but note that there is 'a certain degree of speculation' in saying that such students are more likely to show commitment to the clinic, and they see no reason why those who do not wish to become lawyers should not be able to apply.

Care should be taken to not assume that a clinic student, in order to work and learn under supervision, needs either a practice-level command of legal principles or familiarity and comfort with challenging practice issues. Although the partnering organisation might seek students who have some prior 'real world' experience, less experienced students can benefit more from the closely supervised and supported nature of clinical legal education. The partnering organisation will, understandably, be concerned to ensure that its service provision is not unduly compromised by the inability of clinic students to do what is needed. Reference here to 'unduly' indicates an acceptance that clinic students may adversely affect service delivery to some degree, but within tolerable limits having regard to the joint goals of service and education (and, of course, clinic students

82 Lydia Bleasdale-Hill and Paul Wragg, cited at footnote 21, 265–66.

can have a positive effect on service delivery too). We noted in Chapter 3 that good working relationships between university staff and the staff of a partnering organisation are critical to address the tension between service and education.

Clinics will often avoid the hard task of seriously considering what, if any, prior knowledge or experience is actually needed, both to achieve the learning outcomes and meet the needs of a partnering organisation. The common proxy for a real or perceived need for previous experience is to give priority to later- or final-year students, avoiding a serious analysis of what is actually required to engage successfully with the course. One risk generated by this approach is that the clinic experience is more easily (and misleadingly) characterised as an exercise in work-readiness, putting undue emphasis on ‘practice preparation’. Another is that students have no opportunity to approach other law courses through the critical reflective lens they acquire in clinical legal education.⁸³ Although there is a view that for younger, less practice-focused students, clinical legal education is inappropriate altogether,⁸⁴ another view is that first-year students will benefit from clinical methodology, particularly first-year Indigenous students who may be at risk of withdrawing from their legal studies.⁸⁵

In second semester of their first year, Aboriginal and Torres Strait Islander students at the University of New South Wales (UNSW), for example, learn basic interviewing skills and have the opportunity to interview clients at the in-house clinic. In their second or third year, all law students attend the in-house clinic for a class on interviewing skills, participate in a client advice session and write a reflective assignment.

Valid criteria for selection

There are two pedagogically sound considerations for admission into a clinic: the student’s capacity to achieve the intended learning outcomes; and the service requirements of an external agency. As Massey and Rosenbaum put it: ‘Client needs and pedagogical objectives drive

83 HL Packer, T Ehrlich and S Pepper, *New Directions in Legal Education* (1972) Carnegie Foundation for the Advancement of Teaching/McGraw-Hill, 41; and see CLEPR ‘Clinical Education: The Student Perspective’ (1974) 7(1) *Clinical Legal Education PR Newsletter* 5–6.

84 Rodney J Uphoff, ‘Why In-House Live Client Clinics Won’t Work in Romania: Confessions of a Clinician Educator’ (1999–2000) 6 *Clinical Law Review* 315.

85 Anna Cody and Sue Green, cited at footnote 49.

the criteria for determining student enrollment in clinics.⁸⁶ At times, adherence to these considerations will be compromised by external factors, such as expectations of a placement site, requirements imposed by the funder of a program and obligations imposed by the law school (for example, to final year students). However, we put those to one side in this analysis, except for issues of affirmative action and accommodating disability, which we address below.

The first consideration for admission into a clinic—the student’s capacity to achieve the intended learning outcomes—will raise very few barriers to participation in a clinic. Achieving new doctrinal knowledge may, as in any law course, require prior knowledge of foundational concepts, and in a specialist clinic preference could be given to students with a demonstrated commitment to working in that particular field.⁸⁷ Other likely intended learning outcomes for a clinic can be achieved by any law student, to some degree. Only if a learning outcome is pitched at a level of demonstrating ‘advanced’ or ‘sophisticated’ ability, for example, is there a reason to enrol students with an existing level of ability. For example, ‘at Monash University, admission into [the clinical course] Advanced Professional Practice generally requires satisfactory completion of Professional Practice’, and the Griffith University course Advanced Family Law Clinic requires students to have completed the classroom-based family law course.⁸⁸ A clinic in which students will represent clients in court may have minimum expectations of students, but those expectations need to be clearly set out and closely tied to what is actually required of well-supervised students.⁸⁹

The more influential consideration in setting prerequisites for clinic enrolment is the service requirements of an external agency, relevant for all models of clinic apart from the rare, fully in-house live client clinic, and the relatively uncommon occurrence of clinical components in doctrinal courses. For an external (or ‘agency’) live client clinic, and for the widely used externship model, a clinical course must operate within the operational imperatives of the partnering organisation. This may,

86 Patricia A Massey and Stephen A Rosenbaum, ‘Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs’ (2004–05) *Clinical Law Review* 271, 318.

87 See e.g. admission requirements for the various specialist clinics described in Patricia A Massey and Stephen A Rosenbaum, cited at footnote 86, 318–21.

88 Adrian Evans and others, cited at footnote 13, 13.

89 See e.g. Susan Campbell, ‘A Student Right of Audience – Implications of Law Students Appearing in Court’ (2004) 4 *International Journal of Clinical Legal Education* 22, 38.

although not necessarily, result in the need for minimum requirements for students on matters such as legal knowledge, legal practice skills, or familiarity with social issues or particular communities.

As we observed in Chapter 3, there can be a tension between the intended learning outcomes and an agency's service requirements. Addressing that tension in the context of clinic course design, Chavkin says:

In designing a clinic to maximize service to a client community, selection of a student would necessarily be based on the anticipated ability of that student to provide legal services to clinic clients. Students with poor skills and/or a lack of political commitment to serving low-income clients would be discouraged or prevented from enrolling.

By contrast, if the goal were to maximize educational benefits for students, to ensure that all students develop the skills and values necessary to be responsible and effective lawyers before they graduate, we would target clinic enrollment on the very students with the poorest skills and/or with the lowest level of commitment to serving under-represented populations. We would depend on the effectiveness of clinical methodology to transform the skills and values of these students and to ensure that clinic clients receive legal representation consistent with professional standards.⁹⁰

The recommended best practice for clinical student selection in Australia is set out in this way:

The process of student selection conforms to the university's regulations (in consultation with external agencies if relevant). The selection process is transparent and non-discriminatory. The prerequisites for selection are clearly articulated. The reasons for choosing particular methods of selection (which can include ballot, interview, stage of study or completion of a prior clinic) are articulated. There is no presumption that access to CLE courses and clinical experiences should be limited to later-year students.⁹¹

What needs to be added to this is that any prerequisites for selection, and any hurdles such as stage of study, completion of a prior clinic or being limited to later-year students, are in place only because they are necessary for the intended learning outcomes to be achievable, to ensure equity in students' opportunities to undertake clinical course and, if required, to meet the service requirements of an external agency.

90 David F Chavkin, 'Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton' (2003) 10(1) *Clinical Law Review* 245, 266.

91 Adrian Evans and others, cited at footnote 13, 13.

Few of the usual processes for selecting clinic students can be justified as general rules. Each of them may be justifiable according to these considerations in particular circumstances. There is, for example, no necessary connection between a student's prior academic performance and their ability to meet a clinic's intended learning outcomes, or between a student's prior 'social justice experience' and the service requirements of an external agency. Each clinical course needs to establish—and to be able to defend, when challenged by unsuccessful applicants—selection criteria that are relevant to the work, the intended learning outcomes of the clinic and the situation of the law school.

When no particular factors exclude a student and a clinic is open to all applicants, two methods of selection are commonly used, both relying on arbitrariness in place of evaluation against criteria. A more equitable system for 'neutral' student selection than 'first-come, first-served' is a ballot or lottery, 'a randomized selection process that gives every student an equal chance for selection'.⁹² It is described in *Best Practices* as 'a process of random selection from all eligible students who express interest'.⁹³

Actively promoting the opportunity to enrol

The social justice focus of clinical legal education, particularly in Australia (see Chapter 5), invites students to examine issues of social inequality. Student selection for a clinic is an opportunity for the clinic itself to demonstrate a commitment to redressing inequality, 'serving as a model for promoting diversity in law practice'.⁹⁴ We noted above that selection processes must be transparent and non-discriminatory, but they can go further, and can actively promote access to the clinic for students from socioeconomic groups that are under-represented among lawyers and law students. A clinic can promote opportunities for people—such as people with disabilities and people with carer's responsibilities—whose participation requires reasonable adjustments to be made. Rather than waiting for a person to bring issues of accessibility to a clinic's attention, the clinic can take anticipatory measures to ensure that it is accessible.

92 David F Chavkin, cited at footnote 90, 267; see e.g. a description of student selection by lottery in the George Washington Small Business Law Clinic: Susan R Jones, 'Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice' (1997–98) 4 *Clinical Law Review* 195, 208.

93 Adrian Evans and others, cited at footnote 13, 14.

94 Frances Gibson, 'The Convention on the Rights of Persons with Disabilities: The Response of the Clinic' (2011) 16 *International Journal of Clinical Legal Education* 11, 21.

Such measures could include flexible work hours and attendance requirements, audio-visual and other aids, adaptation of premises and workspaces and choosing accessible externship sites, waiving enrolment prerequisites, and adjusting assessment requirements.⁹⁵

Gibson points out that ‘[i]t can be difficult for people with a disability to get into law schools, complete studies and get jobs as lawyers’.⁹⁶ She suggests:

Clinical staff can assist law school colleagues to experience and understand issues about disability through seminar programs on the issue, encouraging students with and without disabilities to present aspects of their work relating to disability rights, to encourage sessions at university level to be run for staff on disability issues and through collaboration on research on legal issues that incorporate issues of disability.⁹⁷

Teaching in the classroom

It is best practice for a clinic to have a classroom component: ‘Each clinic includes classes that enable students as a group to examine the broader context of law and the legal system.’⁹⁸ In fact, the classroom component is a significant point of distinction between a clinical externship and a work internship in, for example, WIL. Our *Best Practices* research shows that most but not all clinics in Australia have a classroom component,⁹⁹ although Shrag reported in 1996 that a classroom component ‘is not a universal practice’ in the United States.¹⁰⁰

Consistently with all other aspects of a clinic, ‘[t]he goal of the classroom component is of course inextricably linked to the overall goals of the program’.¹⁰¹ In addition to any doctrinal content, and practice skills development,¹⁰² the classroom educates students in reflective practice, legal ethics, and the practice skills necessary to

95 See, e.g. Sande L Buhai, ‘Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements’ (1999) 36 *San Diego Law Review* 137, 167–71.

96 Frances Gibson, cited at footnote 94, 17.

97 Frances Gibson, cited at footnote 94, 18.

98 Adrian Evans and others, cited at footnote 13, 54.

99 *Identifying Current Practices in Clinical Legal Education*, Regional Reports, cited in Chapter 1 at footnote 6; Adrian Evans and others, cited at footnote 13.

100 Philip G Schrag, cited at footnote 25, 236, note 110.

101 Mary Jo Eyster, cited at footnote 3, 354.

102 Mary Jo Eyster, cited at footnote 3, 350.

ensure a good quality of legal service to the client. The classroom is a structured environment in which students can place their experience in the context of academic reading, and share reflections on their clinical experience. Indeed, if nothing else, the classroom component is a way to help students reflect, to ‘assess, optimize and build upon the placement experience’.¹⁰³ But enthusiasm for class is not necessarily shared by clinic students. Coss warns of ‘[s]tudent resistance to a classroom component’, because ‘[h]aving their impatience to practice satisfied by the externship experience, [students] then resent the return to the classroom’.¹⁰⁴

Conduct of the class

Classes for in-house and external live client clinics can be conducted for a single cohort of students, largely sharing a common clinical experience. In contrast, students in a class for an externship clinic are likely to be placed in a variety of different environments, creating both the opportunity for comparative experiences and the challenge of finding common ground. Although a class of externship students can be divided into ‘groups with common experiences’,¹⁰⁵ Coss points out that ‘[t]his has the disadvantage of losing the shared experiences of group discussions, where the very diversity of the settings is the enhancement’.¹⁰⁶

The actual conduct of classes in a clinic course needs to be considered carefully. Noting that ‘creating a classroom where there is active student engagement is the aspirational clinic seminar model’, Louis confesses that ‘when I started ... I was focused so much on what I needed to tell the students that I had very little time to absorb andragogical methodology’. In other words, teaching a clinic class is different.¹⁰⁷

Students’ expectations of both dynamic interaction and responsible participation have important implications for the conduct of classes in a clinic course. A clinical teacher ought not, for example, enter the

103 Margaret Barry, ‘Clinical Legal Education in the Law University: Goals and Challenges’ (2007) 11 *International Journal of Clinical Legal Education* 27, 37, note 48.

104 Graeme Coss, ‘Field Placement (Externship) – A Valuable Application of Clinical Education?’ (1993) 4(1) *Legal Education Review* 29, 48, citing J Motley, ‘Self-Directed Learning and the Out-of-House Placement’ (1989) 19 *New Mexico Law Review* 211, 227.

105 Graeme Coss, cited at footnote 104, 48, citing H Rose, ‘Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?’ (1987) 12 *Nova Law Review* 95, 109.

106 Graeme Coss, cited at footnote 104, 48.

107 C Benjie Louis, ‘Reflections upon Transitions: An Essay on Learning How to Teach after Practicing Law’ (2012) 17–18(2) *International Journal of Clinical Legal Education* 227, 230.

classroom in ‘the teacher’s cloak’, representing the conventional approach to legal education in which ‘[s]uppression of the emotional and intellectual integrity of the pupil is the result [of an authoritarian pedagogy]; their freedom is repressed and the growth of their own personalities is stunted’.¹⁰⁸ Rather, a clinical teacher needs to approach the classroom as a facilitator of students’ learning,¹⁰⁹ both respecting the experience they are getting and nurturing their capacity for reflection: ‘[t]he professor acts as ... tutor, rather than as someone who is professing at or dictating to the student’.¹¹⁰ Students can take greater responsibility for their learning and participate in a respectful and trusting relationship with their supervisor.

Apart from the role played by the teacher, the classroom activity itself needs to be dynamic, characterised by discussion, small group work, and simulations for skills development: ‘the class work is designed to further the application of the concepts, do group work,¹¹¹ and provide an opportunity for students to share challenges and solve problems through discussion and case rounds. Collaboration is encouraged’.¹¹² Citing Ledvinka,¹¹³ James¹¹⁴ and Maughan and Webb,¹¹⁵ Spencer describes ‘a number of practical ideas that clinical teachers can employ’:

the classroom can be arranged to encourage reflection by avoiding placement of the teacher in the ‘power’ role at the front; my own experience confirms that in a circle is best ... [in lecture theatres] asking the students to sit in the front few rows is helpful, especially if the teacher can join them, or at least avoid being above or detached from them (such as behind a lectern or desk) ... Small group or pair discussions provide opportunities for peer and self-assessment and also encourage discussion amongst less extroverted students who prefer not to speak frankly about personal experiences in front of a larger group.¹¹⁶

108 Robert Schehr, ‘The Lord Speaks through Me: Moving beyond Conventional Law School Pedagogy and the Reasons for Doing So’ (2009) 14 *International Journal of Clinical Legal Education* 9, 23, citing Joseph Ratner, *Intelligence in the Modern World: John Dewey’s Philosophy* (1939) Modern Library, 623.

109 Georgina Ledvinka, ‘Reflection and assessment in clinical legal education: Do you see what I see?’ (2006) 9 *International Journal of Clinical Legal Education* 29, 36.

110 Leah Wortham, Catherine F Klein and Beryl Blaustone, cited at footnote 24, 125.

111 See e.g. RN Lacousiere, ‘A Group Method in Clinical Legal Education’ (1980) 30 *Journal of Legal Education* 563.

112 Leah Wortham, Catherine F Klein and Beryl Blaustone, cited at footnote 24, 125.

113 Georgina Ledvinka, cited at footnote 109.

114 Colin James, ‘Seeing Things As We Are. Emotional Intelligence and Clinical Legal Education’ (2005) 8 *International Journal of Clinical Legal Education* 123.

115 C Maughan, and J Webb, ‘Taking Reflection Seriously: How was it for us?’ in C Maughan and J Webb (eds), *Teaching Lawyers’ Skills* (1996) Butterworths.

116 Rachel Spencer, cited at footnote 60, 195.

Literature

Students should be expected to read, analyse and use academic, professional and practical material,¹¹⁷ and it is considered good practice that '[t]he readings for the clinical course encourage a broad, critical and contextual analysis of law'.¹¹⁸ Students' resistance to reading materials, reported by Shrag,¹¹⁹ may be particular to the skills-focused practice-oriented nature of clinical legal education in the United States, but even in that environment academic literature should be the basis of students' critical analysis of their work. As an example, Smith points out that 'jurisprudence ... can become alive as an applied skill as well as an inquiry into legal theory when the jurisprudence discussions are linked to [for example] judicial internships'.¹²⁰

Quoting Andrew Goldsmith, Cooper and Trubek say:

it is only through the fusion of [sociolegal] scholarship and practice that law students can learn to appreciate 'the full complexity of the lawyer's social role, including responsibility to clients, others, and oneself through empirical and conceptual understanding of what lawyering in society involves'.¹²¹

This approach to clinical legal education assumes that a learning goal is indeed 'to appreciate the full complexity of the lawyer's social role'. That is indeed a valid assumption for clinical legal education in Australia, which is to a very large extent an exercise in exploring issues of social justice (see Chapter 5). It should not be hard, therefore, for clinicians in Australia to 'transcend the theory-practice rhetoric',¹²² and to give a theoretical underpinning to clinical teaching, even in its practice-oriented skills aspects.

117 Adrian Evans and others, cited at footnote 13, 51.

118 Adrian Evans and others, cited at footnote 13, 54.

119 Philip G Schrag, cited at footnote 25, 239.

120 Linda F Smith, cited at footnote 7, 547–48.

121 J Cooper and LG Trubek (eds), cited at footnote 35, 6, quoting Andrew Goldsmith, 'An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education' (1993) 43 *Journal of Legal Education* 415.

122 Eric Mills Holmes, 'Education for Competent Lawyering – Case Method in a Functional Context' (1976) 76 *Columbia Law Review* 535, 562; and see Amy D Ronner, 'Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag' (1995–96) 45(3) *American University Law Review* 859, 860–62, especially the references at note 5.

The ‘law-in-context’ focus of clinical legal education in Australia requires students to read and engage with literature about law and society. Ideas and manifestations of poverty, for example, are many and complex, and have to be understood by students if—as is often the case—a clinic is addressing legal causes of, and responses to, needs arising from poverty.¹²³ In any context, clinical legal education confronts students with challenging and problematic aspects of law in practice, inviting the most basic interrogation of issues of law and morality through, for example, theories of natural law and positivism, and deontology and consequentialism.

At the same time, students in clinical legal education are examining the roles of lawyers, and a critical analysis requires perspectives informed by, for example, philosophy, psychology and sociology.¹²⁴ In relation to legal ethics (see Chapter 6), for example, ‘professional responsibility can be approached as an exploration of philosophy which would be as theoretical as any other part of law school. Starting the inquiry into these issues from [clinic] performance ... arguably strengthens the possibility of meaningful theoretical discussion’.¹²⁵

Timing, scheduling and course credit

Length and scheduling of a clinical course

The experiential nature of clinical activity militates against periods of short engagement. A range of respondents to our *Best Practices* research emphasised that there is a necessary minimum period to ensure that the clinical experience has meaning for the student. Depending on how the clinical course is structured, this minimum is generally put at a block of five consecutive days, or a day a week over a semester.¹²⁶ However, there

123 See e.g. Rose Voyvodic, ‘Considerable Promise and Troublesome Aspects: Theory and Methodology of Clinical Legal Education’ (2001) 20 *Windsor Yearbook of Access to Justice* 111, 118–19.

124 Mark Spiegel, ‘Theory and Practice in Legal Education: An Essay on Clinical Education’ (1986–87) 34 *UCLA Law Review* 577, 593–94.

125 Mark Spiegel, cited at footnote 124, 592.

126 See the account of ‘minimum effective time periods for good clinical programs’ in *Identifying Current Practices in Clinical Legal Education*, Regional Reports for Victoria and Tasmania, South Australia, Queensland and Northern New South Wales, Western Australia and Northern Territory, and New South Wales and Australian Capital Territory, cited in Chapter 1 at footnote 6.

are views that in a live client clinic ‘even one day can impact on a student’, while an externship requires ‘minimum two days a week for minimum 20 days for continuity and intensity’.¹²⁷

It was apparent from our *Best Practices* research that the usual level of student commitment over a full semester is at least one half day a week, and more usually one or two days, sometimes expressed in terms of hours (for example, six hours a week, 15 hours a week).¹²⁸ We discuss below the implications this has for the value of course credit. Subject to our above view that it is best practice to run a clinical course over a semester, a clinical course with limited learning objectives can be structured to be offered in a block of days: daily for two weeks, for example, rather than one day a week for 12 weeks. This is especially the case for courses offered over a summer or winter break.

In the discussion above about student selection, we noted a view that it is preferable to schedule a clinical course later in a law degree program so that students have more maturity and knowledge. But, as we said there, the extent to which a student needs to ‘know law’ or to demonstrate ‘maturity’ will vary according to the aims and learning outcomes of the clinic. It is therefore quite feasible to operate a clinic for first-year students, while a clinic with a specialist focus may have to be offered only to students who have studied particular prerequisite courses.

Course credit value

As a matter of fairness to the students, the credit weighting of a clinical course can be approached in the same way as would be the case for a conventional course. In a conventional law course there is usually a tariff of a number of hours a week—say 10—that a student is expected to spend on class attendance, reading and preparation. That same tariff can be met by a clinical course that requires, say, one day’s attendance each

127 See the account of ‘minimum effective time periods for good clinical programs’ in *Identifying Current Practices in Clinical Legal Education, Regional Report: New South Wales and Australian Capital Territory*, at perma.cc/257Z-6EMR.

128 See the accounts of ‘hours per week students spend on clinical tasks’ and ‘how much academic credit do students receive’ in *Identifying Current Practices in Clinical Legal Education, Regional Reports for Victoria and Tasmania, Queensland and Northern New South Wales, Western Australia and Northern Territory, and New South Wales and Australian Capital Territory*, cited in Chapter 1 at footnote 6.

week as well as a classroom component. Clinics requiring more intensive attendance, or running for longer than a normal semester, can be weighted accordingly, perhaps being offered for double credits.

Our *Best Practices* research showed that clinics in Australia commonly take this approach, broadly equating hours spent in a live client clinic or an externship with the student hours expected for a conventional law course.¹²⁹

Conclusion

The excitement of establishing and operating a clinical course can distract from the need for rigorous course design. A clinical course is a sophisticated exercise in legal pedagogy, and the tension between education on the one hand and client service on the other will be best managed if educational design is considered and entrenched. As we described above, this requires clearly stated aims and associated learning outcomes, which will determine such essential aspects as the clinic model, the classroom content, and student selection criteria.

129 See the account of ‘hours per week students spend on clinical tasks’ in *Identifying Current Practices in Clinical Legal Education*, Regional Reports for Victoria and Tasmania, South Australia, Queensland and Northern New South Wales, Western Australia and Northern Territory, and New South Wales and Australian Capital Territory, cited in Chapter 1 at footnote 6.

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