

# Clinical Legal Education in the 21st Century: Still Educating for Service?

*Judith Dickson*<sup>1</sup>

## **Introduction**

As a lawyer and clinical legal educator, I have direct experience of the ways in which clinical legal education programmes in Australia<sup>2</sup> provide legal services to poor and disadvantaged people. In this context I recently began to wonder about the image of lawyers and of the legal profession, that other clinical educators and I portray in our work and about the values underlying clinical legal education.<sup>3</sup> I began to think that despite a longstanding commitment to access to justice,<sup>4</sup> clinical legal education in Australia might actually be acquiescing in a notion of professionalism that is counter to that commitment.

In this article I explore the connection between the continuing commitment of clinical legal education to the provision of legal services to those unable to otherwise afford them and the notions of professionalism traditionally adopted by the organised legal profession. In doing so I focus on the Australian legal environment as the one with which I am most familiar. However, I believe the issues I raise are relevant for other legal educators concerned about the state of the legal profession in their jurisdictions and about the values which clinical legal education imparts to law students.

The underlying premise of this paper, and my starting point, is that clinical legal education as a method of legal education developed in the United States in the 1960s and in Australia in the 1970s *primarily* in response to an obvious lack of legal services for the poor.<sup>5</sup> A service ideal therefore

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1 Lecturer and Clinical Supervisor, School of Law and Legal Studies, La Trobe University, Melbourne, Australia. Earlier drafts of this paper were presented at the Mid-Atlantic Clinical Workshop, Baltimore USA and the Commonwealth Legal Education Association conference, Jamaica in late 1998. I thank my colleagues in both forums for their constructive comments. I also thank my colleagues at La Trobe, Margaret Thornton and Mary Anne Noone.

2 I have also had the opportunity to observe programmes at work in the United States and the United Kingdom and to talk to clinical legal educators from parts of Africa and India.

3 The idea of the law teacher as role model is still relatively new. See (Menkel-Meadow 1991). Le Brun and Johnstone (1994) discuss the implications of

teachers as role models for student learning and Dickson and Noone (1996) present a practical illustration of role modelling within clinical legal education.

4 See the discussion later in the article of the origins of clinical legal education.

5 I have reached this view from my reading of the early literature on clinical legal education. See, eg, the writings of William Pincus and others eg, Pincus (1980) Johnson (1973) Grossman (1974) and papers presented at the conference of the Council on Legal Education for Professional Responsibility CLEPR (1973). For an Australian view see Hanks (1976) Smith (1984) Noone (1997). While demand from the practising profession and law students for practical skills training was a factor in the development of clinical legal education, my view is that this alone would not have resulted in its rapid growth.

underpinned the educational adventure. This commitment to service is explored in the article in a discussion of the origins of clinical legal education in both those countries.

I argue that the legal profession in Australia, at least through the voice of its professional organisations, has traditionally adopted a particular view of itself as a 'profession'. This view, in essence, has been that membership of the legal profession is a 'calling', that legal practice is not primarily a commercial activity and that a characteristic of the profession which distinguishes it from other trades or occupations is that members have an obligation to 'serve the public' in their practice of the profession.<sup>6</sup> I suggest that clinical legal education is based on a similar professional ideal.

Recently, there have been challenges to the legal profession's view of itself and of its role in the community. In both Australia and the United Kingdom governments have sought to demystify the legal profession and to attack its traditional self-regulatory status.<sup>7</sup> Attention has also been focussed on the legal profession's monopoly over the delivery of legal services. One effect of these inquiries I think, has been that the profession's sense of identity has been shaken. The identity of clinical legal education is also, I suggest, at stake if it is based on a view of the legal profession that is no longer relevant. In this article I argue that it is time to rethink and redefine the values of clinical legal education. I hope that in doing so, clinical legal educators can contribute to the development of a new vision of professionalism.

### Structure of the Article

The article is in three parts. In the first part I examine the notion of a profession which I argue the legal profession has publicly adopted. I then look at the ways in which the legal profession has used and relied upon this notion to justify maintenance of a privileged position vis-a-vis the provision of legal services to the community. In the second section I briefly discuss the beginnings of clinical legal education in Australia and compare these with its counterpart in the United States. I then discuss what I see as the link between clinical legal education and the notions of professionalism discussed earlier.

The third section asks whether the traditionally espoused ideals of the legal profession can be sustained in the face of recent and continuing challenges to its role in the legal system. I examine the trend in Australia to see lawyers as inhibiting access to justice rather than assisting it. These challenges (or attacks depending on one's viewpoint) on the legal profession have raised the possibility that the legal profession is viewed at least by government as no different from any other

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6 I am interested here in the idea that the legal profession has, of itself, as expressed by the leaders of the professional organisations, members of the judiciary and so on. Clearly, this idea may be narrower in scope than concepts of professionalism described in sociological literature. I hasten to add that I have not conducted any large-scale empirical research in this area - a project for the future. See, however, Kirby (1996) and Dawson (1996) and for a United States expression of the view see Baillie (1994-95).

7 The list of inquiries would fill a page or more. However, in Australia the list includes reports by two state law reform commissions (New South Wales Law Reform Commission 1982) (Law Reform Commission of

Victoria 1992), the Victorian Attorney-General (Attorney-General's Working Party on the Legal Profession 1995) the Commonwealth Government (Senate Standing Committee on Legal and Constitutional Affairs, 1991-1994), Trade Practices Commission (1994) Access to Justice Committee (1994). In the United Kingdom, the Lord Chancellor's Department Green Paper (Lord Chancellor's Department (UK) 1989) shocked the legal profession in that country. Indirect challenges continue in government initiated inquiries into the costs of civil justice. See, eg, (Lord Woolf 1996) and the recently completed report of the Australian Law Reform Commission (Australian Law Reform Commission 2000).

occupation or industry. If it loses both its monopoly over legal services and its privilege of self-regulation, inherent characteristics of a profession under the traditional view, do its members in turn owe any duty to serve the public?

Finally, I discuss the implications for clinical legal education of these possible or likely changes in the legal profession's espoused ideals. I conclude that clinical educators must pay attention in their teaching to developing a new vision of the lawyers' role that does not rely on adherence to privileged and monopolistic practices. I suggest there are three options for this new vision and I encourage clinicians to retain the longstanding commitment to access to the legal system within a new vision of professionalism.

### **The Notion of a Profession**

I do not intend here to survey the sociological literature on professions and professionalism.<sup>8</sup> While theories of the profession have changed and developed since the 1930s the 'ideal-type' of profession is generally agreed to possess certain characteristics (Larson 1977). Typically, these include the following:

- A period (usually long) of education and training
- Possession of certain skills and expertise
- Ethical rules or code
- Monopoly over delivery of a particular service ( or monopoly over provision for a fee)
- Control over entrance to the profession via the setting or educational and training requirements
- Self-regulation
- Commitment to public service

Once the legal profession became a cohesive group<sup>9</sup> it clearly possessed at least the first six characteristics. The profession itself, or at least the professional organisations presenting a unified public face for the legal profession, has seen these traits as defining and has clung tenaciously to the idea that because as a group it possessed them, it was set apart from other occupations.<sup>10</sup> Whether this is so will be discussed later in the context of challenges to that view. In this part I concentrate on how the legal profession interprets and relies on this idea of a commitment to public service.

I argue that of all the characteristics outlined above, the idea that membership of the legal profession carries with it a commitment to serve the public, is the most powerful. This is because it can be and is used to justify the privilege of self-regulation and that of monopoly over legal services as well as to exhort individual lawyers to engage in ethical legal practice with a view to

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8 Johnson (1972) discusses and criticises the models in sociology at the time of his writing in 1970. Nelson and Trubek (1992) also survey the theories of professionalism. See also, (Larson 1977).

9 The origins of both the Australian and American legal professions lie in the development of the English legal profession. In England the two branches of the profession developed separately. However, lawyers of

either variety, ie attorneys-at-law and serjeants (forerunner of the barrister) appear to have held a monopoly over advocacy and litigation by the end of the 14th century. By the mid 18th century solicitors were organized into a 'professional' body able to lobby for further monopoly. See, Holdsworth (1903) J.H. Baker (1986) (Christian 1899).

10 With the exception of medicine.

public service. It is seen therefore as an integral part of being a lawyer. It contributes to the ideal of the legal profession as a 'calling' and one in which the primary purpose is not mere financial reward.<sup>11</sup>

There are three obvious ways in which the legal profession, through its professional organisations, uses and relies upon this ideal of public service. First, it is relied upon positively to encourage individual lawyers and professional organisations to, for example, commit themselves to increase their pro bono work.<sup>12</sup> Pro bono work can be either for individual clients or for community groups and in Australia at least, is increasing as governments continue to withdraw funds from the public legal aid budgets (Regan 1999). Lawyers' involvement in pro bono work is a mark of their special status as professionals with an overriding commitment to the provision of legal services to the community - the public interest.<sup>13</sup> The commitment to public service (or obligation as it is often referred to) also inspires calls for lawyers to voluntarily contribute their expertise to draft law reform proposals, take part in community consultation or otherwise involve themselves in public activities involving the legal system.<sup>14</sup>

Secondly, this public service ideal is publicised in ways directed at improving the public reputation of lawyers generally.<sup>15</sup> So, for example, in my home state of Victoria and in most other Australian states, the profession organizes a 'Law Week' each year. Telephone advice lines are set up through the professional organization, lawyers give free advice at designated public places throughout the week, displays are set up providing information on common legal problems et cetera. In addition, much time and effort is spent in persuading the public of the value of hiring a lawyer when trouble or transaction presents. The overriding message is that lawyers are independent and skilled advisers with a commitment to serving the community (Law Institute of Victoria 1999) (Scott 1998). As I discuss later, perceived challenges to that independence impact on the notion of obligations of public service.

Thirdly, the legal profession uses the public service commitment in what I conceive to be a negative way - that is, as a justification for privilege. The legal professional organizations argue that their members adhere to this obligation of public service and use their skills and expertise for the good of the community.<sup>16</sup> The argument continues that because lawyers are professionals with expertise and training, the community can rely on them and only them when dealing with the legal system. Conversely, the community cannot rely on non-lawyers because they are not professionals and

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11 Larson (1977) 59 refers to this use of the 'service ideal' as the need to gain 'social credit and autonomy'. See also, Kirby (1996), Sir Daryl Dawson in a speech to the 29th Australian Legal Convention October 1995 reported in (1995) 30 Australian Lawyer 10 and Smith (1994).

12 'Pro Bono Publico' - interpreted variously as 'for the public good' or 'in the interests of the public'. Baillie and Bernstein-Baker (1994-95) base their argument in favour of the (then) proposed American Model Rule 6.1 (pro bono) on a view of the legal profession which incorporates an obligation to serve the public.

13 The American Bar Association reaffirmed this special obligation of lawyers in the Report of its Commission on Multidisciplinary Practice August 1999.

14 The journal of the legal professional association in Victoria, Australia, the Law Institute Journal contains a regular column featuring and discussing the variety of ways in which members of the profession can perform pro bono work. See, eg, (Voluntas Pro Bono Secretariat 1998) and (English and Burchell 1999).

15 Interestingly, the Attorney-General of Australia is organizing a 'Pro Bono' conference for August 2000 with the express aim of publicly recognizing the pro bono work done by the Australian legal profession.

16 This is a recurring theme in the profession's response to current issues such as multi-disciplinary practices and the extent of reservation of legal work to lawyers. See, eg, (Dixon 1999) and (Scott 1999).

above all do not have this commitment to the public good that lawyers, as professionals do.<sup>17</sup> In this circular way, lawyers have resisted attempts by government to take away some of their privileges of monopoly and self-regulation.<sup>18</sup>

An obvious question is whether individual lawyers have ever conformed to this service ideal held out by the professional elite.<sup>19</sup> In practice many different interests exist within the legal profession and individual lawyers practice in a variety of workplaces with differing experiences.<sup>20</sup> In the aftermath of the corporate excesses of the 1980s and in the long working hours of the 1990s, some commentators on the legal profession have looked backwards longingly to a time when this ideal supposedly meant something. Kronman in his book *The Lost Lawyer* (Kronman 1994) bases his critique of current American legal practice on the notion that there was a time not so long ago when lawyers were committed to and were able to carry out this ideal. Justice Michael Kirby of the Australian High Court (Kirby 1996) criticizes the nostalgic approach but still expresses the conviction that lawyers must reassert the essence of their professionalism. The obligation and commitment to practise law in the public service lies he asserts, at the very heart of what it means to be a lawyer.

### *Clinical legal education and the legal profession's notion of professionalism*

#### **Origins of clinical legal education**

How does clinical legal education relate to this ideal of the legal profession? Before answering this question I want to compare briefly its Australian and American origins. I hope to show that despite differences, in both countries clinical legal education was founded on a determination to provide legal services to the poor and in so doing to effect change both in the legal system and in legal education.

In my view there were two catalysts for the rapid growth of clinical legal education in the United States. The first was the 1969 US Supreme Court decision in *Gideon v Wainwright*<sup>21</sup>. The decision created a serious question as to how and from where representation would be provided to the new class of criminal defendants now entitled to it under the US Constitution. Judges, practising attorneys and legal educators saw this as a practical crisis demanding urgent measures to satisfy the

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17 Competence and ethical conduct are bound up with this argument and with the service ideal. The possession of knowledge and skills and the ethical rules governing lawyers' conduct contribute to their special place in the community (Dickson 1998). The courts have supported this argument eg, *Cornall v Nagle* [1995] 2VR 188.

18 For example, during 1995 and 1996, the Victorian Law Institute, the professional organization for solicitors in the Australian state of Victoria, fought hard using these arguments in an effort to resist the Victorian government's determination to, among others, abolish the self-regulatory status of the profession. (The government was ultimately successful). See also Law Council of Australia policy statements (Law Council of Australia 1998).

19 Research carried out in the mid-1970s as part of the Commission of Inquiry into Poverty in Australia found a low rate of participation among the survey sample (25%) in *pro bono* work. See (Fitzgerald 1977). Chesterman (1995, 5) nevertheless points out the influence of 'reformist lawyers' on social and legal change in Australia.

20 Nelson, Trubek and Solomon (1992) explore the variety of professional ideologies espoused by lawyers.

21 372 US 335 (1963). The Court held that defendants facing criminal prosecution in the states on serious charges where there was a possibility of a substantial prison sentence had a constitutional right to legal representation.

sudden need for satisfactory criminal advocates. They all turned to the law schools for help in supplying the need.<sup>22</sup>

Courses for credit were created in which students worked in legal aid offices (generally the neighbourhood law offices funded by the Office of Economic Opportunity) under the supervision of a salaried lawyer. The immediate need was seen both by the profession and the judiciary to be provision of legal services to the poor.<sup>23</sup> When in 1972 the United States Supreme Court, in the case of *Argersinger v Hamlin*,<sup>24</sup> extended the constitutional right of representation to all defendants, whether facing a jury trial or not, the demand for legal services increased again.

The early programmes in neighbourhood legal aid offices were the first large-scale ‘clinical’ programmes within legal education and their priority was clearly community service. At the same time, they were seen as filling an educational gap in the American legal education system, by providing an opportunity for students to experience legal practice and to learn some practical skills before being admitted to the Bar (Pincus 1969).

The second catalyst to growth of clinical legal education in America was the attitude of the Ford Foundation to changes in legal education. In particular William Pincus at the Ford Foundation believed that lawyers had an obligation to be involved in solving some of the pressing social and legal problems of the time.

In 1966, while Program Associate, Public Affairs Program at the Ford Foundation in New York, Pincus wrote of his disquiet in the late 1950s, when reviewing funding applications from legal academics:

*What was missing from the applications was any tangible evidence of awareness of service - of the obligation to convey a professional service, based on many years of learning, to all segments of the American public, including those who might not be able to afford the ordinary price of legal services.*  
(Pincus 1966)

In 1965 the Ford Foundation provided funding to the Association of American Law Schools (“AALS”) to expand the work of the National Council on Legal Clinics.<sup>25</sup> In 1968 the Council on Legal Education for Professional Responsibility (“CLEPR”) was set up by the Ford Foundation as an independent body and funded to the extent of six million dollars. William Pincus became its President. The massive funding provided by CLEPR was directed at introducing clinical legal education into law schools across America and in a way that involved law students in the provision of legal services to the poor.<sup>26</sup>

In Australia, the first clinical legal education programme was established in 1975 at Monash University in Melbourne. Unlike in the United States, there was no constitutional imperative to provide legal services to the poor. Nor was there a Ford Foundation with massive funding for clinical programmes. The early 1970s were, however, a time of social unrest and political turmoil extending to the campuses.<sup>27</sup> They were also years when the Australian Government began to

22 See, eg.: (Brown 1965) (Cleary 1966) (Monaghan 1965)

23 *Ibid.*

24 407 US 25 (1972).

25 This body was funded by the Ford Foundation and in 1958 auspiced a ‘placement’ programme in which students spent time working with a variety of legal professionals within the justice system.

26 In 1972 the US Supreme Court endorsed this aim of clinical legal education. In *Argersinger v Hamlin*, above n 24, Mr Justice Brennan said that “law students can be expected to make a significant contribution . . . to the representation of the poor in many areas . . .”

27 These were the years of the Vietnam Moratorium and the protests against the South African Rugby Team, the Springboks.

identify and address poverty through the Australian Government Commission of Inquiry into Poverty (the “Henderson Commission”) and in which there were moves to simplify access to the legal system in minor matters.<sup>28</sup> Free legal services were established by students and radical young legal practitioners to provide advice and representation to people unable to pay for private legal services. (Chesterman 1996, 4-5) It was onto these legal services that clinical legal education was grafted.

This relationship between clinical legal education and community legal centres (as the free legal services became) and the model of basing a clinical programme in a community legal centre is a distinguishing characteristic of Australian clinical legal education (Noone 1997). Clinical programmes in Australia remain firmly entrenched in this model. The connection has been reinforced recently by the Commonwealth Government in its criteria for receipt of funding in an initiative designed to expand both clinical legal education and the provision of legal services in areas of disadvantage.<sup>29</sup>

In Australia clinical legal education is still firmly linked to poverty law practice. In the United States, my belief is that despite considerable diversity in programmes, in the majority of clinics the educational process is used to provide legal services to poor people.<sup>30</sup> I argue therefore, that from its inception, clinical legal education in both countries has depended upon a service ideal. This took the form of a belief that lawyers have an obligation as lawyers to involve themselves in the equal distribution of legal services.

### **Clinical legal education and the ideals of the ‘profession’**

When clinical programmes are providing legal services to groups of poor or otherwise disadvantaged clients, they are using that form of legal practice to satisfy educational goals. These latter are usually many and varied. One recurring goal, however, at least in the Australian situation is a rather general one of guiding students to see a role for themselves as lawyers, that encompasses the obligation to work for access to justice. This is emphasised in the Australian situation I think by the connection between clinical legal education and the community legal centre movement discussed earlier.

The use of the educational process to provide legal services to the poor is clearly consistent with the service-ideal of a profession discussed earlier. One way of approaching the relationship between clinical legal education and notions of a profession is to see clinical education as imbued with a sense of the public service role of the lawyer. On this view, the chosen client base directly reflects an adherence to the view that lawyers as professionals have an obligation and commitment to public service absent from members of other trades or occupations.

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28 *The second main report of the Henderson Commission delivered in October 1975 was entitled Law and Poverty in Australia. The Small Claims Tribunal was established in 1973 for consumers to take action against traders without the need for legal representation; The Small Claims Tribunal Act (Vic) 1973.*

29 *Commonwealth Government Selection Criteria contained in the Call for Expressions of Interest in funding proposals for four new clinical legal education programmes dated 24 August 1998.*

30 *I hope this belief is not misplaced. It is based on personal experience, personal and email discussions with American clinical teachers and reading of both current writing and discussion on internet lists. Clinical law teachers’ involvement in social justice organisations such as Global Alliance for Justice Education and the frequency of conferences and meetings devoted to such issues reinforces this belief.*

The problem I see with acceptance of this traditional vision of a lawyer as a professional is that it is tied to other characteristics of the profession which entrench privilege and injustice - such as monopoly over delivery of legal services, self-regulation etc. It seems ironic that clinical legal education should rely on a vision of professionalism that can be seen in this alternative light. The commitment of clinical programmes in Australia to access to justice cannot be criticised. However, I suggest that clinical educators there (and probably elsewhere) have not articulated a role for lawyers and the legal profession which challenges the status quo. This failure leaves clinical legal education as ultimately accepting of that status quo. As discussed in the next section, the legal profession is under challenge in Australia in such a way that there exists the real possibility that the traditional notion of the profession must give way. Clinical educators need to be part of the process of rethinking what it means to be a lawyer and by necessity of rethinking the values of clinical legal education itself.

### **Challenges to the legal profession**

The ability of members of the community to access the legal system has been the subject of regular inquiry in Australia during the last twenty years. The late 1980s saw an increasing concern within the broader Australian community that the legal system and the legal services necessary to use it were increasingly inaccessible to the ordinary citizen.<sup>31</sup> The high cost of legal services was seen to be a major contributor to this inaccessibility. Both state and commonwealth governments began to look closely at the regulation and structure of the Australian legal profession. At the same time, the Lord Chancellor's Department in the United Kingdom was examining the operation of the English legal profession (Lord Chancellor's Department (UK) 1989). The question directing these investigations was whether legal services could be provided in a more efficient and effective way by applying the principles of competition policy to the existing methods of operation. That policy could be summarised by the statement that 'restrictions on how, or by whom, services may be provided are justified only if they result in a net public benefit.' (Law Reform Commission of Victoria 1992, 5)

In May 1989 the Australian Parliament referred to the Senate Standing Committee on Legal and Constitutional Affairs the question of the costs of litigation and legal services ("Senate inquiry"). In 1989 the Victorian Law Reform Commission began work under a reference to inquire into the costs of litigation. As part of their investigations, both these bodies applied competition principles and questioned the reservation of substantial areas of 'legal work' to legal practitioners. In one discussion paper, the Senate inquiry raised the option of abolishing all legislation regulating the legal profession and opening up the legal services market to any person who wished to offer themselves to perform legal services (Senate Standing Committee on Legal and Constitutional Affairs 1992).

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31 This was not a new concern as evidenced in the establishment of the Henderson Commission. See above n 28. The 1970s had seen the introduction at both state and commonwealth level of consumer tribunals aimed at providing a cheaper, faster and more accessible dispute resolution process in their specific areas of operation. For example, in Victoria, the Residential

Tenancies Tribunal operating under the Residential Tenancies Act 1980 (Vic) and the Small Claims Tribunal operating under the Small Claims Act 1973 (Vic). In 1984 the Administrative Appeals Tribunal Act (Vic) established the Administrative Appeals Tribunal.

The two inquiries which have had the most significant practical impact on the operation and identity of the legal profession in Australia were the Trade Practices Commission study of the professions including the legal profession (“TPC”) (Trade Practices Commission 1994) and the inquiry of the Access to Justice Advisory Committee (the “Sackville Committee”) (Access to Justice Advisory Committee 1994). Both these inquiries were national in scope and included in their considerations, arguments and questions raised in previous state and federal inquiries.

Both the TPC and the Sackville Committee recommended that the legal profession should be subject to the same competition principles as other industries. These principles were encapsulated in the recommendation of the Hilmer Report that ‘[t]here should be no regulatory restrictions on competition unless clearly demonstrated to be in the public interest.’<sup>32</sup> Each Report examined the traditional reservation of legal work to lawyers, especially conveyancing (real estate transactions) and probate. The only qualification to this broad recommendation was contained in recognition by both inquiries that there was a public interest in the proper administration of justice and the legal system. (Access to Justice Advisory Committee 1994, 67) (Trade Practices Commission 1994, 7) The issue for consideration then was how to balance this public interest against the public interest in competition in legal services.

In making submissions to both inquiries, the various legal professional bodies relied on their status as a ‘profession’ and argued that retention of lawyers’ monopoly over primary legal services was a guarantee of integrity and competence in the performance of those services.<sup>33</sup> The independence of the profession and its characteristic commitment to public service were, it was argued, critical factors in ensuring the integrity of the legal system. With respect to lawyers’ monopoly over advocacy in the courts, it is possible to infer that both the TPC and the Sackville Committee accepted these arguments. In any event neither report recommended abolition of it. Other areas of legal work did not survive the scrutiny.<sup>34</sup>

Of most importance to the discussion in this paper of the professional ideal of public service and its use by the legal profession to justify privilege, was the examination by both inquiries of the way in which the profession was regulated. The control by the profession of entry to the profession (through the licensing process) and of the discipline of its members in their conduct of legal practice was seen as a significant factor in the cost and availability of legal services. The outcome of the examinations was conclusive that the legal profession was not, but should be seen to be, accountable for its practices.<sup>35</sup>

In a sense this was another reinterpretation of the professional ideal. If lawyers hold a privileged place in the administration of justice because of their expertise and monopoly of legal work, a privilege which is granted to them by the community (via legislation), then the public must be

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32 *(Independent Committee of Enquiry into Competition Policy in Australia 1993, Policy Principle I, 206). The Report examined how the principles of competition policy were and could be applied in Australia. In February 1994 the Council of Australian Governments adopted the principles that it espoused.*

33 *See, eg., The Queensland Law Society in its submission: “[Legal] practitioners are required to maintain certain professional standards, are accountable and subject to substantial sanctions in respect of breach of those*

*standards.. .” quoted in the TPC Report (Trade Practices Commission 1994, 58).*

34 *In particular, conveyancing (real estate transactions) and probate and a variety of other areas of administrative and welfare practice.*

35 *Accountability emerged as the key issue in government critique of the legal profession. See, eg., (New South Wales Law Reform Commission 1993); (Access to Justice Advisory Committee 1994, Action 7.1, 210); (Trade Practices Commission 1994, 182-184).*

satisfied that the privilege is being exercised in the public interest. External rather than self-regulation was the recommendation.<sup>36</sup>

This recommendation, now implemented in the state of Victoria in new legislation regulating the legal profession<sup>37</sup>, struck at the very heart of the notion of what it was to be a professional. Self-regulation and commitment to public service go hand in hand in the traditional view. The profession asks the community to trust that its members will perform their work competently and ethically and promises that the professional body will sanction any lawyer who fails to reach these standards. The profession says, 'We lawyers are special, we are not just practising for financial gain, we are serving a higher good and accept an obligation to use our skills for the good of the community. You can trust us.' For almost a century in Australia at least, governments have supported this view. Legislation has entrenched the monopoly of the legal profession over the delivery of legal services and the self-regulatory regime.<sup>38</sup>

Now, however, the Australian legal profession has been challenged to forge a new identity. The recommendations and principles of the Trade Practices Commission, the Hilmer Committee and the Sackville Committee have ensured that the climate in which lawyers practise in Australia is not accepting of traditional arguments supporting privilege and monopoly. In the jargon of the time, lawyers are providers of legal services and practise within the legal 'industry'.<sup>39</sup> In Victoria, with the second highest number of lawyers in Australia, regulation of licensing and discipline has been taken away from the professional body and authority given to independent bodies.<sup>40</sup> Governments are looking for ever-more cost efficient ways of administering the legal system and continue to examine ways to reduce the role of lawyers in litigation.<sup>41</sup>

One cannot overestimate the impact of these changes on the self-image of the legal profession and its members. When added to the ever increasing financial pressures on law firms and the impact of globalisation on traditional modes of legal practice the result is a climate of uncertainty and change in the legal profession.<sup>42</sup> If lawyers are merely another occupational group with no special characteristics which distinguish them from say, electricians or computer programmers, then must they still have this commitment to public service which has been so integral to their identity? What impact do these changes have on the underlying premises of ethical practice? Should these be re-evaluated? These are questions for the legal profession to consider. They are also, however, critical questions for legal educators and clinical legal educators in particular.

### **Where does clinical legal education fit into this new scenario?**

I suggested earlier in this paper that clinical legal education in both Australia and the United States is imbued with a sense of the public service role of the lawyer. Clinical legal education has always taken this seriously. It is of course arguable that in the wider profession, this 'ideal' has been mere

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36 *Ibid*

37 *Legal Practice Act (Vic) 1996*

38 *The Legal Practice Act (Vic) 1996 s.314 continues the virtual monopoly of lawyers over legal practice in Victoria. It has, however, attempted to abolish self-regulation by establishing separate and independent bodies to oversee professional conduct and the licensing regime. See Parts 15 and 18 of the Act.*

39 (*Australian Bureau of Statistics 1995*).

40 *See above n.38.*

41 *The Australian Law Reform Commission in its recently completed review of the adversarial system 1996-1998 investigated these and other issues.*

42 *Discussion of the impact of globalisation on traditional modes and structures of legal practice is ongoing in the legal profession and no doubt contributes to the 'identity crisis' I describe. There is, however, not room in this article to explore that contribution.*

cant, pulled out at convenient moments to justify retention of the overall privileges claimed as a profession.<sup>43</sup> In clinic, however, I think we have tried to imbue our students with the belief that they do as lawyers have obligations to serve the public interest. We have done this by encouraging our students to take a critical approach to the legal system, by mounting test cases whenever possible, by introducing students to the values of community development work or (or more usually and) by exploring what it means to be an 'ethical' lawyer.

If, however, this 'service-ideal' disappears from the ideology of the legal profession because the privileges on which it was based have also disappeared, then clinical legal educators have to make some choices about the values underpinning their programmes. Can we develop a new vision of lawyers and the legal profession which does not rely on outdated notions of professionalism, tied to restrictive practices and privileges? I think there are three general choices of direction.

First, clinical legal education could abandon any suggestion that it has a social or reformist purpose and emphasise its 'training' aspects. It could continue to develop as a method of teaching lawyering skills. This approach may or may not require clients but in any case does not require poor clients. It can be seen as a sophisticated method of professional training, with an intellectual base. It can sit comfortably with the concept of a legal industry as a provider of legal services.

A second possibility is to redefine clinical legal education as a form of 'cause lawyering' (Sarat and Scheingold 1998) in the legal/social activist model. This suggests that a commitment to the challenging of laws as a moral and political pursuit, be the **priority** of the clinic whereas traditionally clinic has operated through a more conventional commitment to the individual client's case.

A third possibility is for clinical legal educators to remain committed to a model which primarily provides a legal service to individual clients but which incorporates aspects of 'cause lawyering'. For example, clinic teachers and students might work with local communities on specific issues, or, drawing from the experience of service to individual clients, challenge systemic discrimination/human rights breaches etc. Attempts at this model already exist in Australia in the community development work of some university clinical programmes and in other countries.

I hope that the first choice is not taken by clinical educators in Australia and other countries. If it is, the programmes should be renamed 'practical training' as in my view they would have no connection with what I have described as the original values of clinical legal education. Such an approach also appears to abandon the service ideal of professionalism in favour of a technocratic interpretation of the value of lawyers' work.

In either of the other two cases, clinical legal educators must I think articulate a new vision of the role and function of lawyers in society. This new vision should expressly challenge a notion of 'professionalism' that appears self-serving and self-interested. It can do this while supporting a special role for lawyers within the justice system, related to their knowledge, skills and ethical conduct. Such a role need not depend upon monopoly and should in my view, include a role for lawyers as critics of the legal system and advocates for the disadvantaged. This role would be in keeping with the origins of clinical legal education and also consistent with a professional ideal that values competence and ethical conduct in the service of the public.

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<sup>43</sup> It is important to distinguish between the professional ideology expounded by the professional elite in public and the ideologies and practices of individual lawyers. For a

discussion of the different professional ideologies invoked see (Nelson, Trubek and Solomon 1992).

## Conclusion

The legal profession in Australia and elsewhere is in the midst of constant change. If it is to flourish attention needs to be given not only to issues of commercial best practice but also to the question of identity. As legal educators I believe we have an obligation to discuss this question with our students and join with them in exploring the future. If, as legal, and in particular, as clinical educators we tie ourselves to an outdated notion of professionalism, then we are conveying a very mixed message to our students. I think we need to be frank about the implications of the legal profession's fierce reliance on these notions and strive to develop a new vision of lawyering for ourselves and our students. It should still be, I hope, possible to educate for and through service.

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