

# “Student assessment in the clinical environment – what can we learn from the US experience?”

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## INTRODUCTION

Clinical legal education has a relatively short history in Australia of some thirty years. By contrast, the US has a much longer and diverse history of clinical pedagogy and has been successfully teaching and assessing students in University legal clinics for over half a century. Traditional law school teaching methodology relies heavily on the Langdellian style of lectures, tutorials and then a form of summative evaluation. Clinical pedagogy is a radical departure from this style and as such assessment of clinical students necessitates a different approach. Clinicians have a duty to offer assessment regimes which complement the clinical technique of law teaching.

This paper proceeds from the fundamental premise that there is a distinct purpose in assessing clinical students. As clinic is often only offered in the latter years of a law degree, it is the culmination of a student’s law school experience and thus seen by many students as the “testing ground” as to whether they can actually be a lawyer and what sort of lawyer they might be. The underlying objective of assessment in a clinical environment is to measure the development and progress of individual legal skills in each student enrolled in the clinic. This is not a normative measure and thus clinical assessment cannot be based upon objective standards. In this author’s view, assessment in clinic is about the development of legal, personal and ethical skills which is distinctive to the individual student – progressing students in their own personal development track.

This paper investigates the issue of student assessment in the clinical environment and provides a comparative analysis of the US and Australian clinical assessment experience and the different assessment regimes currently being utilized in the clinical environment. It investigates whether the “younger” clinical programs in Australia can learn from the US experience. It considers what, if anything, might be adapted from that jurisdiction that would be relevant and appropriate for the Australian clinical environment.

A recent front page of *The Australian*, a nation-wide newspaper, states in a banner headline “Graduates ‘lacking job skills’”.<sup>1</sup> The article claims that the Business Council of Australia (BCA) has accused Australian Universities

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of producing graduates without adequate problem-solving skills; that graduates have skills better suited to academic pursuits and that they lack creativity and oral communication skills. This, the BCA contends, is choking creativity and limiting Australia's competitiveness in the global market.<sup>2</sup> This phenomenon is exceptionally pertinent to Australian law schools and produces a knowing nod of agreement amongst legal clinicians who react with a resounding chorus of "I told you so!" directed at their faculty colleagues.

Arguably, though, the focus in Australian law schools has changed over the past two decades. Whereas, in the past, it was important to develop a body of knowledge of law, process and facts, we have now accepted that knowledge is useless without accompanying skills. Now, we expect law student to master a wide range of skills, including:

- Comprehension of a body of legal knowledge
- The ability to order that knowledge coherently
- Generic academic skills, such as reading for understanding
- Specific legal skills, such as negotiating, advocacy and client interviewing
- Professional, ethical and social skills
- Writing and communication skills
- Characteristics needed for lifelong learning – the ability to be self-motivated in learning, to recognise deficiencies in knowledge and/or skills and to be reflective and self aware of abilities and deficiencies.

This is not meant to be an exhaustive list, but simply indicative of our expectations on students. More specifically, our expectation by the end of the law degree is that students will be able to perform the following operations in their professional lives:

- Know the law,
- Be able to *comprehend it*
- Apply it to particular facts
- Break it down to its component parts
- Reorganise it and apply it for the client's interests
- Evaluate the strength of its authority and its possible impact upon clients

In my view, this is a large expectation, because our teaching methodologies do not go a long way in assisting this process – with the one major exception being clinic.

## WHY IS CLINIC DIFFERENT?

### What our graduates lack

In his article, "*Clinic in the classroom: A step toward Cooperation*", Elliot Burg, Associate Professor of Law at Vermont Law School, complains that:

*"The vast majority of students I have supervised over the years have come to their clinical work with only the barest understanding of what lawyering entails, little inclination towards self-reflection, limited client-centred skills and a tendency to be overwhelmed by facts".<sup>3</sup>*

<sup>2</sup> *Id.*

<sup>3</sup> Burg E, '*Clinic in the classroom: A step toward*

*Cooperation*' (1987) 37 *Journal of Legal Education* 232 at 248.

Given that clinic usually occurs in the latter years of a law degree, this is particularly unflattering to both our students and our pedagogy. The Australian reality appears to be that students come to clinic with a very small bag of useful equipment for practice – if they have any practice implements at all. Traditional law teaching does little to equip them to “jump the chasm” between law and fact. They cannot understand why, in their clinical work, the law always appears reasonably clear and consistent, but the facts as presented to them by clients are a mishmash of events, recollections, half-truths and opinion all presented without chronology or, often, much coherence. Nothing they have learned in law school has equipped them to be fact-gatherers and to sort through this mass of information. Often they cannot even begin to conceive where information provided by a client fits into the knowledge they have acquired during their law studies.

Clinicians find themselves having to use a funnel approach – “*What unit of law that you have studied do you think this client’s problem falls into?*” If a successful response is elicited, the clinician moves onto “*What part or topic in the unit do you think covers this problem?*” until, at least, the area of law is identified after much struggle and the problem solving can commence. However this is often an artificial exercise, as the client’s problem may span a number of law subjects – a family law problem may stretch across criminal law (family violence), wills, property law, bankruptcy, taxation, alternative dispute resolution and other units of law study.

### **Action and reflection**

Clinic, however, provides students with these necessary practice tools, but this is not the limit of the clinical method. It is so much more than this. Long ago, clinical teachers threw off the academically elitist accusations that they were teaching “Introduction to Form Filling”. Clinic provides an excellent opportunity to offer the dual processes of action and reflection. “Action” in legal clinic in Australia does not mean just putting an uninitiated student into a room with a client and hoping for a good result. Our clinics are gradually becoming increasingly sophisticated and are supported by methodical, comprehensive and pedagogically sound skills-based teaching. As Nina Tarr, Associate Professor of Law and Clinical Director of Washburn School of Law, writing of the US clinical scene states:

*“Skills training has developed far beyond the early days when students were thrown into situations and expected to learn by survival. Supervisors in most settings articulate expectations, theories, techniques, etc that they expect the students to incorporate”.*<sup>4</sup>

In their seminal work *Organizational Psychology: An Experiential Approach to Organizational Psychology*,<sup>5</sup> David Kolb and Roger Fry set out their now celebrated learning hypothesis based on four stages of learning. This theory suggests that there are four stages which follow from each other: Concrete Experience is followed by reflection on that experience on a personal basis. This may then be followed by the derivation of general rules describing the experience, or the application of known theories to it (Abstract Conceptualisation), and hence to the construction of ways of modifying the next occurrence of the experience (Active Experimentation), leading in turn to the next concrete experience. All this may happen in a flash, or over days, weeks or months, depending on the topic, and there may be a “wheels within wheels” process at the same time.

Clinic is a wonderful environment for Kolb and Fry’s learning theory to really be put to the test. Students

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4 Tarr N, ‘The Skill of Evaluation as an Explicit Goal of Clinical Training’ (1989–1990) 21 *Pacific Law Journal* 967 at 980 (quoting Barnhizer ‘The Clinical Method of Legal Instruction: Its Theory and Implementation’ (1979–

80) 30 *Journal of Legal Education* 67 at 70.

5 Kolb D A and Fry R, ‘Toward an applied theory of experiential learning’, in C. Cooper (ed.) *Theories of Group Process*, (1975) London: John Wiley.

have an opportunity, on a daily basis, to experience, reflect, conceptualise and experiment (within the boundaries set by their clinical supervisors). This “hands-on” approach provides direct transfer of knowledge from the immediate problem being faced by the client and the clinical student, to the next client that presents with a like problem.

### Curiosity and Informal Learning Opportunities

Besides the urgent “need to know” factor, clinic encourages curiosity by its many processes and the informal discussions which occur between students and supervisors. It is much harder to engender this sort of curiosity in traditional law teaching with large lecture groups and the very public way in which questions must be asked and responded to by the lecturer. Curiosity and creativity are linked<sup>6</sup> and producing creative lawyers is a worthy objective of any law school. Clinic provides an intimate setting for students to ask an endless variety of what they might consider to be ignorant or obtuse questions. Provided that an atmosphere of learning is engendered within the clinic, students have the security to know that no question is ever deemed “stupid” and will be patiently answered by the clinical supervisor to the best of his/her ability.

Further, there are a great many opportunities in clinic for learning to take place outside of the formal student/teacher transactions<sup>7</sup> – for example, in informal discussions over lunch at the end of a client intake session or driving to or from court. It is in these situations that students feel relaxed and, it is hoped, secure enough in their relationship with their clinic supervisor to discuss issues that have been raised by the student’s many and various client interactions. The chance to indulge in this kind of free ranging discussion is very rare in the classroom setting – firstly, because the sheer numbers of students in a traditional lecture setting inhibits one-on-one discussion of this sort and secondly, because the atmosphere is too formal and too rigid. Further, because lecturers usually have the specific objective of getting through a set amount of material in each lecture period, this discourages the relaxed and familiar environment which is a prerequisite for such interactions. In this author’s experience, many academic colleagues have expressed the fervent conviction that they would thoroughly enjoy the prospect of this informal and fertile teaching environment and are quite envious of their clinical colleagues’ ability to indulge in such a fulfilling form of pedagogy.

Clinic also differs markedly from lecture style in that clinicians are in the unique position to provide their students with one-to-one, detailed, timely and ongoing feedback as to their progress. Feedback in this context is distinct from assessment in that it is a powerful and effective vehicle for student learning. This is one area which sets clinical teaching entirely apart from the mainstream – students benefit enormously from immediate knowledge and insight as to their progress and such information greatly assists them in the “reflection” stage of Kolb and Fry’s paradigm.<sup>8</sup> It then assists them to move forward with a sense of security and purpose to the abstract conceptualisation stage. For example, if a clinical student has dealt with a client and then has received an immediate and helpful critique from her supervisor, this will assist her to reflect on whether she has:

- a) understood the client’s problem and the legal, social and financial consequences which have arisen, and
- b) how she has dealt with these issues in a caring and professional way.

6 Batt C & Katz H, ‘Confronting Students: Evaluation in the Process of Mentoring Student Professional Development’ (2003–2004) 10 *Clinical Law Review* 581 at 597.

*Collaboration in Clinical Programs*’ (1994–1995) 1 *Clinical Law Review* 199 at 230.

8 *Supra* note 5.

7 Chavkin D F, ‘Matchmaker, Matchmaker: Student

The student is then in a position to use her insights to move from a personal reflection of her immediate dealing with this particular client to deriving more abstract rules from the experience. Further, she can apply principles of her doctrinal learning from law units that she has already studied to a more general understanding of the type of problem this client has presented with. Basically, she is able to move from the concrete to the abstract, having the benefit of knowing that she is on safe ground in that progression, as her supervisor has assisted to “ground” her reflections which are derived from the immediate client interaction. Without the benefit of the supervisor’s immediate feedback, her move to the abstract stage would be insecure and halting.

Thus, clinical students have the huge advantage of testing their insights against the hard rock of their supervisor’s knowledge and experience. The feedback which the supervisor provides does not always have to be positive. Negative feedback as to a student’s performance with their client can also be hugely productive as long as it is given in a fashion which is designed to assist the student in future transactions. It should be noted that feedback in clinic is not at all related to assessment – clinic has the unique opportunity to use feedback as a way of centring and cementing student learning. It is an essential tool of the clinician in the “reflection” aspect of clinic’s dual objectives of “action and reflection”.

A discussion of how clinicians might better use this tool is presented below in the section relating to how we can enhance the clinical feedback process in the future.

### **The Medical Paradigm**

It should be noted that clinical methodology is certainly not limited to law schools. The benefit of skills development for students, rather than the process of simple accretion of knowledge, is being acknowledged in various disciplines. Mark Barrow from the UNITEC Institute of Technology in Auckland, New Zealand states this of higher education across all fields of learning –

*“There has been a reduction in the value of ‘knowing that something is the case’ and an increase in the value of ‘knowing how’, placing greater emphasis on the development of skills, attitudes and values appropriate to the discipline being studied or the profession being prepared for.”<sup>9</sup>*

Legal clinicians can learn from the medical paradigm. For obvious reasons, clinical methodology in medical training has been used successfully for a great many years. Amy Ziegler, Assistant Adjunct Clinical Professor of Law at Saint Louis University argues that the evaluative model role of the medical clinical supervisor<sup>10</sup> is directly analogous to that of the legal clinical supervisor. She refers to clinical teaching in medical literature<sup>11</sup> which sets out the medical clinician’s role as having three major activities associated with it:

1. Structuring the work and learning environments
2. Promoting problem solving and critical appraisal skills
3. Observing student performance and offering constructive feedback<sup>12</sup>

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9 Barrow M, ‘Student Assessment and knowing in contemporary Western societies’ in ‘Transforming knowledge into wisdom: Holistic Approaches to Teaching and learning: Proceedings of the 2004 Annual International Conference of Higher Education Research and Development society of Australasia (HERDSA)’ 4–7 July 2005, Miri, Sarawak, Ed. Sheehy, F & Stauble B, pp 42–49, Milperra, NSW (HERDSA) at 43, quoting Peters, M, Marshall, J., & Fitzsimmons P ‘Poststructuralism and Curriculum Theory: Neo-Liberalism, the Information

*Economy and the Crisis of Cultural Authority’* (1999) *Journal of Curriculum Theorizing*, Summer, 111.

10 Ziegler A, ‘Developing a System of Evaluation in Clinical Legal Education’ (1992) 42 *Journal of Legal Education* 575 at 583.

11 Pratt D & Magill M, ‘Educational Contracts: A Basis for Effective Clinical Teaching’ (1983) 58 *Journal of Medical Education* 462.

12 *Supra* note 10 at 584.

Clinical supervision precisely mirrors these activities. Clinic is essentially about the process of resolving problems, not the answers themselves<sup>13</sup> and these three activities provide an excellent structure for thinking about the function of clinical supervision. The beauty of this model is that it can be individualised for each student's particular learning needs, whilst still retaining its basic construction. Thus, Ziegler suggests, a clinician can vary the teaching approach, contingent upon the teaching task at hand, as that of:

- Expert
- Model, or
- Facilitator

Ziegler states:

*"As expert, the clinical supervisor gives students authoritative information without necessarily demonstrating the thought process or skills used to obtain them. As 'model', the teacher demonstrates the skills and thought processes of a good clinician providing an 'open book' that learners may watch and imitate. As a 'facilitator', the teacher guides the student in doing the actual work while focusing on helping the student acquire and analyse information."*<sup>15</sup>

This sort of flexibility is simply not available in traditional lecture-style teaching and thus this demonstrates the paucity of this "one size fits all" teaching methodology, compared to the range of teaching implements available to the clinician.

Thus, clinical methodology provides opportunities for learning much more than just technical skills or a body of knowledge. It enables clinicians to mentor students in all aspects "what makes a good lawyer (or doctor)" relevant to the needs and abilities of that particular student.

Legal clinics teach much more than traditional legal skills and the focus of what is being learnt is very different to traditional legal pedagogy. Thus, the assessment regimes that we develop need to take into account all aspects of what is being taught – over and above the traditionally "measurable" basic legal skills – and find relevant and creative methods of measuring what our students are learning. These assessment methodologies need to be flexible enough to take into account our students' individual learning needs and yet also be even-handed and pedagogically defensible.

## WHY IS ASSESSMENT IN CLINIC DIFFERENT?

The focus of assessment in clinic must be distinct from traditional assessment methods because the teaching methodologies being used are distinct. The clinician, in teaching process rather than knowledge, obviously must therefore assess process and not knowledge. Because clinic focuses on qualities such as practical skills, creativity, enthusiasm and effort these are the areas that must be suitably assessed. Generally, clinic is not focussed upon teaching a body of knowledge, or even "traditional" law school skills like research and legal writing and thus it is not appropriate to attempt to assess these features.

Students, do, however, learn a body of "knowledge" in the traditional sense whilst working in clinic. They come out of clinic often with a new set of skills and a wider knowledge base, not only of the law itself, but its processes, abilities and (more often than not) its disabilities. Clinical pedagogy does not derive its knowledge base from appellate decisions and thus students learn knowledge by involvement in particular legal situations from which they can enhance and deepen their knowledge and insights into legal doctrine. This is learning the law in a totally different way than they have been exposed to in academia. Anthony

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<sup>13</sup> *Ibid* at 587.

<sup>15</sup> *Id.*

<sup>14</sup> *Ibid* at 585.

Amsterdam, Professor of Law at New York University Law School sums this up as follows –

*“The academic teacher seeks to enrich understanding of the general by deriving abstract principles from the particular; the clinician seeks to enrich understanding of the general by refining a capacity to discern the full context of the particular.”*<sup>16</sup>

### **The Skills of Self-Reflection and evaluation**

Apart from learning a knowledge base and a set of practical skills, students also have the ability in clinic to fully immerse themselves in the skill of self-reflection. I believe Australian law school are only just now on the cusp of fully drawing out the potential that self-reflective skills can provide to students’ legal learning. Self-reflection is a large part of the focus of clinical pedagogy in the U.S and is a key aspect of the teaching in various US clinics. Self-reflection provides students with insights into their own professional and ethical behaviour and enables them to pause and consider the way they are interacting with their supervisors, colleagues, legal clinic staff and, most importantly, their clients. The skill of self-reflection is often implicit in clinic work and is used by clinicians to assist students with their metacognitive abilities. By asking a student: “How would you go about finding the resolution to this dispute? What might be the appropriate approach?” and “How would you do this differently next time?” we are achieving a dual purpose:

1. Modelling a lawyering practice which is careful and reflective, and
2. Providing tools for improving metacognition (that is, problem solving) skills.

Thus, we are able to provide guideposts for the students to use in creating a plan of action to resolve a client’s problem, to then monitor that plan as it unfolds, and to finally evaluate it in terms of effectiveness in order to determine how to amend the plan when a similar problem is presented in the future.

Ziegler describes “evaluation methodology” as a process of ongoing dialogue with students, directed by the clinical supervisor.<sup>17</sup> It is a skill for which clinic provides a perfect environment, because there are myriad opportunities for students to practise and the close presence of the clinical supervisor to guide the process. Ziegler defines the process as follows:

*“Evaluation means helping students uncover assumptions, querying the purposes and source of their beliefs and providing opportunities for discussion about legal policy questions which arise from the client’s problem.”*<sup>18</sup>

It is my submission that “evaluation methodology” has an even wider focus than that described by Professor Ziegler. It is not only a lifelong *professional* skill, but a *life* skill in itself which can assist students in all aspects of their life, both professional and personal. In this way, clinic may have a much broader benefit to its students – not only are we providing students with professional skills, but with basic life survival skills. This appears to be a considerable assertion to make about just one unit of study in our students’ academic careers. However, there are many aspects of clinic in which students are confronted with unique and challenging experiences which, anecdotally, have a significant impact on their outlook and thought processes. The ability for students to learn a methodology of reflection and self evaluation is often just one of the many benefits a student acquires from the clinical experience.

The teaching of ethics is also implicit in this form of pedagogy. When we model, teach and assess reflective skills, we are demonstrating a powerful message to students about the sort of legal professionals we want them to be. We are demanding that they must factor in the full consequences of their legal advice and

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16 Amsterdam A A, ‘Telling Stories and Stories about them’ (1994)1 *Clinical Law Review* 9 at 39.

17 *Supra* note 10 at 575.

18 *Ibid* at 570.

their professional behaviour and not just react to situations by attempting to utilize a “quick fix” or a “one size fits all” philosophy. In this regard, clinic isn’t teaching ethics, but “doing” them and this ethical message is being provided to students in the way we expect them to behave in their interactions with clients, other legal professionals and their clinic colleagues., Nina Tarr believes that academic law teaching by comparison actually discourages the self-evaluative process by our insistence on always being the expert and handing down our evaluations, rather than encouraging students to do it themselves.<sup>19</sup>

## Reflective Journals

A number of law schools around Australia have embraced the concept of a “reflective journal” being a compulsory element in the assessment of clinic. For example, Flinders University in Adelaide, South Australia provides a course known as “Community Legal Practice” in which 30% of the clinical assessment is for the professional journal students must write.<sup>20</sup> This aspect of the course requires the students’ observations and insights and is based on the belief that the students’ ability to take control of their professional development in an essential part of any professional’s learning process.<sup>21</sup> The requirement is that the journal is maintained on a weekly basis. Thus, at this Flinders University School of Law clinic, the students are not evaluated on their skill level, but on their “*initiative, involvement, perception and understanding of the broader issues elicited from the activities they are involved in.*”<sup>22</sup>

Similarly, Sydney’s Macquarie University Department of Law offers the Macquarie Legal Centre Legal Program. The students undertaking this course are required to write a reflective journal of up to 500 words per session day (the students must attend 9 out of 10 session days to pass the course), covering such issues as the lawyer/client relationship, client communication, access to legal advice and gaps or anomalies in law and legal procedure. The journal forms part of each student’s required “Placement report” which is worth 50% of the final assessment in the subject.<sup>23</sup>

James Cook University in North Queensland, in its clinic based at the Townsville Community Legal Service, provides 20% of its unit assessment for a reflective journal, requiring critical analysis of

- Social justice issues
- The role of law in society
- Advantages and pitfalls of skill based learning
- Self reflection of interview performance
- Areas in which community legal services could be improved<sup>24</sup>

Finally, Monash University Law Faculty (the first in Australia to offer clinical legal education)<sup>25</sup> has offered its students the option of writing a reflective journal in place of the 20% assignment portion of the clinical unit for the first time in first semester 2006. At this stage, students are being asked to pose the following questions as part of the reflective process:

- How and why does the client find him/herself in this situation?

<sup>19</sup> *Supra* note 4 at 971.

<sup>20</sup> *Flinders University Topic Guide for “Community Legal Practice” Semester 1, 2006* at 5.

<sup>21</sup> *Ibid* at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Macquarie University Division of Law Study Guide –*

*“Law 443 Macquarie Legal Centre Clinical Program Semester 1, 2006”* at 4.

<sup>24</sup> *Email from Bill Mitchell Townsville Community Legal Centre, 15 February 2006*

<sup>25</sup> *Clinic commenced in 1975 as a joint venture between the then Springvale Legal Service (now Springvale Monash Legal Service) and the Law Faculty.*



- What is the policy rationale for this that might explain it?
- How can the effects be mitigated?
- What can I do to ensure that the injustice does not happen again?
- From whose perspective is it unjust?
- How and why did this affect me so much? (Or why didn't it affect me at all?)

Students are required to submit journal entries to their clinical supervisors on a fortnightly basis, and generally the issues that they are asked to reflect upon will arise in the course of their client interviewing session. The students are advised to spend some time after each session thinking about issues which the clients raised and questions arising therefrom and then writing them down in a structured and coherent manner.

Students are instructed that they must be prepared to bring their latest journal entry with them in order to discuss it at their weekly file review with their supervisor. They are expected to write approximately a half to one page of the journal per entry.

How this is to be assessed is still a matter of some concern and the debate continues. The main problem is how to assess insight. Many clinics simply use the “hurdle requirement” method of assessment for journals – that is, if a student has submitted the correct number of journal entries during the semester, this will satisfy that aspect of the unit and the actual content of the entries themselves is not graded. It is submitted, however, that a graded assessment must be provided for this aspect of the students’ clinic work for them to take it seriously. The US experience can be of direct benefit in this regard. As one US clinician reports:

*“...the externship was pass/fail and I had little leverage to force a higher level of work. The students correctly guessed that I would not flunk someone for failing to be conscientious about their journal.”<sup>26</sup>*

This venture into the concept of reflective journals by clinics in Australian law schools is, arguably, still somewhat unsophisticated in the pedagogy of student self-evaluation and we have much further to go to develop and enhance this unique area to its full potential. Tarr has argued that historically, clinical teachers are just too busy with high file loads to take time to examine their teaching methodologies and develop theories about effective teaching and assessing models<sup>27</sup> – this comment is apposite for Australian legal clinics today.

However, this is where we can learn from the US in its more developed treatment of student self-evaluation and most importantly, the way this facet is assessed. The problem that we face is that we are still trying to assess students in clinic in a similar way to other academic units. This is unfair as it does not meet with our “process” and self-evaluative focus. How we can ameliorate this situation is tackled in the next section of this paper.

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<sup>26</sup> *Supra* note 4 at 992.

<sup>27</sup> *Supra* Note 4 at 977.

## WHAT IS THE BEST WAY TO ASSESS STUDENTS IN CLINIC?

### An Individualistic Assessment Regime

The first matter to deal with in determining the optimal way to approach clinical assessment is resolving the ways that we cannot assess students. It is impracticable to grade clinic in relation to the completion by students of standardized tasks (like writing a letter of advice, or a plea in mitigation of sentence) because clinics simply do not have typical or set tasks.<sup>28</sup> Thus, if we are assessing things like self-reflection, ethical awareness, process, technique, problem solving and professional responsibility we need to find creative ways to do this. To a certain extent, this requires participation in an individualistic assessment regime. This means that we can, and should, have the flexibility to create an assessment design that can be individually tailored for each one of our clinical students. This does not require us to re-invent the assessment regime for each student that enters the clinic, but it does mean that our assessment methodology should be flexible enough to cater for, and measure, a diverse range of students' skills and abilities.

The US literature is quite rich and diverse on the subject of assessment relationships in legal clinics. The experience in the US has been one of very individualistic grading practices amongst clinicians and there is little to suggest that a systematic methodology for grading clinical work has emerged. There also appears to be a feeling that many of the skills that we value in clinic are exceptionally hard to monitor and grade. For example, the concept of "professional responsibility" may be defined in various ways by different clinical supervisors. This is graded at one of the clinics in Cleveland State University and is defined as "*The ability to recognise the ethical considerations in a situation, analyse and evaluate their implications for present and future actions, and behave in a manner that facilitates timely assertion of rights.*"<sup>29</sup> However, this is just one clinic's opinion as to what the concept means. It is also pointed out by clinicians that, once a definition has been agreed upon for a particular skill or ability we wish to cultivate in our clinical students, it is difficult to assess given the limited time available to supervisors to observe individual students.<sup>30</sup>

Thus, most clinics that provide their students with a final grade do so on the basis of detailed and itemised grading sheets which provides a wide opportunity for students to show prowess in a broad range of areas instead of being limited to proving their "worth" within a limited range of set criteria. For example, the "Families and the Law" clinic of the Catholic University of America Columbus School of Law has a grading criteria which encompasses 44 different assessment criteria, grouped under six different classifications of skills.<sup>31</sup> Similarly, Pace Law School in White Plains, New York provides 61 items of assessment criteria, grouped under eight main skills area and four further "sub-skills" with a further section for the supervisor to make additional observations.<sup>32</sup> These sub-skills include such items as "*Awareness of psychosocial/economic/scientific, etc. factors in legal situation*" and "*Nonverbal communication, 'body language,' professional presentation of self*".<sup>33</sup> This is a good example of a clinic's ability to teach and subsequently assess important skills for lawyering which do not fall within the tradition enquiry of "Can the student undertake research or write pleadings?"

In this way, assessment is highly particularized to the individual and students are able to accumulate marks

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28 Cort R, 'A.A.L.S. Clinical Legal Education Panel: Evaluation and Assessment of Student Performance in A Clinical Setting' (1980) 29 *Cleveland State Law Review* 603 at 604.

29 *Ibid* at 622.

30 *Supra* note 6 at 605.

31 Brustin S & Chavkin D, 'Testing the grades: Evaluating Grading Models in Clinical Legal Education' (1997) 3 *Clinical Law Review* 299 at 313.

32 Pace Law School – John Jay Legal Services "Evaluation of Student Work" found at

33 *Id*

in various areas where their talents are to be found. If we are committed to providing grades in clinic, rather than simply a pass/fail assessment (this debate is covered later in this paper) then the lesson to be learnt here is that we must recognise individual student strengths in our assessment by providing a multifaceted and detailed marking regime that allows students to learn and to be assessed in individual ways. If we pride ourselves on the fact that we do not subscribe to a “one size fits all” teaching methodology, we cannot have a standardised appraisal scheme.

Of course, the drawback of such an individual method of assessment is the huge resource issue in terms of staff/student ratios and the sheer time required to observe, analyse and keep adequate records of each student’s particular progress in the clinic. There is also the fact that clinic is generally a continuous assessment regime. This is very positive for students, as this provides formative assessment throughout the course of the clinical unit – however, it does place clinicians on a “*constant treadmill of assessment*.”<sup>34</sup>

Whilst acknowledging these issues, it should be remembered that resourcing is not a new issue to clinical programs. Clinics are always expensive to establish and financially difficult to maintain. The upside is that they are usually staffed by a tremendously dedicated and committed team that is prepared to take on the extra assessment load required if it means getting it “right”.

### **The pass/fail v grading debate**

In a 1994 Journal of Legal Education survey of grading in clinics, 120 universities in the US were surveyed and the following results were discovered:<sup>35</sup>

1. 37% of clinical courses used a fully graded model
2. 39% graded students on a pass/fail basis
3. 19% utilised both a pass/fail and graded method
4. 1% gave no credit at all.
5. 3% did not respond

It seems that, at least amongst the law schools that responded to this survey in the US, the clinical grading debate is almost equally divided. Anecdotal evidence from clinicians in Australian law schools suggests that there is a similar division in this country.

Stacy Brustin and David Chavkin both of Catholic University of America Columbus School of Law, in their article ‘*Testing the grades: Evaluating Grading Models in Clinical Legal Education*’ ask a series of essential questions about the value of grading in clinic, specifically:<sup>36</sup>

- What does grading achieve in clinic?
- Does it encourage students to be more professional?
- Should marks be given to students who perform best, or to students who improve the most?
- Is grading necessary for academic credibility?
- How do you grade a student who works hard but whose performance is not very good?

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34 Johnstone R & Vignaendra S, ‘*Learning Outcomes and Curriculum Development in Law*’ (2003) Report to the Australian Universities Teaching Committee of the Department of Education at 367.

35 Kaufman N A Survey of Law School Grading Practices 44 *Journal of legal Education* 415 (1994) at 417.

36 *Supra* Note 31 at 301.

Answers to these questions are fundamental to the underlying pedagogical aims of every legal clinic. The answers do not have to be identical in every clinic, as diversity of aims and pedagogical aspirations are certainly to be encouraged – however, it is vital that these issues, and others relating to assessment, are tackled by clinicians

It is interesting to note that, despite the divided views amongst clinical teachers, when clinic students were given a choice as to whether they wanted to be graded, 84% went for the graded option.<sup>37</sup> This does not necessarily mean, however, that grading in clinic is in students' best learning interests.

It is submitted that in a graded clinical environment, a tension exists between the community service goals of the clinic and the students' endeavours to achieve grades. This can be a positive tension, and, arguably, can result in a better educational process and consequentially a higher level of client service delivery.<sup>38</sup> Further, the students having to determine for themselves the issue of what is the focus of their involvement in the clinic – their grades or community service – is in itself an fertile area of discussion clinical supervisors can enter into with their students. The downside of this tension is that the poorer students can be induced by the absence of an exam to treat clinic as having less academic credibility. The consequence of this outlook is that their standard of work suffers and much more critically, their clients' interests are not taken care of adequately.

It has also been argued that clinics are intended to be safe environments for students to experiment, satisfy curiosity and explore their own values, assumptions and motivations.<sup>39</sup> Grading students may interfere with the non-judgemental environment,<sup>40</sup> inhibiting students' desire to explore and test themselves for fear of "getting it wrong" and consequently losing marks. Further, it may be an additional source of stress and preoccupation for students in an already stressful environment.<sup>41</sup>

Alternatively, grading may have the opposite effect on students – it can have a motivational effect and lead to a higher level of professionalism.<sup>42</sup> Grades also provide the opportunity to acknowledge the time, effort and labour that students contribute to their clinical work. Finally, there is always the "external" issue of the academic credibility of the clinic. Grading makes a statement to both the students and the faculty that clinic has as much academic rigour as other "black letter law" units and students will be subjected to the same exacting regime as their other units of study.<sup>43</sup>

Brustin and Chavkin's rigorous investigation<sup>44</sup> led them to conclude that there are "tangible benefits" to grade students in clinical courses which, they believed, may improve the pedagogical process and augment service delivery to clients.<sup>45</sup> Despite this study, the "to grade or not to grade?" debate is far from over in legal clinics and is unlikely to be resolved. It is a healthy and necessary issue to deliberate upon and keeps clinicians focussed on their pedagogical aims, despite the fact that a consensus may never be reached amongst, or indeed within, law schools

If clinics do choose to grade their students, it is essential for the grading criteria to be detailed, systematic and transparent. It is also submitted that, if a law school runs more than one clinic, for example a general law and a specialist clinic, that there be universality of assessment methodology between both. Despite the fact that the subject matter or the legal foci are different between the clinics, the same skills and professional processes are being learnt, and thus the assessment regime should reflect this.

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37 *Ibid* at 302.

38 *Ibid* at 307.

39 Schrag P, 'Constructing a Clinic' (1997) 3 *Clinical Law Review* 175 at 202.

40 *Id.*

41 *Supra* Note 33 at 306.

42 *Id.*

43 *Ibid* at 307.

44 *Id.*

45 *Ibid* at 308.

## Student Teaming

Student collaboration and the formation of student “teams” in clinical work is an issue which has elicited some discussion on the US clinical literature.<sup>46</sup> This appears to be an under-utilised aspect of clinical pedagogy in Australia and the question arises as to whether the US experience can be valuable for Australian clinics. Certainly, the issue of students working in clinical collaboration is a relevant issue in that it reflects the reality of participation in teamwork which will be required of them later in professional life.

In *Learning Outcomes and Curriculum Development in Law*, a report to the Australian Universities Teaching Committee of the Department of Education in 2003, Richard Johnstone and Sumittra Vignaendra of the University of New South Wales found that compelling students into teamwork has been a matter of some difficulty in Australian law schools. As one academic comments:

*“One thing which is very difficult – to have all these incredibly independent and personally motivated students, and they never want to do things together in groups. You tell them that in real life when they go to work, everyone works together with others in groups – you don’t have to like them, but you have to learn to work together. We start them off in first year doing little things in groups, such as presenting in class, and they loathe it... they sit in class and won’t put up a hand or answer in case they are wrong. It is an incredibly selfish approach to learning. They think ‘I got here, I got a high [university entrance score], I am not going to give away anything, this is about me and my achievement’. This is one of the biggest challenges in teaching.”<sup>47</sup>*

However, some US clinicians have argued that the major benefit of requiring students to collaborate in a clinical setting is bringing together the practical resources of students who have different skills and knowledge bases. Ideally, each student benefits from the other and the client benefits from both. Further, any conflict between the students can be resolved in a positive and beneficial way for both of them. Student collaboration can teach students professional autonomy as they learn to make decisions jointly,<sup>48</sup> without resorting to a dependence on a hierarchy to impose decisions upon them. Because students have diverse life experiences, not only can they develop an insight into their clinical colleague’s motivations and reasoning processes, the ability of the student pair or team to understand and appreciate the client’s experience may also be enhanced.<sup>49</sup> Finally, having the support of another student may assist in reducing a student’s anxiety and self doubt in the challenging clinical environment.<sup>50</sup>

The drawbacks of student teaming must also be investigated. Principally, there is the issue of the diminished client service that can be provided – the simple arithmetic is that requiring students to work in pairs will reduce by half the number of clients that can be seen in a given period. This comes back to the tension between client service delivery and the pedagogical focus, the resolution of which will depend very strongly on how the clinic perceives its role in the community as opposed to its function as a University teaching facility.

The other question which must be posed is whether student teams actually collaborate at all. Chavkin reports that he discovered much evidence of parallel work practices occurring in student teams. In many cases the students did not attempt to pool resources, but simply divided up responsibilities into discrete

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46 See especially Bryant S, ‘Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession’ (1993) 17 Vermont Law Review 459; Chavkin D F, ‘Matchmaker, Matchmaker: Student Collaboration in Clinical Programs’ (1994–1995) 1 Clinical Law Review 199.

47 *Supra* note 33 at 373.

48 Bryant S, ‘Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession’ (1993) 17 Vermont Law Review 459 at 460.

49 Chavkin D.F. “Matchmaker, Matchmaker: Student Collaboration in Clinical Programs” 1 Clinical Law Review 199 (1994–1995) at 213.

50 *Ibid* at 215.

sections and worked on them unaccompanied by their partner or other team members.<sup>51</sup> In these situations, there is no need for consensus between students for decision making, or necessity to exercise negotiation or interaction skills as part of a joint venture – the team association is simply ignored. Further, when students do make a genuine attempt to work in collaboration, one must speculate if consensus about decision making or direction of casework actually takes place at all, or whether one or more members of the group are just giving in to the majority or the strongest personality. Finally, there is worrying evidence that less responsible decisions are actually made by groups,<sup>52</sup> a phenomenon expressed as “groupthink”<sup>53</sup> in which the ethical standards of a team are reduced by the anonymity of mass responsibility

In addition to the issue of the pedagogical value of student teaming in a clinical environment is the more pertinent issue of how the clinician assesses them. Chavkin points this out as one of the most common problems noted by clinicians who supervise student teams.<sup>54</sup> For the clinician, there are a range of problems associated with how to correlate client outcomes with group participation and how to attribute marks to members of the group who are variously lazy, domineering, less intelligent than other members, inhibited or apathetic.

It is my submission that, however difficult one perceives individual clinical assessment to be, if clinicians are attempting to be even-handed in their marking, group clinical assessment is even more arduous. This does not mean that student teaming it is not appropriate to the clinical environment. It does mean, however, in clinics where teaming is enforced, that students are told candidly and unambiguously at the commencement of the clinical experience that a genuine collaboration with their team members is expected. It also means that if students’ ability to work in teams is being assessed, that this fact is explicit and that students are provided with details of how these marks are assigned. Further, it requires a thorough understanding of the pedagogical aims of student teaming amongst the clinical supervisors and a commitment to fairness to individual students, which is not blurred by the complications of team interactions.

## Feedback

Law teachers report a consistent criticism from students that the students do not receive enough feedback from teachers on their general progress, and on the performance in assessment tasks.<sup>55</sup>

Clinicians are in the unique position to provide their students with timely, one-to-one feedback. However, clinicians are often justifiably criticized for squandering this constructive pedagogical tool because they don’t approach the critique of students in a systematic or productive fashion.

Accordingly, it is submitted that there are some basic approaches that supervisors in clinical programs should take in order to maximize the way positive criticism can be provided to students. In this way, feedback can become a useful pedagogical tool and an agent for further and deeper learning in the student:

- *Praise should be given in public and criticism in private.* It is never appropriate to belittle a student in front of others. This serves absolutely no purpose and just denigrates the student concerned. Negative feedback must be given in private. Students have the right to keep their mistakes private from their peers. Praise in public, however, is the corollary of this rule. A word or two of praise in front of other students will always be appropriate,

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51 *Ibid.*

52 *Ibid* at 223.

53 Janis I, *Groupthink: Psychological Studies of Policy Decisions*

and *Fiascos* 1982, Houghton Mifflin, Boston.

54 *Supra* Note 47 at 227,

55 *Supra* note 46 at 379.

however – as long as such public praise is divided equally amongst students.

- *Criticism sessions should end positively.* There are always encouraging things to say to a student no matter how much they are struggling and no matter how far they have to go to develop skills. If a supervisor has spent time being critical, they should always try to find at least one affirmative comment and make this the last part of any criticism. It does not have to be a substantive piece of praise, as long as it is an encouraging observation which can leave the student feeling that there are aspects of their work or the effort they are making that are appreciated.
- *Students should be asked for feedback on themselves before the supervisor provides it.* Students are often remarkably good at self-evaluation and usually will pick the item/s that requires discussion with them in a formal self-assessment session. If an official feedback sheet is provided for a more formal or methodical feedback session, this should include a section in which the student could provide a self-assessment. If the student correctly identifies the area/s of weakness, it softens the feelings of criticism, as the supervisor can commence observations along the lines of “*I’m glad you pointed that out, as that’s the very thing I wanted to discuss with you...*”, thus leading neatly into the critique. Conversely, students will sometimes point out an area as a strength which the supervisor wishes to discuss as a weakness or a matter for further improvement. This need not be an insurmountable issue and can have its pedagogical value. For example, a student may like their own formal or officious communication tone which they have adopted in their letters to clients, and the supervisor may wish them to adopt a more approachable, plain-English style. They would have identified their letter writing as a strength, because to them it sounds more professional and “lawyer like”. The supervisor may feel that such a style acts as a barrier to communication. In such a situation, the supervisor could commence a discussion with the student about the appropriate function as lawyers in the communication process and potential role in de-mystifying the law for clients by use of language. Thus, despite the fact that the student had measured themselves in this area completely in opposition to the supervisor’s assessment, a useful, and it is hoped, positive dialogue can ensue.
- *Feedback should be requested on the supervisor’s performance.* This is simply providing students with a right of reply and an opportunity to also provide a critique. They are usually very reluctant to do so, but will sometimes open up if convinced that it cannot affect their final grade in any way. If they do take up the challenge and provide a critique of the supervisor’s teaching, supervision or legal work, it is incumbent on the clinician to model appropriate behaviour and not get angry with their criticisms or make excuses. The critique must be taken in the open environment that it is given; remembering the very distinct power imbalance that always exists between teacher and student, despite the fact that it is less obvious in the clinical setting. For most students, it will take an act of courage to appraise their supervisor directly to his/her face, but if clinicians are sincere in their desire for a student to do so, they should be rewarded for it by mature and insightful responses from their supervisor.
- *Supervisors must be forthright.* Evaluations should be obvious and clear. Criticisms and future expectation for improvement should be as clear as possible. Colloquial “asides” that are meant to be humorous should be avoided as they are often not taken as so. Clinicians need to take into account that law students often have large egos, but they

also deflate very easily. Students will often remember one flippant or negative aside that is made in clinic for years afterwards and retain unnecessary bitterness against their supervisor based on a simple miscommunication. This is not to say that clinicians should be in fear of students not valuing the critiques made of them – part of being courageous and straightforward with students is an acknowledgment that they will not like what is said to them and therefore may not like their supervisor. Clinical supervisors should be able to live with this (as should all teachers) – but this aversion by the student of a critical analysis of their clinical work should not be based on a misapprehension of what was actually said – that is, it should not be based on a lack of ability to communicate a clear message.

- *A written summary of the discussion should be provided.* If a student is a possibility of failing or doing very badly in the clinical unit, feedback discussions should be summarised in writing and a copy provided to the student. Any expectations enunciated in such a document should be very clear and obvious, with deadlines provided for achieving certain tasks, if appropriate. In this way, the fact that it is in writing makes it exceedingly obvious that the supervisor is very serious about expectations. Further, if the student fails to satisfy the criteria set out in the letter, a supervisor cannot be accused later of being unclear in their expectations when the student ultimately fails the unit or does poorly.
- *Formal feedback must have the same structure for all students.* Clinical units afford the distinctive opportunity for supervisors to engage in one-to-one teaching. This is obviously a pedagogical strength, but an assessment weakness. The most prevalent accusation which is levelled at assessment in clinical programs is that of subjectivity. As such, clinicians are under an obligation to ensure that assessment of students is always completely above reproach. Accordingly, a particular structure for prescribed feedback sessions should be settled upon and then not varied by individual supervisors within the clinic. Students always compare what is said to each other, so each student should be provided with the same structure. If not, certain individuals will feel they are being victimized, or that others are being favoured.
- *Supervisors should not wait for a formal feedback session.* Critiques should be given in an ongoing fashion to ensure students have time to improve performance. There is no purpose in a supervisor being unsatisfied with students' work, and not telling them. Criticism should not be stored up for one big session, as this may have damaging consequences on a student and be more of a setback in their performance than a constructive experience. Instead, well-timed and minor criticisms should be provided. Of course, supervisors must also be careful of constant nagging in which particular students are always being criticized—an attempt should be made to achieve a balance with positive comments if at all possible.
- *Transparency.* This is essential. Clear, concise, thorough and non-defamatory records of students' progress throughout their work period at the clinic must be kept. Students should be advised of their ability to have a copy of all written comments and a complete breakdown of their marks when the course is completed. Notes should always be thoroughly professional – with no personal asides or irrelevant comments not associated with work performance. Written records should also all be of one nature – the same comment structure or marking sheet format should be used for all students with notes written about all students at the same time, if possible. Again, the fundamental basis of



this is being systematic in the approach to assessing students in the clinic and providing feedback in a clear, even-handed and impartial way to all students.

- *Students carry emotional baggage.* Students all have different and varied circumstances that impinge on the quality of their work in the clinic and their commitment to the unit and their clinic clients. In many law schools, clinic is but one unit of study in a busy law course and must be juggled with the students' social and work life. Taking this balance into account at all times should make supervisors hesitate before verbally attacking a student with harsh comments about things like punctuality and responsibility if, for example, a student has let their clinical colleagues down or missed an appointment. Students should always receive the benefit of the doubt – something appalling may have happened in their lives which made them unable to perform a work task or be on time and, as such, matters would need to be approached in an empathetic and compassionate manner – thus modelling the way clinicians would want their students to interact with their own clients.

Providing feedback to students in a clinical setting should never be considered a chore. It has vast pedagogical implications and can be a powerful educative tool. Clinicians cannot afford to deal with the giving of feedback in a piecemeal fashion – it should not be approached in a half-hearted or unprofessional manner, especially considering the denunciation that clinicians are often subjected to of clinical units being not subjected to the same academic rigour of other, more “mainstream” units of legal academic study. If legal clinics are to continue to win the academic credibility battle within their own law schools, clinicians must approach student assessment and feedback in a prescribed, thorough and meticulous manner.

The clinical teaching style can, however, stay open, friendly and supportive – the learning atmosphere of a clinic is often the reason students thrive so well. However, underlying the clinical teaching style should be an approach to feedback that is consistent amongst all supervisors in the clinic and which cannot be questioned for lack of diligence or attention to detail. In this way, students can receive a supportive and benevolent working environment where they will feel comfortable to take learning risks and expose themselves to the full learning experience which legal clinic can provide.

Feedback, however, is not a formal assessment tool. As Cynthia Batt and Harriet Katz put it, it is “part of a larger evaluative process assessing a student’s overall attitude, work habits, and approach to lawyering.”<sup>56</sup> Thus, there are often matters raised in feedback sessions with students which clinicians do not specifically measure in their summative assessment – discussion about students’ attitude and behaviour towards administrative staff in the clinic is an example of an issue which is often raised in feedback sessions, but is usually not formally assessed. However, students’ responses to feedback and their progress after the provision of feedback are measurable items and therefore assessable. Thus, although feedback does not form an immediately assessable aspect of students’ clinical work, it is an integral part of the process which leads to formal assessment.

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56 *Supra* note 6 at 584

## PREDICTIONS FOR THE FUTURE?

Batt and Katz in *Confronting Students: Evaluation in the Process of Mentoring Student Professional Development*<sup>57</sup> set out a number of issues that are essential for mentoring and evaluating the professional development of students in clinical courses:

1. Professional development must be understood to form a substantial aspect of the clinical curriculum.
2. There must be appropriate goal setting between the supervisor and the student at the outset of the clinical experience. The students have to know the supervisor's professional development goals or priorities
3. We need to develop a systematic pedagogy in order to teach professional development which incorporates precise, specific language. This pedagogy must include the engagement and reflection of students.
4. We need to use performance specific feedback as a vehicle for on-going assessment of professional development issues.
5. We need to evaluate student progress on a periodic basis

In my opinion, Australian legal clinics need to take up the challenges offered in this inventory of issues. Our pedagogy is still “fuzzy” and requires a much stronger focus. Currently, we are squandering opportunities to develop a consistent and lucid learning theory that we can be comfortable with – a bedrock upon which we can build our assessment methodologies.

Our goal-setting and assessment processes need to be constantly under the microscope and not something that we take on occasionally, in a sporadic way<sup>58</sup> or as a reaction to a student complaint or the threat of a faculty review.

In the past decades, there has been a steady growth in the number of legal clinics being developed around Australia. The programs being offered are diverse and creative and offer exceptional learning opportunities for law students. Australian legal education is slowly moving towards the US paradigm of a clinic or more in every law school. This growth posits a number of issues which require dialogue, such as:

1. What does the growth of clinics and their increasing centrality in the law school curriculum mean for grading generally?
2. In the light of clinics' increasing role in legal education, how can clinicians ensure that clinics retain their focus, whatever they believe that to be?
3. What are clinicians devoted to inculcate law students with – technical skills, ethics, self reflective processes, ability for adult life long learning? Which of these are important and how will clinical grading systems reflect clinicians' perception of these skills or abilities?

These are the sort of issues that Australian law clinicians need to be grappling with. They are no longer “experimental” or pilot programs and thus cannot afford to be devoting themselves to the technical or practical “here and now” issues. The focus needs to shift from immediate survival to the development of a long term and pedagogically sound vision for the role of legal clinics in the development of ethical, self-reflective and competent lawyers.

<sup>57</sup> *Supra* note 6 at 607–609.

<sup>58</sup> O'Leary K, 'Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an

*Integral Part of the Social Justice Agenda of Clinics'* (2004–2005) 11 *Clinical Law Review* 335 at 339.

## CONCLUSION

Historically, Australian legal clinicians have been so busy struggling for basics like accommodation, funding and academic recognition that they have not had the time or energy to create a systematic pedagogy or assessment philosophy. It is certainly an exceptionally under discussed and little published area of clinical practice which requires further examination. Clinicians have relied, to a large extent, on the positive student experience in clinics and the resultant lack of criticism of the grading processes. However, the good grace of students does not replace a sound educative theory. Much of the past assessment practices have been based on clinicians' instincts as lawyers and educators on what is individually believed to be important. The non-static aspects of clinic need to be recalled – to a certain extent clinical teaching is a "movement" and thus needs to continue to develop if it is to stay relevant and appropriate.

Individualism in legal clinics around Australia currently appears to work in reverse – supervisors expect students to fall into particular grading categories and comply with grading curves appropriate to other law units, whilst allowing themselves individualism in their understanding and observance of assessment processes, focus and outcomes. By comparison, US clinics have instigated assessment regimes which are very individualistic in their treatment of students and their different learning styles. There is an acknowledgment (missing in Australian clinics) of the "personalisation" of the clinical experience for students – each student's experience in clinic is different by the very nature of what a clinic is and the assessment methodology is flexible enough for the students to benefit from these individual experiences. Supervisors in US clinics, however, are focussed, in agreement and have a sound understanding of their grading practices and the rationales which underpin them. This is not because US clinics are better – it is a result of the fertile discussion, dialogue and debate which has been able to flourish once clinics became an integral part of the US legal education landscape.

Legal clinicians in Australia, having fought and won the battle of credibility, now have the opportunity to engage in that level of discourse. In my opinion, the discussion can now move forward to deal with the complex issue of assessment in legal clinics in order for us to develop what is yet in its infancy in Australian legal clinics – a robust, articulate and focussed pedagogy.